

No. _____

In the
Supreme Court of the United States

WATERFRONT MARINE CONSTRUCTION, INC., ET AL.,
Petitioners,
v.

HEARD CONSTRUCTION, INC.,
Respondent.

**On Petition for Writ of Certiorari
to the Supreme Court of Virginia**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a disappointed bidder to a federal contract fails to file a bid protest pursuant to the Tucker Act, 28 U.S.C. § 1491 (2016), does a state trial court have subject matter jurisdiction to interpret federal regulations to determine a party's entitlement to that same federal procurement contract under the pretext of a state tort action?
2. Where a disappointed bidder to a federal contract fails to file a bid protest pursuant to the Tucker Act, 28 U.S.C. § 1491 (2016), does a state trial court have subject matter jurisdiction to interpret federal regulations to determine a party's entitlement to that same federal procurement contract under the pretext of a state tort action, without any testimony from the contracting officer responsible for the award of the contract?

PARTIES TO THE PROCEEDINGS

Petitioners, Waterfront Marine Construction, Inc. (Waterfront), Ken Sutton, and Randy Sutton, were the defendants and appellants in the court below with respect to the issues presented. Respondent, Heard Construction, Inc. (Heard), was the appellee in the court below with respect to the issues presented.

CORPORATE DISCLOSURE STATEMENT

Petitioners, Waterfront Marine Construction, Inc. Ken Sutton, and Randy Sutton certify the following:

No publicly traded company owns more than 10% of their stock. Waterfront Marine Construction, Inc. is wholly owned by Infrastructure Constructors, Inc. Infrastructure Constructors, Inc. is wholly owned by Infrastructure and Industrial Constructors USA, LLC. Infrastructure and Industrial Constructors USA, LLC is wholly owned by Infrastructure and Industrial Constructors USA Holdings, Inc. Infrastructure and Industrial Constructors USA Holdings, Inc. is 88% owned by S & B US Construction Inc. S & B US Construction Inc.'s corporate parent Shikun & Binui Ltd. is publicly traded on the Tel Aviv Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Waterfront Marine Construction Co., Inc., Randy Sutton, and Ken Sutton petition this Court for a writ of certiorari to review the judgment of the Chesapeake Circuit Court and the Virginia Supreme Court's denial of Petitioners' Appeal.

**OPINIONS AND ORDERS
ENTERED IN THE CASE**

1. Re: Heard Construction, Inc. v. Waterfront Marine Construction Co., *et al.*, 98 Va. Cir. 67 (2018) (Chesapeake Cir. Ct.). This Opinion is reproduced in the appendix (App.) beginning at App. 9.
2. Final Order entered Feb. 20, 2018. This Order is reproduced beginning at App. 4.
3. Order denying Appeal entered November 8, 2018. This Order is reproduced beginning at App. 2.
4. Order denying Petition for Rehearing entered February 1, 2019. This Order is reproduced beginning at App. 1.

STATEMENT OF JURISDICTION

The Chesapeake Circuit Court entered its judgment on February 20, 2018. App. 4. Both Heard and Petitioners filed timely Petitions for Appeal to the Virginia Supreme Court. The Virginia Supreme Court denied Petitioners' timely Appeal on November 8, 2018. App. 3. The Virginia Supreme Court also denied Heard's Appeal on November 8, 2018. App. 2. Heard filed a Petition for Rehearing *en banc* with the Virginia Supreme Court, which was denied on February 1, 2019.

App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 because the Virginia statute granting the state subject matter jurisdiction over tort cases is repugnant to the laws of the United States where the validity of a federal contract award is the underlying premise for the lawsuit.

STATEMENT OF RELEVANT STATUTES AND REGULATIONS

1. 28 U.S. Code § 1346.

Set forth at App. 21.

2. 28 U.S. Code § 1491.

Set forth at App. 23.

3. 110 Stat. 3874, Administrative Disputes Resolution Act of 1996, Pub. L. 104-320 §12.

Set forth at App. 27.

4. 4 C.F.R. § 21.1 Filing a protest.

Set forth at App. 30.

5. 4 C.F.R. § 21.8 Remedies.

Set forth at App. 33.

6. 13 C.F.R. § 121.1009.

Set forth at App. 36.

7. FAR 1.602-1.

Set forth at App. 40.

8. FAR 1.602-2.

Set forth at App. 41.

