

**Board of Contract Appeals**  
General Services Administration  
Washington, D.C. 20405

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DENIED: September 14, 2001

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GSBCA 15266

MARITIME EQUIPMENT & SALES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

William M. Moore, Mobile, AL, counsel for Appellant.

Judith A. Bonner, Office of Regional Counsel, General Services Administration,  
Philadelphia, PA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **WILLIAMS**, and **DeGRAFF**.

**DeGRAFF**, Board Judge.

Appellant challenges respondent's decision to cancel a contract to sell surplus Government property. Because the award of the contract was plainly illegal and appellant cannot enforce the contract against respondent, we deny the appeal.

### Findings of Fact<sup>1</sup>

On November 22, 1999, the General Services Administration (GSA) issued an invitation for bids to purchase two surplus United States Coast Guard boats, the Sorrel and the Papaw. The invitation incorporated the special conditions for sealed bid sales set out in Standard Form 114C-1 (1970 edition). Exhibit 2. The special conditions stated that a binding contract would arise when GSA furnished the successful bidder with a written award, and that the award would be made to the responsible bidder whose bid conformed to the invitation and would be most advantageous to the Government, price and other factors considered. Exhibit 4. The invitation for bids stated that GSA would award items to the high bidder, and neither the invitation nor the special conditions stated that any factor other than price would be used as a basis for award. Exhibits 2, 4.

Bids were due by 2:30 p.m. on December 15, 1999. Exhibit 2. Several bidders, including Maritime Equipment and Sales, Inc. (Maritime), submitted timely bids for the boats. Exhibits 5, 6, 8, 17, 18.

At 2:30 in the afternoon on December 15, GSA opened the bids of four bidders and determined that Maritime was the high bidder for both boats. Exhibit 6. GSA prepared a notice of award for each boat, which stated that GSA accepted Maritime's bids, and informed Maritime by telephone at approximately 2:45 p.m. that it was the successful bidder for both boats. Maritime asked GSA to send the notices of award to it by telefax, which GSA did at approximately 3:00 that same afternoon. Exhibits 7, 19; Affidavit of Karen Craig (Craig Affidavit) (June 14, 2001) ¶¶ 9, 10; Affidavit of Christopher Hart (Hart Affidavit) (June 14, 2001) ¶ 8. At 3:30 p.m., GSA discovered three additional timely bids, which had been mistakenly placed in a folder containing bids for a different sale. Exhibits 8, 17, 18; Craig Affidavit at ¶¶ 11, 12; Hart Affidavit at ¶¶ 9, 10. Although Maritime's bid for the Papaw remained the highest bid, one of the misplaced bids for the Sorrel was higher than Maritime's bid. Exhibit 8; Craig Affidavit at ¶ 13.

On the morning of December 16, GSA's contracting officer contacted Maritime and explained that another bidder had submitted a timely bid for the Sorrel that was higher than Maritime's bid, and that the other bid had been misfiled and not found until after bids were opened. He said that, as a result of the error, GSA was going to cancel the award to Maritime of the contract for the Sorrel. Exhibit 9; Affidavit of Leroy Williams (Williams Affidavit) (June 14, 2001) ¶¶ 1-4. On December 17, the contracting officer sent a letter to Maritime stating that the award of the contract for the Sorrel was canceled due to an error in processing the bids. The letter explained the nature of the error, and stated that Maritime could appeal the contracting officer's decision either to the Board or to the United States Court of Federal Claims. Exhibit 10. The contracting officer subsequently awarded the contract for the Sorrel to the high bidder. Williams Affidavit at ¶ 6.

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<sup>1</sup> The parties elected to submit the case for a decision based upon the written record, without a hearing. Our findings of fact are based upon the exhibits contained in the appeal file and affidavits submitted by GSA.

On March 15, 2000, Maritime appealed the contracting officer's decision to cancel the award of its contract for the Sorrel. Exhibit 14.

