

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

S. Ct. Civ. No. 2014-0006

Re: Super. Ct. INJ. No. 2/2013 (STT)

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Appellee/Defendant.

BEFORE: RHYS S. HODGE, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

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PER CURIAM.

THIS MATTER is before the Court on Appellant Tip Top Construction Corporation's Motion For Temporary Injunction Pending Appeal, its Supplemental Brief, as well as an Opposition filed by Appellee Government of the Virgin Islands. Also before this Court is a February 10, 2014 transmittal from the Clerk of the Superior Court, consisting of a February 7,

2014 Memorandum Opinion issued by the Superior Court which explains the reasons for summarily denying Tip Top's motion for a preliminary injunction. *See* V.I.S.Ct.R. 4(f). In its motion, Tip Top requests that this Court enjoin the Government from signing a contract with Island Roads Corporation and from authorizing Island Roads Corporation to do any work on the Main Street Enhancement Project, which "is a Federal-aid Highway project that is being undertaken by the Government of the Virgin Islands with the use of federal funds" and "encompasses the reconstruction of Main Street, Charlotte Amalie, St. Thomas, Virgin Islands." (Mem. Op. 3.) This Court, in a January 31, 2014 Order, issued a temporary injunction pending the filing of an opposition by the Government and issuance of the Superior Court's Memorandum Opinion.

"To determine whether a litigant is entitled to a stay [or injunction] pending appeal, this Court considers: (1) whether the litigant has made a strong showing that he is likely to succeed on the merits; (2) whether the litigant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies." *In re Najawicz*, S. Ct. Crim. Nos. 2008-0098, 0099, 2009 WL 321342, at *3 (V.I. Jan. 8, 2009) (unpublished); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Nevertheless, "[t]he first of these factors is ordinarily the most important." *Rojas v. Two/Morrow Ideas Enterprises, Inc.*, S. Ct. Civ. No. 2008-0071, 2009 WL 321347, at *2 (V.I. Jan. 22, 2009) (unpublished) (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)). "[W]hen 'the balance of equities, as determined by the other three factors, clearly favors a stay,'" a party may obtain a stay or injunction pending appeal upon showing "a 'substantial case on the merits'" *Id.* (quoting *Washington Metro. Area Transit Comm'n v. Holiday Tours*,

Inc., 599 F.2d 841, 843 (D.C. Cir. 1977)).¹ *Accord*, *Foster v. Gilliam*, 515 U.S. 1301, 1303 (1995); *Lake Eugenie Land & Dev., Inc. v. BP Exploration & Prod.*, 732 F.3d 326, 345 (5th Cir. 2013); *Leiva-Perez v. Holder*, 640 F.3d 962, 966-71 (9th Cir. 2011).

In its February 7, 2014 Opinion, the Superior Court “concluded that Tip Top is unlikely to succeed on the merits, and thus is not entitled to a preliminary injunction,” yet stated that it would nevertheless consider “the remaining preliminary injunction factors.” (Mem. Op. 21.) With respect to the remaining factors, the Superior Court concluded that all three favored granting a preliminary injunction. As to irreparable harm, the Superior Court relied on substantial case law holding that the “lost opportunity to compete on a level playing field for a

¹ In its opposition, the Government contends that this Court should not rule on Tip Top’s motion in the first instance, but direct the Superior Court to do so pursuant to Supreme Court Rule 8, which provides that “[a] motion for such relief may be made to the Supreme Court” provided that it “show[s] that application to the Superior Court for the relief sought is not practicable.” V.I.S.Ct.R. 8(b). Specifically, the Government contends that Tip Top must meet a higher burden to obtain a preliminary injunction as opposed to an injunction pending appeal, and that the Superior Court could therefore realistically deny a preliminary injunction at the trial level while simultaneously authorizing an injunction pending appeal.