INTRODUCTION

This case presents an important national policy question that is of first impression for this Court. Specifically: Should a disappointed bidder for a federal government contract award be permitted to ignore the exclusive relief available to it under the Tucker Act and instead pursue relief through a state tort action that requires a state court or jury to determine whom the awardee of a federal contract should be?

At issue in this petition is an attempt by Heard, the state-court tort plaintiff, to circumvent the award controversy procedures related to a federal contract procurement, in order to redress its disappointment over not receiving a federal contract award from the United States Navy. Whether or not Heard should have received the contract award it complains of is subject to the exclusive jurisdiction of the United States Court of Federal Claims (hereafter, the Court of Federal Claims) under the Tucker Act. 28 U.S.C. § 1491 (2016); 4 C.F.R. §§ 21.0–21.14 (1996).¹ Yet, Heard never pursued the exclusive relief offered thereunder. Instead, it filed a Virginia state law claim of tortious interference with a contract expectancy. To

¹ A disappointed bidder may also file an administrative agency protest with either the federal procuring agency or the U.S. Government Accountability Office (GAO), although decisions issued by these agencies are advisory only and can be appealed to the Court of Federal Claims.

prevail on this claim, Heard is *required* to prove that it, not Waterfront, should have received the federal contract award in question. This determination is exclusively reserved to the Court of Federal Claims. A Virginia trial court and jury has no jurisdiction to make a determination that Heard would have received a federal government contract award under any circumstances. Consequently, Heard is unable to prove its state tort claim.

Congress clearly intended this result in enacting the Tucker Act. Federal government contracting is a unique area of contract law which rests upon a uniform body of law and regulations regardless of the state (or nation) in which that contract is procured and performed. This makes sense. The federal government is a single buyer of its contract services, and it would be illogical and inefficient to have 50 different sets of contracting rules for both the federal government and its contractors to follow. To allow the Virginia trial court's decision to stand would place each federal contract awardee at risk of a state tort lawsuit by a disappointed federal contract bidder, in circumvention of the exclusive relief jurisdiction of the Tucker Act.

STATEMENT OF THE CASE

Waterfront and Heard were competing bidders for a Navy boat ramp replacement contract (Pier 34 Contract) located in Virginia Beach, VA. There were eight bidders. Heard was the fourth lowest bidder. Waterfront was the second lowest bidder. The lowest bidder was C&D Construction (C&D). C&D withdrew its bid several days after bids were publicly opened.

The Navy then awarded the contract to Waterfront as the next lowest bidder.

Heard has alleged that it, not Waterfront, should have received the contract award, but never filed a bid protest with the Navy, the GAO, or the Court of Federal Claims to assert its claims. Specifically, Heard alleged that Waterfront intentionally misrepresented its Small Business Administration (SBA) size status in its bid to the Navy and that but-for Waterfront's misrepresentation, the Navy's contracting officer would have made the award to Heard – the fourth lowest bidder – under Heard's interpretation of complex SBA HUBZone program regulations. App. 50. Such an allegation must be exclusively brought to the Court of Federal Claims under the Tucker Act in order for the plaintiff to obtain relief. Heard has never sought this relief.

Instead, Heard waited more than two years after the Navy awarded the contract to Waterfront to file a tortious interference with a contract expectancy claim in Virginia's Chesapeake Circuit Court. Heard's claim included lost profits and punitive damages. At trial, Heard failed to provide testimony from the Navy's contracting officer. The contracting officer is the only witness who could have provided jurisdictional support for Heard's allegations. Heard never called her as a witness.

Petitioners repeatedly raised Heard's failure to provide testimony from the contracting officer in opening and closing arguments, a Motion to Strike at the close of Heard's evidence, and again at the close of Petitioners' evidence. Trial Tr. vol. 3 592:14-593:19,

595:11-596:23; Trial Tr. vol. 3, 744:7-745:2. Each time, the state trial court improperly found that it could interpret the federal regulations at issue as the basis for determining that Heard would have received a federal contract award. The question of the state trial court's subject matter jurisdiction was discussed at length by Petitioners (then-Defendants) in their Motion to Set Aside the Verdict filed on September 6, 2017, expanded upon in Petitioners' Reply Brief, and argued on November 15, 2017. App. 78-123.

