

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

McCARTER RIDING STABLES, INC.,

Plaintiff,

vs.

No. 03-35C

Judge Lawrence M. Baskir

THE UNITED STATES,

Defendant,

and

DON MANIS,

Intervenor.

**PLAINTIFF'S RESPONSE TO DEFENDANT'S AND
INTERVENOR'S MOTION TO STRIKE AFFIDAVITS AND
PORTIONS OF PLAINTIFF'S MOTION FOR JUDGMENT**

In separate motions, both the Defendant and the Intervenor move the Court to strike all of the Affidavits accompanying Plaintiff's Motion for Judgment Upon the Administrative Record and the corresponding portions of Plaintiff's Memorandum in Support of its Motion for Judgment Upon Administrative Record. Both Defendant and Intervenor assert that Plaintiff is improperly attempting to supplement the Administrative Record with proof that the government did not consider when making its determination to award the contract to Manis. McCarter's inclusion of the Affidavits in support of its Motion for Judgment Upon Administrative Record was proper

and necessary to McCarter's argument that the United States improperly determined that Don Manis ("Manis") was a qualified person and that McCarter did not submit a responsive proposal.

The Court should not view the Administrative Record as an absolute boundary that defines the scope of the case. In *Graphic Data, LLC, v. The United States*, 37 Fed. Cl. 771, (1997), the Court of Federal Claims ruled that it is proper to support the administrative record in certain bid protest cases. The Court, citing *Cubic Applications, Inc., v. United States*, 37 Fed. Cl. 345, 349 (1997), stated:

The primary focus of the Court's review should be the materials that were before the agency when it made its final decision. This is a presumption necessitated by the limited nature of the court's inquiry. As a practical matter, however, in most bid protests, the "administrative record" is something of a fiction, and certainly cannot be viewed as rigidly as if the agency had made an adjudicative decision on a formal record that is then certified for court review. This is true in the contract award context if for no other reason than that, due to the absence of a formal record, the agency has to exercise some judgment in furnishing the court with the relevant documents.

Ultimately, the *Graphic Data* court ruled that to limit the court to the administrative record would effectively prevent the court from determining whether the government's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at 780.

Similarly, in *North Carolina Division of Services for the Blind v. The United States*, 53 Fed. Cl. 147 (2002) the Court of Federal Claims allowed the Plaintiffs to submit “extra-record” materials, including affidavits. The Court noted that generally bid protests are confined to the administrative record in existence. However, the Court noted that there are certain circumstances where additional materials need to be considered in order to “preserve a meaningful judicial review”. *Id.* at 158. Citing *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), the *North Carolina Division of Services for the Blind* court said that the court should consider the following factors in making its extra-record evidence determination:

- (1) When agency action is not adequately explained in the record before the Court;
- (2) When the agency failed to consider factors which are relevant to its final decision;
- (3) When an agency considered evidence which it failed to include in the record;
- (4) When a case is so complex that a Court needs more evidence to enable it to understand the issues clearly;
- (5) In cases where evidence arising after the agency action shows whether the decision was correct or not;
- (6) In cases where agencies are sued for failure to take action;

- (7) In cases arising under the National Environmental Policy Act; and
- (8) In cases where relief is at issue, especially at the preliminary injunction stage.

The court in *North Carolina Division of Services for the Blind* ultimately allowed the plaintiff's submittal of affidavits that demonstrated and shed light on information contained in the administrative record, but not adequately explained.

In the instant case, McCarter submitted with its Motion for Judgment on the Administrative Record the Affidavits of Curt D. ("Pete") McCarter, Fred Rowland, Don L. Heil and Nina L. Margetson. Each of these Affidavits are relevant to the issues to be determined by the Court and either demonstrate that the National Park Service failed to consider factors which are relevant to its final decision or shed light on information included in the Administrative Record, but not adequately explained.

The Affidavit of Curt D. ("Pete") McCarter was filed to demonstrate to the Court two broad points. First, Mr. McCarter describes conversations he had with National Park Service officials prior to his submission of the proposal. In Paragraph 8 of his Affidavit, Mr. McCarter states that he was "instructed to include my suggested changes in my proposal pursuant to 36 CFR, Ch. 1, §51.15(b)." Mr. McCarter further states that his response in

the proposal to Principal Selection Factor 5 was not an equivocal response and simply noted his suggested changes to the proposal, pursuant to the instructions of National Park Service officials. Additionally, Mr. McCarter states the results of his background investigation of Don Manis, the successful offeror. Mr. McCarter presented this same information to National Park Service Officials during the contracting process. The inclusion of this information and the Affidavit is necessary because it shows that the National Park Service failed to consider important information concerning the successful offeror and improperly determined that Manis was a qualified person.

McCarter also submitted the Affidavits of Don L. Heil and Fred Rowland in support of its Motion for Judgment of the Administrative Record. Both Mr. Rowland and Mr. Heil are professionals who have long been associated with the horse riding stable industry in the area surrounding the Great Smoky Mountains National Park. Both Mr. Rowland and Mr. Heil relate their experiences in dealing with the successful offeror and relate their belief that Mr. Manis is not a qualified stable operator. These Affidavits are relevant in that they show that the National Park Service Officials improperly determined that Manis was a qualified person.

Finally, McCarter submitted the Affidavit of Nina L. Margetson. Ms. Margetson is the President of Horse Haven of Tennessee, Inc., a nonprofit organization that investigates equine abuse and neglect in Tennessee. Ms. Margetson states that her organization “has received numerous complaints on three separate riding stables that have been operated by Mr. Don Manis.” Ms. Margetson relates specific details of neglect and abuse of Mr. Manis’ horses and improper conduct at Mr. Manis’ stables. More importantly, Ms. Margetson states that she related her concerns and serious reservations concerning Mr. Manis to Joe Ossoff of the National Park Service. Nowhere in the Administrative Record is there a reference to Ms. Margetson. Ms. Margetson properly provides information that was known by the National Park Service but not included in the Administrative Record.

The Affidavits submitted by McCarter in support of its Motion for Judgment on Administrative Record are proper and should be considered by the Court in determining the issues presently before it. Just as in *Graphic Data* and *North Carolina Division of Services for the Blind*, the “extra-record” evidence submitted by McCarter is necessary for the Court’s determination because the Administrative Record is not complete enough

to preserve a meaningful judicial review and allow the Court to fully consider the issues.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny the Defendant's and Intervenor's Motions to Strike Affidavits and Portions of Plaintiff's Motion for Judgment.

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CERTIFICATE OF SERVICE

We hereby certify that true and correct copies of the foregoing document were properly mailed or delivered to:

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This 28th day of April, 2003.

BERNSTEIN, STAIR & McADAMS LLP

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