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ENVIRONMENTAL PLAINTIFFS DENIED ATTORNEYS FEES

The Ninth Circuit Court of Appeals reversed a district court award of attorneys fees to an environmental activist plaintiff because the Forest Service had withdrawn the challenged national forest management rule before the district court ruled on the merits of plaintiff's motion for injunctive relief. The district court had originally dismissed plaintiff's case on procedural grounds. Plaintiff appealed that decision to the Ninth Circuit. In reversing the district court's procedural ruling, the Ninth Circuit held that the Forest Service had violated the National Environmental Policy Act (NEPA) by depriving plaintiff of its right to comment on the environmental documentation associated with the rule, but the Ninth Circuit declined to rule on the merits of the appeal because the district court had not reached the merits. The Ninth Circuit remanded the case to the district court to determine whether injunctive relief was appropriate.

Before the district court ruled on the merits of plaintiff's motion for injunctive relief, the Forest Service withdrew the challenged rule. Based on this turn of events, the plaintiff stipulated to the dismissal of the case and moved for attorneys fees, which the district court granted. However, because the plaintiff received no relief from any court, it did not qualify for attorneys fees under the Equal Access to Justice Act (EAJA). Under the EAJA, a party may be awarded attorneys fees only if it is found to be a "prevailing party." Even though the Ninth Circuit had signaled to the district court that the plaintiff should prevail on the merits, the Forest Service's withdrawal of the challenged rule was voluntary. In these circumstances, plaintiff obtained no judicial relief on the merits of its claims and was not a prevailing party entitled to attorneys fees under the EAJA.

As we reported in a previous edition of *Legal Briefs* (Issue No. 30, Sept. 2008), the Tenth Circuit Court of Appeals similarly invalidated an award of attorneys fees to an environmental activist plaintiff on the grounds that it was not a "prevailing party." In that case, the plaintiff had challenged a Forest Service timber sale and the district court granted a preliminary injunction to prevent the possibility of environmental damage while the merits of the case were being decided. While the preliminary injunction was in place, a forest fire ravaged the sale area. The Forest Service then decided to voluntarily withdraw the sale. The district court dismissed the case as moot but conditioned the dismissal on the government's promise that the original sale "had been permanently withdrawn and will never be revived." The court also stated in the dismissal order that any new sale would have to comply with federal environmental law. After the case was dismissed, the district court found that the plaintiff was entitled to attorneys fees under the EAJA because it had successfully obtained the preliminary injunction and because the order dismissing the case was based on the government's agreement not to proceed with the original sale.

On appeal, the Tenth Circuit reversed the award of attorneys fees because the plaintiff had not achieved any relief on the merits of its environmental claims against the sale. The preliminary injunction did not grant plaintiff the relief it had sought – a determination that the original sale violated federal environmental law. It merely preserved the status quo so that if the plaintiff were to prevail on the merits, its victory would have meaning. Because the relief obtained in the preliminary injunction was not the same relief sought in the complaint, the plaintiff was not a prevailing party entitled to fees under the EAJA.■

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Legal Briefs *is published by Saltman & Stevens, P.C. to update developments of interest to those who enter into contracts with the federal government. It is not intended to provide legal advice. Such advice may be given only when related to specific facts. Those desiring further information may contact Alan Saltman, Ruth Tiger (editor), or Richard Goeken at (202) 452-2140.*

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FEDERAL COURT FINDS NO BASIS FOR ENDANGERED SPECIES ACT SUIT AGAINST RINGLING BROS.

In a novel effort to use the Endangered Species Act (ESA) "take" provisions to challenge the alleged mistreatment of elephants by the Ringling Bros. and Barnum & Bailey® circus, several animal rights groups and a former Ringling Bros. employee filed suit more than nine years ago against Feld Entertainment, Inc., the corporate entity which owns Ringling Bros. After several years of contentious discovery and proceedings and a six-week trial last year, the district court concluded that none of the plaintiffs had standing to maintain the lawsuit because the plaintiffs had failed to prove that they suffered any injury. The former employee "gave conflicting answers and was repeatedly impeached on the witness stand," failed to prove that he was aesthetically or emotionally injured by witnessing Ringling Bros.' alleged mistreatment of the elephants, and was "essentially a paid plaintiff and fact witness who is not credible." The former employee received at least $190,000 as his sole source of income over the past eight years from the animal rights groups, their lawyers, and the Wildlife Advocacy Project, an entity controlled by the lawyers. As a result, the court gave no weight to his testimony and entered judgment in favor of the defendant

Plaintiffs have appealed the judgment and some interim adverse rulings, and Feld Entertainment has cross-appealed some of the court's rulings over the years that were adverse to it. In addition, Feld Entertainment is seeking to recover costs and attorneys fees and, in related litigation, has sued the plaintiffs and the lawyers, alleging that their pursuit of the ESA suit constituted an illegal scheme in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act. All proceedings are currently stayed while the parties engage in court-ordered mediation.■