In its January 10, 2018 Memorandum Opinion, the Virginia trial court correctly recognized that it does "not have the power to order an award of the contract" but then incorrectly ruled that it had concurrent jurisdiction and that Heard's claim was not a bid protest to be brought under the Tucker Act, but rather a state claim. App. 13-16. In making this improper finding, the Court's Order disregards the fact that a contracting officer retains discretion to cancel a solicitation or take other relief that does not require awarding a contract to a successful protestor, assuming a protest had been properly brought in the first-place.

Petitioners appealed the state trial court judgment to the Virginia Supreme Court by filing their Notice of Appeal on February 21, 2018 and their Petition for Appeal on May 17, 2018. App. 124-168. Heard filed its own Petition for Appeal on May 21, 2018. On October 16, 2018, a 3-judge panel of the Virginia Supreme Court heard oral argument on Petitioners' and Heard's Petitions for Appeal. The Virginia Supreme Court denied both Petitioners' and Heard's Petitions for Appeal on November 8, 2018. App. 2-3. On November

26, 2018, Heard filed a Petition for Rehearing with the Virginia Supreme Court, which was denied on February 1, 2019. App. 1.

REASONS FOR GRANTING THE WRIT

I. THE TUCKER ACT, 29 U.S.C. § 1491, PROVIDES EXCLUSIVE RELIEF TO A DISAPPOINTED BIDDER IN CONNECTION WITH A FEDERAL PROCUREMENT AWARD AND PREEMPTS A STATE TORT CLAIM ACTION WHICH REQUIRES A PLAINTIFF TO ESTABLISH A DISCRETIONARY FEDERAL CONTRACT EXPECTANCY

This case arises solely because Respondent, Heard, was a disappointed bidder for a Navy procurement contract award. App. 44-60. In that regard, resolution of Heard's claim requires an interpretation of federal regulations and alleged improprieties in a contract award – acts reserved exclusively for the Court of Federal Claims. *See* 28 U.S.C. § 1491(b)(1) ("[T]he United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting . . . to the award of a [Federal] contract or any alleged violation of statute or regulation in connection with a procurement"); *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1344 (Fed. Cir. 2008) (finding that Section 1491 "confers **exclusive** jurisdiction") (emphasis added). The only court that can determine the proper awardee of a federal

procurement is the Court of Federal Claims. 28 U.S.C. § 1491.²

These federal bid protest statutes and regulations are in place precisely to provide recourse to a disappointed bidder who alleges mistakes or wrongdoing in connection with a federal contract award. A disappointed bidder who files a bid protest can seek injunctive relief to prevent the contract from moving forward. *See* 28 U.S.C. § 1491(b)(2) (giving the Court of Federal Claims the power to award in bid protests “any relief that the court considers proper, including declaratory and injunctive relief”). Therefore, as soon as Heard believed that the award was improper,³ Heard was required by federal law to file a bid protest if it wanted to challenge and enjoin an

² While the text of Section 1491 includes federal district courts, the Administrative Dispute Resolution Act (ADRA), which amended the Tucker Act, included a sunset provision providing that jurisdiction of the federal district courts would expire on January 1, 2001 unless otherwise extended by Congress. *See* Pub. L. No. 104-320, 110 Stat. 3874 (1996) (“The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code . . . shall terminate on January 1, 2001 unless extended by Congress.”). Congress did not extend the deadline. As the Federal Circuit has explained, “it is clear that Congress’s intent in enacting the ADRA with the sunset provision was to vest a single judicial tribunal with exclusive jurisdiction to review government contract protest actions.” *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001).

³ *See* Defs.’s Reply Mot. to Set Aside the Verdict, Ex. 2 (Pl.’s Supp. Resp. to Def. Ken Sutton’s First Interrog. No. 13 stating Heard believed there were improprieties as of the day of the bid, September 25, 2012).

allegedly improper contract award based on a violation of SBA regulations. Moreover, failure to assert a timely bid protest moots recovery later on. *See Nat. Telecommuting Inst., Inc. v. United States*, 123 Fed. Cl. 595, 602 (2015) (stating that a plaintiff who “sit[s] on his rights in bringing a bid protest while the Government moves forward with a contract” cannot recover). Heard, a presumably sophisticated government contractor, understands this process. Trial Tr. vol. 2, 451:8–452:11.