### Discussion

Before we reach the merits of this appeal, there is one preliminary matter we need to address. In its complaint, Maritime asked that we award money damages, grant specific performance, and reverse the decision to cancel its contract for the Sorrel. On June 22, 2000, we granted GSA's motion to dismiss Maritime's claims for money damages and for specific performance. In our decision, we explained that the only portion of the appeal over which we have jurisdiction is Maritime's request that we overturn the decision of the contracting officer to cancel the contract. Maritime Equipment & Sales, Inc. v. General Services Administration, GSBCA 15266, 00-2 BCA ¶ 30,987. On April 23, 2001, GSA filed a second motion to dismiss Maritime's claim for money damages. Respondent's Motion to Dismiss (Apr. 23, 2001). We deny the motion because there is no monetary claim to be dismissed, given our June 22, 2000 decision.

Turning to the merits, we deny the appeal. GSA's award to Maritime of the contract for the Sorrel violated statute and regulation, and the resulting contract was plainly illegal. Maritime cannot enforce the contract against GSA.<sup>2</sup>

### General principles

In order to determine whether a contractor can enforce a contract against the Government, we must first decide whether a statute or regulation was violated when the award was made. John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964). In deciding whether a statute or regulation was violated, we will consider the purpose and intent of the statute or regulation, as well as its plain language. United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961); CACI, Inc. v. Stone, 990 F.2d 1233 (Fed. Cir. 1993); Urban Data Systems, Inc. v. United States, 699 F.2d 1147 (Fed. Cir. 1983); Yosemite Park v. United States, 582 F.2d 552 (Ct. Cl. 1978); Schoenbrod v. United States, 410 F.2d 400 (Ct. Cl. 1969). We will also look to see whether the action that the Government claims constitutes a violation of a statute or regulation was actually a permissible exercise of discretion allowed by the statute or regulation, as is frequently the case when a decision is made concerning the responsiveness of a bid or a bidder's responsibility. Levinson v. United States, 258 U.S. 198 (1922); United States v. Speed, 8 Wall. 77 (1868); Trilon Educational Corp. v. United States, 578 F.2d 1356 (Ct. Cl. 1978); Warren Brothers Roads Co. v. United States, 355 F.2d 612 (Ct. Cl. 1965); Coastal Cargo Co. v. United States, 351 F.2d 1004 (Ct. Cl. 1965); Brown & Son Electric Co. v.

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<sup>2</sup> Our analysis might very well be different if this case concerned fraud, conflict of interest, or something similar. John Reiner & Co. v. United States, 325 F.2d 438, 440 n.2 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964). It might also be different if the Government, instead of the contractor, argued that the contract was valid. United States v. New York & Porto Rico Steamship Co., 239 U.S. 88 (1915); Secretary of the Navy, B-141226 (Dec. 31, 1959).

United States, 325 F.2d 446 (Ct. Cl. 1963); John Reiner, 325 F.2d at 422; Schneider v. United States, 19 Ct. Cl. 547 (1884).

If a statute or regulation was violated when an award was made, we must then determine if the award was plainly illegal due to the violation. An award is not plainly illegal if the Government initially viewed the award as legal and if that view is reasonable in light of applicable statutes and regulations. John Reiner, 325 F.2d at 440. An award is plainly illegal, however, if it is contrary to statute or regulation due to some action by the contractor, or if the contractor was on notice that the procedures the Government followed during the award process violated statute or regulation. Contractors are on notice of limitations imposed by statute or regulation upon the authority of a Government official to enter into a contract. Total Medical Management, Inc. v. United States, 104 F.3d 1314 (Fed. Cir.), cert. denied, 522 U.S. 857 (1997); Ast/Servo Systems, Inc. v. United States, 449 F.2d 789 (Ct. Cl. 1971); Prestex, Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); Condenser Service & Engineering Co. v. United States, 115 F. Supp. 203 (Ct. Cl. 1953); Schneider, 19 Ct. Cl. at 551; Melrose Associates, L.P. v. United States, 43 Fed. Cl. 124, supplemented by 45 Fed. Cl. 56 (1999), aff'd, No. 00-5022 (Fed. Cir. Feb. 12, 2001); Hall v. United States, 19 Cl. Ct. 558, aff'd, 918 F.2d 187 (Fed. Cir. 1990) (table); Colorado State Bank of Walsh v. United States, 18 Cl. Ct. 611 (1989), aff'd, 904 F.2d 45 (Fed. Cir. 1990) (table); Johnson v. United States, 15 Cl. Ct. 169 (1988).