GAO SUSTAINS PROTEST BECAUSE CONTRACTING AGENCY FAILED TO COMPLY WITH SBA'S RULING ON APPLICABLE NAICS CODE

The Government Accountability Office (GAO) sustained a protest which challenged a contracting agency's decision to ignore the final decision of the Small Business Administration (SBA) regarding the proper North American Industry Classification System (NAICS) code applicable to a contract. The NAICS code for a contract set-aside for bidding by small business only establishes the applicable size standard. Some NAICS codes have a number of employees size standard (typically 500 employees) and others have an annual receipts size standard (typically $7 million). Depending on the NAICS code assigned, a company may or may not qualify as a small business for a particular contract. In this case, an interested offeror appealed the NAICS code initially assigned to a contract by the contracting agency. SBA agreed with the protester and reversed the contracting agency's NAICS code selection. Even though SBA has final authority to determine which NAICS code best describes the principal purpose of a contract and to reverse a contracting agency's initial decision to assign a particular NAICS code if it disagrees, the contracting agency refused to change the NAICS code in accordance with SBA's decision. GAO found the agency's conduct unreasonable and sustained the protest.

COMMENT: This case is a good example of an offeror timely challenging what it considered to be a defect in the solicitation. The offeror challenged the NAICS code assigned by the agency, presumably because it either did not meet the small business size standard for that NAICS code or because it felt it had a competitive advantage if a different NAICS code applied. Regardless of the reason, the offeror recognized the need to consult with counsel who challenged the solicitation on its behalf before offers were due. As a result of this timely action, the contracting agency was prevented from going forward with the contract until the protest was resolved.

If something in a solicitation is objectionable for any reason, a protest of the terms of the solicitation must be filed before the response due date. Absent timely action before bids or proposals are due, you risk waiving the ability to complain about the solicitation defect later if you are not selected for contract award. Consult knowledgeable government contracts counsel to determine the most effective way to proceed if you suspect that an element of a solicitation you are considering responding to is not quite right.■

RECORD INADEQUATE TO JUSTIFY FOREST SERVICE'S DECISION TO SELECT HIGHER-PRICED VENDOR FOR CONTRACT AWARD

The GAO recently sustained a bid protest which challenged the Forest Service's decision to award a contract for stream restoration work on the Ochoco National Forest in Oregon to a higher-priced vendor. The solicitation stated that the Forest Service would select the vendor whose quotation provided the best value to the government as evaluated under three equally-weighted factors: cost/price, past performance and key personnel. The award justification document assigned point scores to each of the three elements of the vendors' bids and stated that the higher-priced vendor was selected based on its key personnel and similar past performance. The contemporaneous record contained no other information about the higher-priced vendor's quotation and no information at all, other than the point scores, on the evaluation of the protestor's quotation. In these circumstances, GAO ruled that the contemporaneous evaluation documentation failed to adequately support the Forest Service's decision to select the higher-priced vendor for contract award.■

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MATCHING PAYMENTS UNDER THE BIOMASS CROP ASSISTANCE PROGRAM IN LIMBO

The Biomass Crop Assistance Program (BCAP) provides matching payments for the collection, harvest, storage and transportation (CHST) to owners of eligible material who supply that material to a qualified Biomass Conversion Facility (BCF). Eligible material includes agricultural crops, crop residue, woody material removed from public and private forest lands and resulting waste material, including wood waste and residue. Examples of eligible woody material on National Forest System and Bureau of Land Management lands includes pre-commercial thinnings, slash, bark and trees that would not be used for higher-value products. Owners of eligible material on federal lands can include holders of certain timber sale and stewardship contracts.

Following a Presidential directive to aggressively accelerate the investment in and production of biofuels last year, the Commodity Credit Corporation (CCC) published a Notice of Funds Availability (NOFA) announcing the implementation of the 2009 CHST Matching Payment Program through the Department of Agriculture's Farm Service Agency. The BCAP pays owners for sale and delivery of eligible material to a qualified BCF at the rate of $1 for each $1 paid by the qualified BCF, limited to a maximum of $45 per dry ton.

During its first 10 months of operation, the BCAP resulted in almost 5,500 agreements with eligible material owners and paid out a total of $185 million. Matching payments made for forest-related material constituted a considerable portion of all payments made as "Federal Woody Resources" accounted for $8.6 million, "Non-Federal Woody Resources" accounted for $147 million and "Waste Products," consisting of pellets, sawdust and shavings, accounted for an additional $15 million. Concerns were raised that the BCAP had grown too quickly and, by diverting products for energy use, was distorting established markets, especially for chips, pellets, sawdust and shavings.

On February 8, 2010, the CCC issued proposed regulations to implement the BCAP, which "terminated and rescinded" the NOFA, thereby effectively de-funding the BCAP pending development of a final rule. The proposed regulations also identified three options for making future matching payments that are designed to address the perceived distortions in existing markets resulting from the BCAP:

Option 1: Matching payments not to exceed $16/ton to owners of eligible material supplied to a BCF for conversion to heat, energy, or biobased products other than cellulosic ethanol. Matching payments not to exceed $45/ton for owners of eligible material supplied to a cellulosic ethanol production BCF.