Heard never filed a bid protest challenging the award of this Project. Instead, Heard filed a challenge to Waterfront’s size status under applicable SBA regulations. The two administrative procedures are different. A size protest is filed with the SBA and seeks a determination of a company’s size status under applicable SBA size standards. The SBA does not have authority to make a determination regarding the propriety of a contract award or the rights of each party to a federal contract award. Trial Tr. vol. 2, 221:4–222:8, 348:5–11; *White Hawk Grp., Inc. v. United States*, 91 Fed. Cl. 669, 673 (2010) (“A size protest is a purely administrative claim before the SBA in which a small business concern ... objects to the size determination of another offeror. ...‘size protests’ bear no relation to bid protests.”). Even Heard’s expert witness, Mr. Jenkins, agrees that SBA’s sole purpose is to determine size status. Trial Tr. vol. 2, 348:5–23.

Instead of filing a bid protest at the Court of Federal Claims, Heard alleged a Virginia statutory tortious interference with a contract expectancy claim; however, the only way a disappointed federal contract

bidder can create a federal contract expectancy (and ensuing federal contract award) is through a successful federal bid protest. 28 U.S.C. § 1491(b)(1); 4 C.F.R. § 21.1; 4 C.F.R. § 21.8. A mandatory element of proof for Heard's claim is a contract expectancy. *Maximus v. Lockheed Info. Mgmt. Sys. Co., Inc.*, 254 Va. 408, 414 (1997). As support for its alleged contract expectancy, Heard relies on an interpretation of the federal HUBZone program regulations. *See, e.g.*, App. 50. However, only a duly authorized federal government contracting officer or the Court of Federal Claims, through the exercise of declaratory relief in a bid protest, is legally able to make such an evaluation and determination. 28 U.S.C. § 1491(b)(1); FAR 1.602-1 and 2 ("Contracting Officers have authority to enter into, administer, or terminate contracts and make related determinations and findings."); *Distributed Solutions, Inc.*, 539 F.3d at 1344 (Fed. Cir. 2008).⁴

A state court in Virginia does not have jurisdiction to establish a federal contract expectancy. If it did, it would create a parallel court system full of judges and juries with no experience in the rules and regulations unique to federal procurements, acting as rough justice second-guessers who seek to substitute their opinions of whom should have received a federal contract award over federal procurement officials and judges who are experts in procurement award matters. *Garner v.*

⁴ Heard's expert agrees that only the contracting officer has the authority to make this evaluation absent a bid protest at the Court of Federal Claims. Trial Tr. vol. 2. 314:25-315:7. With this admission, the state trial court should have dismissed the case upon Petitioners' (then-Defendants) Motion to Strike.

Teamsters, Chauffeurs & Helpers Local Union No. 776 (A. F. L.), 346 U.S. 485, 500–01 (1953) (“We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded.”). As a result, the state trial court did not have subject matter jurisdiction to interpret federal procurement law and regulations to determine if Heard, or Waterfront, or someone else, such as the third lowest bidder, would be entitled to a federal contract expectancy, thereby rendering Heard unable to establish a contract expectancy for purposes of its state tort claim.

II. PURSUANT TO THE TUCKER ACT, 28 U.S.C. § 1491, A STATE TRIAL COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION TO MAKE A DISCRETIONARY FEDERAL CONTRACT AWARD DETERMINATION WHEN SUCH A DETERMINATION IS NECESSARY TO MAINTAIN A STATE TORT CLAIM OF TORTIOUS INTERFERENCE WITH A CONTRACT EXPECTANCY

The Respondent in this appeal filed a tortious interference with a contract expectancy claim. The first *mandatory* element to prove this claim is a valid

contract expectancy. *Gov't Employees Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 705–06 (E.D. Va. 2004) (a contract expectancy requires proof of a specific existing contract or expectancy between two parties based upon a “concrete move in that direction.”). There are only two ways to prove a federal contract expectancy. First, a plaintiff could offer evidence that it successfully availed itself of the mandatory federal bid protest procedures with an order from the Court of Federal Claims. Heard did not seek this avenue of relief, and therefore was unable to provide such evidence. Second, Heard could have subpoenaed the testimony of the Navy’s contracting officer to see if she agreed with its contentions that she would have awarded Heard the contract under the facts alleged by Heard.⁵ Heard did not do this either. Absent this evidence, a Virginia state court judge may not exercise a federal contracting officer’s authority or grant it to unauthorized agents. *GTSI Corp. v. Wildflower Int’l, Inc.*, No. 1:09CV123 (JCC), 2009 WL 2160451, at *5 (E.D. Va. July 17, 2009) (recognizing “that litigants may improperly use state causes of action to take a second (or belated first) bite at a federal procurement challenge” and that if the allegations in the tort lawsuit required the Court “to make legal findings reserved exclusively to administrative or other executive