If the award of a contract was plainly illegal, we must then determine the effect of the violation of statute or regulation. Sometimes, the statute or the regulation spells out the effect of the violation. In the absence of such direction, we determine the effect of the violation by implication, looking at the purpose of the provision that has been violated "and such other considerations as may give us light." United States v. New York & Porto Rico Steamship Co., 239 U.S. 88, 92 (1915). "[A] statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment." Mississippi Valley Generating Co., 364 U.S. at 563.

When a statute or regulation limits the authority of a Government official to enter into a contract, the implication of a plain violation of such a statute or regulation is that the contractor cannot enforce the resulting contract against the Government. Federal Crop Insurance Co. v. Merrill, 332 U.S. 380 (1947) (crop insurance contract unenforceable where regulations precluded insurance coverage for specified crop); Total Medical Management, 104 F.3d at 1320-21 (contract void where its reimbursement rates were higher than allowed by regulations); Urban Data Systems, 699 F.2d at 1153-54 (contract void where statute prohibited price terms contained in contract); Yosemite Park, 582 F.2d at 558 (contract not enforceable where statutes and regulations prohibited payment of fee and recovery of taxes as were allowed by contract); Ast/Servo Systems, 449 F.2d at 791-92 (contract for sale of surplus property void where property was sold without having been demilitarized and agency manual required demilitarization before sale); Schoenbrod, 410 F.2d at 404 (contract void where statutes and regulations made price an award factor and award was made without considering price); Condenser Service, 115 F. Supp. at 207-08 (contract not enforceable where statute authorized sale of surplus property and agency sold property not in its possession); Commodities Recovery Corp. v. United States, 34 Fed. Cl. 282 (1995) (auction sale contract not enforceable where statute authorized sale of unclaimed merchandise and agency sold property that had been reclaimed); Hall, 19 Cl. Ct. at 559-60

(contract for sale of surplus property void where property was sold instead of being sent to repair depot as required by agency order); Colorado State Bank of Walsh, 18 Cl. Ct. at 631 (contract of guarantee not enforceable where regulatory procedures for obtaining guarantee were not followed).

The award of the contract for the Sorrel

GSA's authority to dispose of surplus personal property is found in 40 U.S.C. § 484 (1994). With certain exceptions not relevant here, the statute requires GSA to advertise for bids before disposing of surplus property, using such methods, and upon such terms and conditions, as will permit full and free competition consistent with the value and nature of the property. GSA is then required to award a contract to the responsible bidder who submits a responsive bid that is "most advantageous to the Government, price and other factors considered . . . ." 40 U.S.C. § 484(e)(2)(C). The regulations that implement the statute require GSA to use the special conditions for sealed bid sales set out in Standard Form 114C-1. 41 CFR 101-45.304-8 (2000). One such condition is that the award will be made to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the Government, price and other factors considered. Standard Form 114C-1, ¶ D. Neither the invitation for bids for the Sorrel nor the special conditions contained in Standard Form 114C-1 stated that any factor other than price would be used as the basis for award. The invitation for bids clearly stated that items would be awarded to the high bidder.