The Government’s position, however, is unsupported by case law, which holds that the burden and analysis to attain an injunction pending appeal is wholly identical to that which applies to a request for a preliminary—as opposed to permanent—injunction. *Yusuf v. Hamed*, S. Ct. Civ. No. 2013-0040, 2013 WL 5429498, at *3 n.3 (V.I. Sept. 30, 2013) (“a stay pending appeal . . . applies the same test as a preliminary injunction”); *see also Conestogo Wood Specialties Corp. v. Sec’y of U.S. Dept. of Health & Human Services*, No. 13-1144, 2013 WL 1277419, at *7 n.5 (3d Cir. Feb. 8, 2013) (unpublished) (“[T]he standard for obtaining an injunction pending appeal is essentially the same as that for obtaining a preliminary injunction.”) (collecting cases); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012) (unpublished) (evaluating “a motion for an injunction pending appeal using the same factors and . . . approach that govern an application for a preliminary injunction”); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *1 (10th Cir. Dec. 20, 2012) (unpublished) (“In ruling on a motion for injunction pending appeal, this court makes the same inquiry as it would when reviewing a district court’s grant or denial of a preliminary injunction, which means this motions panel must assess the same factors that will control the merits panel’s review of the underlying appeal.”) (internal citations and quotation marks omitted); *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982) (“In ruling on a request for an injunction pending appeal, the court must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction.”) (collecting cases)(internal quotation marks omitted); *SynQor, Inc. v. Artesyn Technologies, Inc.*, No. 2:07-CV-497-TJW-CE, 2011 WL 238645, at *10 (E.D. Tex. Jan. 24, 2011) (unpublished) (“[A] finding that a permanent injunction is warranted does not preclude a granting of a stay of that injunction pending appeal as both issues require different analyses.”). Since Tip Top bears an equivalent burden with respect to a motion for preliminary injunction and a motion for injunction pending appeal, and both motions require the Superior Court to perform an identical analysis, we conclude that requiring Tip Top to file a motion for injunction pending appeal with the Superior Court would be futile and unnecessarily waste judicial resources, for the Superior Court could not simultaneously deny a motion for a preliminary injunction while issuing an injunction pending appeal.

contract has been found sufficient to prove irreparable harm.”² *CRAssociates, Inc. v. United States*, 95 Fed. Cl. 357, 390-91 (Fed. Cl. 2010) (collecting cases). Additionally, relying on testimony from a December 30, 2013 hearing,³ the Superior Court found that the Government would not suffer any harm from granting a preliminary injunction, since “the Government . . . [is] not fully prepared to break ground” on the Project “because funding . . . had not been secured and Island Road’s liability insurance certificate was deficient.” (Mem. Op. 22-23.) Moreover, the Superior Court observed that “[p]ublic confidence in the procurement process is imperative in a democratic society,” *C & C/Manhattan v. Gov’t of the V.I.*, 40 V.I. 51, 71 (V.I. Super. Ct. 1999), and found that the public would benefit from “careful consideration” of Tip Top’s claims given that its bid was nearly \$2,000,000 less than the winning bid submitted by Island Roads. Finding no error with its analysis—at least at this preliminary stage in this appeal—we agree that the balance of the equities favor an injunction pending appeal. *Rojas*, 2009 WL 321347, at *2.

We also conclude that Tip Top has demonstrated a “substantial case on the merits” so as to warrant an injunction pending appeal. *Id.*; *Washington Metropolitan Area Transit Comm’n*, 559 F.2d at 843. Based on the language in the Opinion, it appears that the Superior Court believed that Tip Top was not entitled to a preliminary injunction *solely* because it believed Tip Top is not likely to succeed on the merits. (Mem. Op. 21.) We note, however, that courts are heavily split as to whether to apply “a sequential injunction test,” where all four factors must be

² In its motion, Tip Top, based solely on a single decision issued by the Connecticut Supreme Court, contends “that unsuccessful bidders may not bring actions for money damages, but instead are limited to equitable remedies.” (Mot. 23 (citing *Lawrence Brunoli, Inc. v. Town of Branford*, 722 A.2d 271, 273 (Conn. 1998).) Given our agreement with the substantial case law providing that the inability to fairly compete for a government contract constitutes irreparable harm, we need not decide, as part of our consideration of Tip Top’s motion, whether Tip Top is indeed limited solely to equitable, non-monetary remedies.

³ Because neither Tip Top nor the Government has filed a copy of the December 30, 2013 hearing transcript with this Court, we must, in the absence of the transcript, assume that all of the Superior Court’s factual findings are correct. See *Thomas v. Cannonier*, S. Ct. Civ. No. 2007-0042, 2009 V.I. Supreme LEXIS 33, at *4-5 (V.I. Apr. 7, 2009) (unpublished) (collecting cases).

satisfied in full, or a “sliding-scale test,” where the four factors are balanced and weighed, and that this Court has not yet spoken as to the appropriate standard. *Yusuf v. Hamed*, S. Ct. Civ. No. 2013-0040, 2013 WL 5429498, at *3 n.3 (V.I. Sept. 30, 2013) (collecting cases). If we were to ultimately adopt the “sliding-scale test”—the same test we have employed in the past to determine whether to grant a stay or injunction pending appeal—it is highly likely that we would reverse the February 7, 2014 Opinion and direct the Superior Court to consider and weigh all of the four factors in the first instance. *Id.* at *3 (noting that “this Court reviews the Superior Court’s overall decision to grant or deny an injunction for abuse of discretion”) (collecting cases).