⁵ Petitioners are not asking this Court to address the question of if a duly authorized contracting officer could, in effect, reverse her contract award decision by testifying at a trial several years after her actual contract award decision. Petitioners do not believe that such a finding is necessary to resolve this case, but does acknowledge that it poses an interesting question that is beyond what is necessary to resolve this case.

agencies – such that this Court lacks all power to make them – then summary judgment may be the proper remedy.”).

In reality, this case has no relationship to state contract or tort law. It *solely* arises as a result of a discretionary federal contract award decision. To Petitioners’ knowledge, this Court has not been asked to review the question of whether a state court judge (or a jury) may step into the shoes of a federal agency contracting officer and make a discretionary determination on the proper award of a federal contract. However, this Court has considered the wide discretionary authority vested in procurement agencies and the inability of a reviewing court to substitute its judgment for that of a governmental agency. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (“absent constitutional constraints or extremely compelling circumstances the ‘administrative agencies ‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’”). Justice Scalia, while sitting on the D.C. Circuit Court of Appeals, noted that “it is undisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties.” *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 203-04 (D.C. Cir. 1984).

This Court has also generally favored federal statutory law enforced by administrative procedures over individual actions to enforce common-law doctrines of private rights, where such rights

potentially come into conflict. *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776* (A. F. L.), 346 U.S. 485, 490 (1953) (“Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.”).

Ironically, in this case, the state trial court recognized its lack of jurisdiction to make a federal contract award decision, yet denied Petitioners’ (then-Defendants) Motion to Set Aside the Verdict for lack of subject matter jurisdiction. *See* App. 13-17. In its ruling, the state trial court found that Heard’s claim was not a bid protest to be brought under the Tucker Act, but rather a state tort claim. The state trial court relied on *GTSI Corp. v. Wildflower Int’l, Inc.*, No. 1:09CV123 (JCC), 2009 WL 2160451, at *5 (E.D. Va. July 17, 2009). This reliance, however, is misplaced, and in fact the *GTSI* ruling supports the outcome asserted by petitioner. The ruling in *GTSI* came at the motion to dismiss stage and even then the *GTSI* court expressly recognized “that litigants may improperly use state causes of action to take a second (or belated first)

bite at a federal procurement challenge.” *Id.* The *GTSI* court acknowledged that it was required to accept the allegations of improper bidding and affiliation as state law claims at the motion to dismiss stage; however, the court also recognized that if the allegations required the court “to make legal findings reserved exclusively to administrative or other executive agencies – such that this Court lacks all power to make them – then summary judgment may be the proper remedy.” *Id.*

The facts in this case fall squarely into this category. The lawsuit alleges that Heard would have been awarded the Contract by the Navy but for Petitioners’ actions. App. 50, App. 53. The state trial court does not have subject matter jurisdiction to opine on what a contracting officer would have done in the absence of her testimony or interpret Federal regulations to determine whom should be awarded a federal government contract. Yet the state trial court was only able to find a tortious interference with a contract expectancy in this case by doing so. Since such a determination is required to resolve this case, any attempt to resolve it in state court (rather than through the bid protest process set forth in the 28 U.S.C. § 1491(b)(1)) is an improper attempt to take a “second bite (or belated first bite) at the apple.” *GTSI*, 2009 WL 2160451, at *5.

It is not possible for a state court to have subject matter jurisdiction over a state law tort claim that *requires* the state court or a jury to effectively overrule the actual federal contract award decision made by the authorized contracting officer. A state trial court

and/or a state jury are not authorized to substitute their own judgment for a duly authorized federal contracting officer’s discretionary judgment. *Delta Data Sys. Corp.*, 744 F.2d 197 at 203-04 (D.C. Cir. 1984). If a state trial court was permitted to evade the Tucker Act’s exclusive subject matter jurisdiction in this manner, any disappointed bidder for a federal contract in Virginia (or eventually every other state) could circumvent the federal government’s exclusive subject matter jurisdiction by litigating a federal bid protest dressed up as a state tort claim. *Garner*, 346 U.S. at 500–01 (1953) (finding that where Congress has clearly intended for one body to adjudicate controversies, state courts may not adjudge the same controversy and extend their own form of relief).