Option 2: Matching payments up to $45/ton to owners of eligible material supplied to any BCF, *except* no payments may be made for use of wood residues that are converted to heat or energy unless the residues used are over and above a BCF's historical baseline use for heat or energy production.

Option 3: Matching payments up to $45/ton to suppliers of eligible material to a BCF that (a) converts fully from fossil fuel consumption to use of eligible biomass; or (b) shows "exceptional promise for producing innovative advanced biofuels, renewable energy, or biobased products;" or (c) consumes eligible biomass above an established historical baseline. This option also allows matching payments up to $16/ton to suppliers of CHST eligible material to a BCF that does not increase renewable biomass consumption over a historical baseline.

Over 20,000 comments on the proposed regulations were submitted before the April 9, 2010 deadline and final regulations are currently due to be issued later this year. Whatever options are included in the final rule, owners of eligible material should have knowledgeable counsel analyze their particular situations and the intricacies of the BCAP to ensure that they take advantage of all available opportunities.■

DEMOCRATS INTRODUCE LEGISLATION THAT WOULD PROHIBIT POLITICAL SPENDING BY GOVERNMENT CONTRACTORS

The Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act would bar government contractors, foreign-controlled corporations and companies that have received government assistance from making political expenditures. Introduced in the House and the Senate in late April, the legislation is meant to "blunt the harmful impacts from the Supreme Court's decision allowing corporations and other special interests to spend unlimited sums to influence elections." The Senate bill was introduced by Charles Schumer (D-NY) and has 45 co-sponsors, including Ron Wyden (D-OR), and the similar House bill was introduced by Chris Van Hollen (D-MD) and has 99 co-sponsors.

Although the bills exempt persons with contracts of less than $50,000, they do not define what constitutes either a "government contractor" or a "government contract." Nor do they indicate when a person ceases to be a government contractor. As drafted, the bills' restrictions would apply to contractors who hold Integrated Resource Contracts, the principal purpose of which is to provide services or construction. The tenor of the bills appears to be broad enough to encompass holders of timber sale contracts as well. The bills would also require corporations, unions and other organizations that make political expenditures to disclose their donors and stand by their ads.■

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UNTIMELY PROPOSALS PROPERLY REJECTED FROM FURTHER CONSIDERATION FOR CONTRACT AWARD

A request for proposals specified that the first part of each offeror's proposal had to be submitted to the government by a particular date and that cost proposals had to be submitted via email by a later date. An offeror timely submitted the first part but was excluded from the competition because the government did not receive the cost proposal by the second deadline. The offeror protested and argued that it timely submitted the cost proposal to the email address specified by the government and requested and received a delivery status notification which indicated that its email had been relayed to the proper email address. Unfortunately, the delivery status notification was sent by the offeror's own email server and proved only that the message was successfully relayed from the offeror's email system. It did not prove that the government actually received the cost proposal by the deadline. Because the offeror failed to show that it timely delivered the cost proposal, the government's decision to exclude the offeror's proposal from further consideration for contract award was upheld.

In another recent case, a protester electronically sent, but the agency did not receive, the protester's proposal by the due date for receipt of proposals. This solicitation provided that proposals could be submitted either electronically or in hard copy. The protester argued that, contrary to the agency's records, it timely submitted its proposal via email before the proposal deadline and that the protester's "sent" email folder verified this. The protest was denied because it is an offeror's responsibility to deliver its proposal to the proper place at the proper time and there was no evidence establishing that the proposal was actually received by the agency.

COMMENT: It has always been the offeror's responsibility to ensure that its bid or offer is received by the contracting agency by the specified date and time. With the increasing use of electronic communications, offerors must develop procedures to ensure that electronic offers make it to the specified government repository by the stated response date. As the cases discussed above demonstrate, ensuring receipt requires confirming that your offer has actually been received by the agency, not simply confirming that it was sent. For electronic submissions, you need to submit your proposal sufficiently in advance of the submission deadline in order to give you time to follow-up with government personnel to confirm that your proposal has been received.■

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About Us…

Saltman & Stevens, P.C. was founded in 1980 and our focus is on matters involving contracts with the federal government. We are located in the heart of Washington, D.C., close to the specialized courts and administrative tribunals that resolve disputes related to every type of government contract. This location also permits us to conduct frequent face-to-face meetings with top-level agency officials. The Firm provides counseling and litigation representation to a nationwide and international clientele on matters such as preparing and litigating government contract claims and bid protests, obtaining and maintaining government contracts and permits, and advising clients on compliance with numerous policies and regulations that affect their ability to deal with the federal government. The Firm also has a nationally recognized practice in federal timber contract law and in the use and enjoyment of natural resources within the national forests, national parks, and other federal lands. For more information about the Firm's attorneys and practice areas, please visit our website at www.saltmanandstevens.com.

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