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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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COFC Awards Enhanced Attorney Fees in Protest Following “Egregious” Agency Conduct

*By E. Sanderson Hoe, Anuj Vohra, and Frederick Benson**

In Starry Associates, Inc. v. United States, the Court of Federal Claims awarded “enhanced” attorney fees to plaintiff’s counsel, which sets an important precedent reminding government agencies that the deference owed to their determinations is no substitute for compliance with the requirements of, and fidelity to, the federal procurement process. The authors of this article discuss the decision.

Last year, the Court of Federal Claims’ (“COFC”) decision in *Starry Associates, Inc. v. United States*,¹ which sharply criticized a Department of Health and Human Services (“HHS”) decision to cancel a solicitation, was a rare rebuke in an area where agencies enjoy considerable deference from the courts. The court’s decision noted the unique circumstances of that case—a series of agency actions resulting in the cancelation of the solicitation at issue that the court characterized as “capricious” and “reflect[ing] a lack of fidelity to the procurement process,” e.g., submission of a declaration to GAO inaccurately representing that a conflicted HHS employee had recused himself from a reevaluation of proposals, failure to conduct the solicitation reevaluation in good faith, and cancellation of the solicitation to redraft it with terms more favorable to Starry’s competitor. That cancelation resulted in multiple Government Accountability Office (“GAO”) protests, a hearing at GAO, multiple depositions of agency officials during a follow-on protest at the court, and a decision enjoining HHS from cancelling the solicitation (raising the interesting question of whether HHS must now award the contract to Starry Associates). In a subsequent decision issued in the case recently,² the case’s exceptional

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¹ 127 Fed. Cl. 539 (2016), available at https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0044-54-0.

² 131 Fed. Cl. 208 (2017), available at https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0044-69-0.

nature was further demonstrated by the COFC’s decision to award “enhanced” attorney fees to plaintiff’s counsel.

ATTORNEY FEES

After successfully challenging HHS’s cancellation of a solicitation for business-operations services, Starry filed a motion for attorney fees pursuant to the Equal Access to Justice Act (“EAJA”). The government can avoid an award of EAJA fees upon a demonstration that the positions it took were “substantially justified,” a deferential standard requiring only that such positions were reasonably based in both law and fact (though the court noted that both Department of Justice’s (“DOJ”) position before the court, as well as HHS’s position throughout the proceedings were relevant to this inquiry). Defending its conduct in this case, the DOJ asserted that it reasonably relied on prior GAO decisions and agency representations regarding the case history. The court was unconvinced, observing that the “record as further developed in this protest ought to have thoroughly disabused defense counsel of any notion of rationality” behind HHS’s decision to cancel its solicitation. In light of a record that “contains a lengthy history of agency personnel being indifferent to the fidelity of the procurement process,” the court concluded that “[a]t no point was the government’s position reasonably justified based on the law or the facts,” such that Starry was “entitled to recover fees and costs under EAJA.”

Because of the EAJA’s statutory cap on the amount of fees awards, Starry also requested an upward departure. The EAJA allows for awards in excess of the statutory cap if a court determines that a “special factor” justifies a higher fees award. After rejecting DOJ’s argument that “special factor” departures were only warranted in instances where the proceedings could be handled by a very limited number of attorneys, the court described two grounds for its decision that Starry was entitled to an enhanced fee award. First, the court highlighted HHS’s problematic conduct, noting that “what the agency did here constitutes an egregious example of intransigence and deception, not just with regard to the bidder, but to the GAO and to the court.” Second, the court cited the extensive procedural history Starry needed to navigate to obtain a favorable outcome in this case. The court concluded that the “extreme measures that plaintiff was forced to pursue to vindicate its right to a rational and lawful federal procurement process, combined with the shocking disregard of the truth by the agency, justif[ied] an award at higher than the default rate.”

AN EXCEPTIONAL CASE

While the COFC’s ruling on the merits was in and of itself noteworthy, its subsequent award of enhanced EAJA fees makes this case truly exceptional. The court acknowledged as much, noting that its holding was “not applicable across

a broad spectrum of litigation,” but when an “agency’s conduct necessitates that an offeror file four protests in over two years, in two fora, winning two of them and prompting one corrective action, and when the agency’s defense of its conduct is highly irregular (misrepresentations and illusory promises), the circumstances of the case are anything but ordinary.” Despite the ruling’s narrow scope, the case sets an important precedent reminding government agencies that the deference owed to their determinations is no substitute for compliance with the requirements of, and fidelity to, the federal procurement process.