Moreover, Tip Top has established a substantial case on the merits, *Rojas*, 2009 WL 321347, at *2, even if we were to apply the “sequential injunction test.” As noted above, the Superior Court concluded that Tip Top satisfied the final three factors, and only failed to satisfy the first factor, *i.e.*, demonstrating a likelihood of success on the merits. The Superior Court concluded, and the parties do not dispute, that the procurement process for the Project was governed by Title 23 of the United States Code as well as Subpart A of Part 635 of Subchapter G of Chapter 1 of Title 23 of the Code of Federal Regulations, by virtue of the fact that the Government is relying on federal highway funds to pay for part of the construction. *See, e.g., Lathan v. Brinegar*, 506 F.2d 677, 682-83 (9th Cir. 1974) (explaining that state highway departments receiving federal assistance for highway planning, design and construction must comply with 23 U.S.C. § 101 *et seq.*, as well as pertinent provisions in the Code of Federal Regulations); *Appalachian Mountain Club v. Brinegar*, 394 F.Supp. 105, 111 (D. N.H. 1975) (“Federal law is applicable because the construction financing is pursuant to the Federal-Aid Highway Program.”). The Superior Court agreed with Tip Top that the Government was

required to comply with section 635.114 of title 23 of the Code of Federal Regulations, which provides, in pertinent part, that

(c) Following the opening of bids, the STD⁴ shall examine the unit bid prices of the apparent low bid for reasonable conformance with the engineer's estimated prices. A bid with extreme variations from the engineer's estimate, or where obvious unbalancing of unit prices has occurred, shall be thoroughly evaluated.

(d) Where obvious unbalanced bid items exist, the STD's decision to award or reject a bid shall be supported by written justification. A bid found to be mathematically unbalanced, but not found to be materially unbalanced, may be awarded.

23 C.F.R. § 635.114. A bid is mathematically unbalanced if it "contain[s] lump sum or unit bid items which do not reflect reasonable actual costs plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other indirect costs," while a bid is materially unbalanced if it creates "a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the Federal Government." 23 C.F.R. § 635.102.

In its November 8, 2013 Memorandum awarding the contract to Island Roads, the Evaluation Committee stated that it received an application from Tip Top "which was twenty percent (20%) lower than the Engineer's Estimate of Ten Million Four Hundred Fort-four Thousand Five Hundred Seventy-five Dollars and Zero Cents (\$10,444,575.00)." (DPP Mem.

1.) Nevertheless, the Evaluation Committee stated that Tip Top's bid should be rejected simply because "[a] large number of items submitted by Tip Top showed significant variance between

⁴ For purposes of this regulation, the term "STD" refers to a state or territorial "department, commission, board or official . . . charged by its laws with the responsibility for highway construction," 23 C.F.R. § 635.102, which in the case of the Virgin Islands is the Department of Public Works. See 20 V.I.C. § 1(b) ("Supervision and control of the public highways shall be exercised by the Commissioner of Public Works. Under his supervision and control, all public highways shall be constructed, reconstructed, repaired, and maintained by the Department of Public Works."); 31 V.I.C. § 1(1) ("The Commissioner of Public Works shall . . . participate in the planning of, supervise the construction of, and repair and maintain, all . . . public roads, highways. . . and properties of like character. . .").

their proposed bid and the Engineer's Estimate making the bid mathematically unbalanced," without providing any further elaboration.⁵ (*Id.*)

As noted above, the Superior Court indicated that the pertinent Federal Regulations require that unbalanced bids be "thoroughly evaluated," 23 C.F.R. § 635.114(c), and that when a mathematically—but not materially—unbalanced bid is submitted, any decision to reject the bid "shall be supported by written justification." 23 C.F.R. § 635.114(d). The Superior Court concluded that the Evaluation Committee's statement, in a single sentence and without any other analysis, that Tip Top had submitted a mathematically unbalanced bid was a sufficient "written justification." While, like the Superior Court, we cannot find any judicial decisions interpreting the phrase "written justification" found in section 635.114(d), we note that section 635.114(c) mandates that all unbalanced bids be "thoroughly evaluated," and that section 635.114(d) permits an agency to award a mathematically unbalanced bid. Therefore, based on the arguments and authority submitted to this Court, we agree with Tip Top, as well with the advisory opinions issued by the Comptroller General of the United States,⁶ that mathematical unbalance, without more, cannot warrant rejection. *See, e.g., In re W.B. Construction & Sons, Inc.*, B-405818, 2012 WL 32162, at *5 (Comp. Gen. 2012) ("While unbalanced pricing may increase risk to the government, agencies are not required to reject an offer solely because it is unbalanced."); *In re All Star Maintenance, Inc.*, B-231618, 1988 U.S. Comp. Gen. LEXIS 944, at *5 (Comp. Gen. 1988) ("[A] low evaluated bid cannot be rejected merely because it is mathematically

⁵ The Evaluation Committee also found that Tip Top's proposed bid was not responsive because a form had not been signed by one of its proposed subcontractors. The Superior Court, however, concluded that this curable technical defect should not have excluded Tip Top's bid from consideration.

