THE GOVERNMENT CONTRACTOR®

THOMSON WEST

Information and Analysis on Legal Aspects of Procurement

Vol. 49, No. 24 **June 27, 2007**

Focus

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FEATURE COMMENT: The COFC Takes Jurisdiction Over Bid Protest Of A NAFI Contract

Southern Foods, Inc. v. U.S., et al., 2007 WL 1805166 (Fed. Cl. June 8, 2007)

In a June opinion, Judge Eric Bruggink of the U.S. Court of Federal Claims found jurisdiction over a bid protest action challenging the award of a nonappropriated fund (NAF) contract. The protester in its complaint requested declaratory and injunctive relief, as well as money damages. The Government moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the U.S. did not waive sovereign immunity for nonappropriated fund instrumentalities (NAFIs) for any purpose, including bid protests, under the so-called NAFI Doctrine. Judge Bruggink rejected that argument, but ruled against the protester on the merits of the protest.

In taking jurisdiction, Judge Bruggink found that the NAFI Doctrine does not preclude bid protest jurisdiction over contract award disputes involving NAFI contracts, and held that the procurement at issue does not fall within the NAFI Doctrine because the agency conducting the procurement was funded with a mix of appropriated and nonappropriated funds. This FEATURE COMMENT discusses the COFC's jurisdiction over bid protests, the application of the COFC's jurisdiction in the *Southern Foods* decision and the potential implications of a COFC decision taking jurisdiction over the protest of a NAF contract.

The Court's Protest Jurisdiction—The Tucker Act provides the court's general jurisdiction over claims against the U.S.:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 USCA § 1491(a)(1).

The Administrative Dispute Resolution Act of 1996 (P.L. 104-320), § 12, 110 Stat. 3870, 3874–75 (1996) (ADRA), amended the Tucker Act to explicitly provide the court with bid protest jurisdiction in § 1491(b):

> Both the Unite[d] States Court of Federal Claims … shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. [][T]he United States Court of Federal Claims ... shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 USCA § 1491(b)(1). In resolving bid protest actions, the court may award any relief that it "considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs." 28 USCA § 1491(b)(2).

The NAFI Doctrine—Both the COFC and the U.S. Court of Appeals for the Federal Circuit have

recognized that Tucker Act jurisdiction is limited by 28 USCA § 2517(a), which requires that monetary judgments be paid out of appropriated funds. See, e.g., *Furash & Co. v. U.S.*, 252 F.3d 1336 (Fed. Cir. 2001) ("absent some specific jurisdictional provision to the contrary, the Court of Federal Claims lacks jurisdiction over actions in which appropriated funds cannot be used to pay any resulting judgment"). If no appropriated funds are involved, i.e., a NAFI procurement, then there is no Tucker Act jurisdiction unless the entity is one of the enumerated exchange systems in § 1491(a)(1).

To assist the determination of what is, and what is not, a NAFI, the Federal Circuit established a four-factor test:

> [a] government instrumentality is a NAFI if:
> (1) It does "not receive its monies by congressional appropriation[]";
> (2) It derives its funding "primarily from [its] own activities, services, and product sales[]";
> (3) Absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity[]; and
> (4) There is "a clear expression by Congress that the agency was to be separated from general federal revenues."

AINS, Inc. v. U.S., 365 F.3d 1333, 1342 (Fed. Cir. 2004) (internal citations omitted). For the instrumentality to be considered a NAFI and, therefore, outside the court's jurisdiction, all four factors must be met.

The Court's Application of the NAFI Doctrine in the *Southern Foods* Decision—Southern Foods was a disappointed offeror for a contract for the sale of food and food-related products to Army Morale, Welfare, and Recreation (MWR) entities on certain Army installations. The U.S. Army Community and Family Support Center (USACFSC), now known as the Family and Morale, Welfare and Recreation Command, issued the request for proposals (RFP) under Army NAF contract and policy regulations. The products purchased under the contract were to be used in support of food sales activities. The RFP explicitly stated that any contracts awarded thereunder were to use nonappropriated funds only.