The purpose of statutes and regulations which provide that contract awards will be made after advertising is to secure fair prices, to prevent fraud and corruption, and to give everyone an equal opportunity to compete for award. In order to effectuate this purpose, the contract that is awarded must be the same contract that was advertised. Toyo Menka Kaisha, Ltd. v. United States, 597 F.2d 1371 (Ct. Cl. 1979); Prestex, 320 F.2d at 372; New York Mail and Newspaper Transportation Co. v. United States, 154 F. Supp. 271 (Ct. Cl.), cert. denied, 355 U.S. 904 (1957). The purpose of 40 U.S.C. § 484(e)(2)(C) is to ensure that when surplus personal property is disposed of by bids after advertising, the Government obtains the highest price. 1958 U.S.C.C.A.N. 2861-75; Commission on Organization of the Executive Branch of the Government, Report to Congress on Use and Disposal of Federal Surplus Property, April 18, 1955, pp. 50-51, 56-57; 36 Comp. Gen. 94 (1956). The statutory and regulatory provisions serve to protect the financial interests of the Government and the interest of the public in free and open competition.

GSA's award to Maritime of a contract for the Sorrel violated the language and the purpose of the statute and the special conditions imposed by the statute's implementing regulations. GSA was required to advertise for bids for the Sorrel and to make an award to the responsible bidder who submitted the most advantageous responsive bid.<sup>3</sup> Price was the only award factor, which meant that the most advantageous bid was the highest bid. Because Maritime did not submit the highest bid for the Sorrel, GSA's award to Maritime of a contract for the Sorrel was inconsistent with the statutory and regulatory requirements for an award, after advertising, to the bidder whose bid was most advantageous to the Government.

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<sup>3</sup> So far as we know, all of the bidders were responsible and all of the bids were responsive to the invitation for bids.

The violation of statutory and regulatory requirements resulted in a plainly illegal award to Maritime. GSA viewed the award to Maritime as lawful only briefly, when it thought that Maritime was the high bidder. Late in the afternoon on the day that bids were opened, GSA realized that it had awarded the Sorrel to a bidder other than the high bidder. The next morning, GSA notified Maritime by telephone that it was not the high bidder for the Sorrel and that its award would be canceled. The following day, GSA provided Maritime with written notice that the award was canceled. GSA did not encourage or permit Maritime to perform, and subsequently awarded the contract for the Sorrel to the high bidder. GSA did not view the award of a contract to anyone other than the high bidder as lawful, and if it had, its view would have been unreasonable in light of the statutory and regulatory provisions discussed above. In addition, Maritime was on notice of the statute and the published regulations incorporated in the invitation, which required GSA to award the Sorrel to the bidder who submitted the most advantageous bid. Maritime knew from reading the invitation for bids that there were no evaluation factors other than price and that GSA was supposed to award the Sorrel to the high bidder. Because GSA did not view the award to Maritime as legal and because the statute and regulation put Maritime on notice that GSA was not authorized to award to anyone other than the high bidder, the award to Maritime of the contract for the Sorrel was plainly illegal.

Maritime cannot enforce the contract for the Sorrel. GSA officials had no authority to enter into a contract unless they complied with the statutory and regulatory provisions requiring GSA to advertise the sale of the Sorrel and to award a contract to the responsible bidder who submitted the responsive bid that was most advantageous to the Government. The statute and the regulations governing the sale were meant to protect the interests of the Government and the public by securing fair prices, preventing fraud and corruption, giving everyone an equal opportunity to compete for award, and ensuring that when surplus personal property is disposed of by bids after advertising, the Government obtains the highest price. The statute and the regulations were not meant to protect the interest of a bidder who was awarded a contract even though it did not submit the high bid, and the implication of a plain violation is that Maritime cannot enforce its contract against GSA. Toyo Menka Kaisha, 597 F.2d at 1377; Prestex, 320 F.2d at 372; New York Mail, 154 F. Supp. at 276. 1958 U.S.C.C.A.N. 2861-75; Commission on Organization of the Executive Branch of the Government, Report to Congress on Use and Disposal of Federal Surplus Property, April 18, 1955, pp. 50-51, 56-57; 36 Comp. Gen. 94 (1956).

#### Decision

The appeal is **DENIED**.

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MARTHA H. DeGRAFF  
Board Judge

We concur:

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STEPHEN M. DANIELS  
Board Judge

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MARY ELLEN COSTER WILLIAMS  
Board Judge