⁶ Under federal law, the Comptroller General may adjudicate bid protests under federal procurement law. 31 U.S.C. § 3554(a)(1).

unbalanced.”). Thus, instead of applying a *per se* rule rejecting all mathematically—but not materially—unbalanced bids, it would appear that, “where the [agency] receives an unbalanced bid or offer, the [agency] is required to consider the risks to the government associated with the unbalanced pricing in making the award decision, and whether a contract will result in unreasonably high prices for contract performance,” with the offer being rejected only if the agency “determines that the lack of balance in the bid or offer poses an unacceptable risk to the government.” *In re W.B. Construction & Sons*, 2012 WL 32162, at *5. Since the November 8, 2013 Memorandum simply states that Tip Top submitted a mathematically unbalanced bid, we cannot ascertain whether the Evaluation Committee performed such an analysis, or impermissibly applied a *per se* rule to exclude Tip Top’s bid solely because it was mathematically unbalanced.

We recognize, of course, that the Superior Court’s Opinion also credited the testimony of Wystan Benjamin, a Department of Public Works employee who served on the Evaluation Committee and provided additional reasons why Tip Top’s bid was purportedly rejected. However, as noted above, section 635.114(d) requires a *written* justification, and the Superior Court cited to no legal authority—and this Court can find none—to support the proposition that an agency may supplement its written justification with the oral testimony of a single member. Significantly, we note that the Evaluation Committee consists of nine members, some of whom are non-voting members, and that Benjamin’s name and signature do not appear on the portion of the November 8, 2013 Memorandum identifying which members approved of the document. And even if Benjamin participated in the Evaluation Committee’s evaluations, courts have repeatedly held that the *post hoc* observations of a single member of a deliberative body should ordinarily carry little, if any, weight. *See, e.g., Heintz v. Jenkins*, 514 U.S. 291, 298 (1995) (A

“statement [made] not during the legislative process, but after the statute became law . . . is not a statement upon which other legislators might have relied in voting for or against the Act, but it simply represents the views of one informed person on an issue about which others may (or may not) have thought differently”); *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978) (noting that “post hoc observations by a single member of Congress carry little if any weight”); *Mason v. Village of El Portal*, 240 F.3d 1337, 1339 (11th Cir. 2001) (holding that discriminatory views of one member of five-member village council cannot be imputed to the entire council); *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 401-02 (D.C. Cir. 1974) (statement of single member of multi-member administrative agency “merely represents the unofficial expression of the views of one member” and “is not a decisional pronouncement affecting legal rights and obligations”); *Schwartz v. Town Planning & Zoning Comm’n*, 362 A.2d 1378, 1381 (Conn. 1975) (“Evidence of the individual views of one member of a . . . commission is not competent to show the reasons actuating the commission or the grounds of its decision.”). Thus it cannot be determined from the cognizable evidence that proper consideration was given to the mathematically unbalanced bid in this case, and Tip Top, in addition to establishing a balance of the equities in its favor, has shown a substantial case on the merits so as to warrant issuance of an injunction pending appeal.⁷ *Rojas*, 2009 WL 321347, at *2; *Foster*, 515 U.S. at 1303.

For the foregoing reasons, we extend the injunction pending appeal previously awarded by this Court in its January 31, 2014 Order. Accordingly, it is hereby

ORDERED that the motion for injunction pending appeal is **GRANTED**; and it is further

⁷ Because the legal issues addressed in this Order were resolved without the benefit of full briefing by the parties, the parties are advised that the conclusions reached herein shall not govern disposition of Tip Top’s appeal and that this Order should not be cited as binding authority in the parties’ merits briefs.

ORDERED that the partial temporary injunction, entered by this Court on January 31, 2014, and extending the Temporary Restraining Order originally issued by the Superior Court on December 19, 2013, is **HEREBY EXTENDED** until this Court fully adjudicates this appeal and the Clerk of Court issues the mandate; and it is further

ORDERED that copies of this Order shall be issued to the parties.

SO ORDERED this 14th day of February 2014.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court