In analyzing whether the NAFI Doctrine precludes the court from granting the monetary relief Southern Foods requested, Judge Bruggink rejected the Government's argument that because the contract at issue cannot use appropriated funds and the Army is not authorized to use appropriated funds for food sales activities, see Army Reg. 215-1, Table D-1, the contracting entity meets the *AINS* test. Instead, Judge Bruggink focused on the entity running the procurement and awarding the contract, determining that the bid preparation costs sought by Southern Foods were "based on its relationship as a bidder to USACFSC and not on the contract for food services itself." *Southern Foods*, No. 07-210C, slip op. at 10 (Fed. Cl. June 8, 2007). As Southern Foods was an unsuccessful offeror, it was not a party to the contract resulting from the RFP. Therefore, the issue of jurisdiction could not be resolved based on the contract's use of only nonappropriated funds. Judge Bruggink applied the *AINS* test to USACFSC—the entity that issued the RFP, and signed and would administer the contract. Because Army Regulation 215-1, "Military Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities," indicated that all of the Army's NAFIs receive at least limited support from appropriated funds (Army Reg. 215-1 at §§ 3-7, 3-8, and 3-9 describe three categories of NAF programs, each of which may receive some appropriated fund support), USACFSC did not meet the first prong of the *AINS* test and was subject to the court's jurisdiction over monetary damages.

ADRA Provides Independent Jurisdiction over Bid Protests—More fundamentally, Judge Bruggink rejected the Government's arguments that the court's jurisdiction to issue injunctive and declaratory relief was limited by the NAFI Doctrine. The *Southern Foods* decision indicates that the NAFI Doctrine applies solely to the issue of monetary damages and does not affect the court's ability to offer protesters injunctive or declaratory relief under its ADRA bid protest jurisdiction. While the decision provides little analysis on this point, it appears that Judge Bruggink accepted the plaintiff's jurisdictional arguments distinguishing the court's Tucker Act jurisdiction in § 1491(a) from its ADRA jurisdiction in § 1491(b). The test for jurisdiction under § 1491(b) is whether an "interested party" objects to a solicitation issued by a "Federal agency" for "a proposed contract or to a proposed award or the award of a contract," or "a procurement or a proposed procurement." Relying on *Lion Raisins, Inc. v. U.S.*, 416 F.3d 1356 (Fed. Cir. 2005), Southern Foods argued that USACFSC was an "arm of the Government" and a federal agency. Judge Bruggink accepted that the COFC had jurisdiction over injunctive and declaratory relief because such relief does not involve payment of "monies from the

Treasury." Furthermore, this jurisdiction is not affected by the protester's accompanying request for bid preparation costs, although Judge Bruggink found jurisdiction over those because the NAFI Doctrine did not apply under the facts of this particular case.

Practical Implications of the *Southern Foods* Decision—The practical implications of the *Southern Foods* decision impact jurisdiction over NAFIs in both contract claims and bid protests. Although COFC decisions do not bind other COFC judges, Judge Bruggink's decision offers a persuasive argument that the COFC has jurisdiction over NAF procurements for contractors who prefer to take their grievances to the court.

In the contract claims arena, *Southern Foods* demonstrates that it pays to "do your homework" on who the contracting activity is and whether use of appropriated funds is authorized to acquire the contract's supplies or services. The court's jurisdiction over entities that identify themselves as NAFIs is not limited to the exchanges set forth in 28 USCA § 1491(a)(1). Rather, the entity must pass all four prongs of the *AINS* test to defeat the court's jurisdiction.

In the bid protest arena, *Southern Foods* makes clear that the court's ADRA jurisdiction allows it to consider bid protests against NAFI procurements even if the NAFI meets the *AINS* test. As the other major bid protest forum, the Government Accountability Office, does not have jurisdiction over NAF activities, 4 CFR § 21.5(g), the court provides the only alternative to an "agency-level" NAF protest. In fact, Southern Foods protested unsuccessfully to the NAFI before filing suit at the COFC. Despite this prior protest process, when the court reviewed the administrative record, it found what appear to be errors in the determination and findings documenting the procurement process and the award decision. *Southern Foods*, supra, slip op. at 8. The record lacks explanation for these apparent errors, and it also appears that they were not identified in the agency-level protest process, in which the protester had access to only the debriefing and not the full evaluation record. These errors led the court to remand the matter and order the Government "to have a new contracting officer re-evaluate the proposals and submit a new D&F based on the proposals submitted." Id. at 2. These facts highlight the importance of providing interested parties an option for a protest forum that allows the protester's attorneys to review the agency's procurement records. Such transparency is critical to ensuring the integrity of the procurement system.

Conclusion—The *Southern Foods* decision offers new strategies for contractors with claims against organizations generally considered to be NAFIs, as it is common that NAFIs receive some, albeit limited, appropriated fund support. Perhaps more significantly, the decision offers contractors a new, neutral forum in which to challenge NAFI procurements through bid protests. Regardless of whether the NAFI in question meets the *AINS* test, the court can offer equitable relief to a protester.

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