It is also not necessary to make a state-court tort exception to the Tucker Act’s exclusive subject matter jurisdiction in order to protect a disappointed bidder from actual wrongdoing in connection with a federal procurement. The Tucker Act specifically authorizes jurisdiction over “any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.” 28 U.S.C. § 1491(b)(1). Respondent’s claim is based solely on allegations of intentional violations of SBA regulations, and it could have – but did not – bring these claims as a bid protest at the Court of Federal Claims.⁶ 28 U.S.C. § 1491. In addition, the federal government has authority to investigate and take action against a contractor who intentionally violates SBA size regulations in

⁶ Heard has not provided an explanation in the record for this failure, despite its familiarity with the process.

connection with a federal procurement, including civil and criminal penalties and suspension and debarment. 13 C.F.R. § 121.108 (citing 31 U.S.C. § 3729 *et seq.*; 31 U.S.C. § 3801 *et seq.* and others) However, no such investigation or action has been taken by the government in this case. Trial Tr. vol. 1, 215:22-216:14. In fact, the Navy's contracting officer directed Waterfront to perform the contract she had awarded to it, as her business judgment and discretion allows. FAR 1.602-1 and 2. It does not seem possible that Congress intended to allow state courts to second-guess federal agency procurement decisions by deputizing state tort plaintiffs to allege their own interpretations of contracting officer and agency discretion.

III. ONLY THIS COURT CAN PREVENT MISUSE OF THE FIFTY STATE TORT SYSTEMS TO CIRCUMVENT THE EXCLUSIVE FEDERAL CONTRACT AWARD JURISDICTION ESTABLISHED BY THE TUCKER ACT

This case presents an important national policy question that is a case of first impression. Specifically: Should a disappointed bidder for a federal contract award be permitted to ignore the exclusive relief available to it under the Tucker Act and instead pursue a state tort action that requires proof of a federal contract award? Petitioners submit that the answer to this question is no.

Federal government contracting is a unique area of contract law which rests upon a consistent body of law which applies, regardless of the state (or nation) in which that contract is procured and performed. From

a policy and efficiency standpoint, this makes sense. The federal government is a single owner of contract services, and it would be illogical and inefficient to have 50 different sets of contracting rules for both the government and its contractors to follow.

At issue in this petition is an attempt by Heard, the state-court tort plaintiff, to circumvent the award controversy procedures related to a federal contract procurement, in order to redress Heard's disappointment over not receiving a federal contract award from the Navy. Whether or not Heard should have received the contract award it complains of is entirely subject to the sole jurisdiction of the US Court of Federal Claims under the Tucker Act. 28 U.S.C. § 1491.

If the state trial court's decision is not vacated, future federal contract awards will be subject to state court tort actions in all 50 states by disappointed-bidder plaintiffs. In effect, this establishes a new tort-claim forum shopping opportunity by plaintiffs who ignore the exclusive-jurisdiction federal bid protest process because they believe a state court and jury inexperienced in the rules and regulations of federal procurements might provide them a better outcome than federal procurement officials and the Court of Federal Claims who have significant experience in the resolution of such matters.

CONCLUSION

The state trial court improperly found subject matter jurisdiction over the claims at issue in this litigation. In doing so, the state trial court created a clear avenue for disappointed bidders to circumvent the rules and procedures set forth in the Tucker Act for bid protests and to seek remedies in an unauthorized forum outside the time granted for protests, directly contradicting United States federal law. Such precedent creates injury to the government contracting community and if left to stand will have a chilling effect on federal procurements. Contractors who fear unreasonable litigation for profit-shifting after completion of a project will likely divorce themselves from these projects. The Virginia Supreme Court's refusal to hear Petitioners' Appeal leaves this Court as the only opportunity to correct the issues raised in this Petition.

Waterfront Marine Construction, Inc., Ken Sutton, and Randy Sutton respectfully request that this Petition for Writ of Certiorari be granted. The issues presented are of critical importance to the federal contracting community, have nationwide impact, and have no opportunity for remedy except in this Court.

Respectfully submitted, this 2nd day of May, 2019.

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