

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
FREEDOM, N.Y., INC.,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.  
-----x

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: 86 Civ. 1363 (CBM)

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MOTLEY, Ch. J.

## OPINION

Plaintiff in this case is a disappointed bidder on a Government contract for freeze-dried military rations. It challenges the Government award of this contract to Cinpac, Inc., an Ohio corporation, on the ground that under pertinent statutes and regulations, Cinpac was not a qualified bidder. As relief plaintiff has requested a permanent injunction barring the Government from performing its contract with Cinpac. Defendant United States of America now moves for dismissal of this suit pursuant to Fed. R. Civ. P. 12(b)(7), arguing that Cinpac, who is not amenable to service of process in this jurisdiction, is an indispensable party within the meaning of Fed. R. Civ. P. 19. For the reasons that follow, defendant's motion is granted and this suit is dismissed.

## DISCUSSION

Rule 19 of the Federal Rules of Civil Procedure sets forth specific criteria to guide the court in evaluating whether an absent party is so indispensable to a proceeding that in equity and good conscience the suit should not go forward without him. The first step in considering a motion to dismiss based on Rule 19 is a determination of whether the third party is a "person to be joined if feasible" under Fed. R. Civ. P. 19(a). A particular third party is such a person

according to this section of the Rule if his interest in the litigation is such that

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Fed. R. Civ. P. 19(a).

Applying these express criteria, it is clear that under 19(a)(2), Cinpac, the absent third party on whom the present motion turns, is a "person to be joined if feasible." ✓

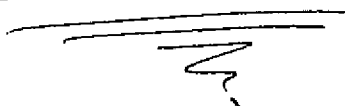
As the awardee of the contract which forms the subject matter of this litigation and whose performance plaintiff is seeking to enjoin, Cinpac has an obvious interest "relating to the subject matter of the litigation." This interest is in no way diminished by plaintiff's recent amendment of its complaint in this suit to drop the requested declaratory judgment holding Cinpac's government contract to be null and void. This is because the sole relief now requested by plaintiff, a permanent injunction barring the Government from continuing performance of the Cinpac contract, has as a practical matter an equally decisive impact on Cinpac's interests.

Of course it is not enough for Rule 19(a) purposes that an absent party have some sort of interest relating to

the subject matter of the action; instead, it must also be shown that his absence will be prejudicial, either to himself or to another party already in the suit.

As to the first of these considerations, it would be difficult to deny that Cinpac's absence during the disposition of this suit will impair or impede its ability to protect its own interests. The relief requested hinges on a finding that the Government -- with Cinpac's collusion -- violated applicable laws and regulations in granting Cinpac the contract. While Cinpac's own interest in this litigation will be largely protected through the position of the Government defendant who argues strenuously that the Cinpac award was in accord with pertinent procurement laws and regulations, the interests of Cinpac and the Government are not congruent. For example, were the evidence during the course of this action to suggest that Cinpac had indeed lied on its eligibility statement, as plaintiff charges, the government might no longer remain such a vigorous ally, and could even find itself in the position of Cinpac's adversary in criminal or at least debarment proceedings.

Moreover, even without such a dramatic divergence of interests between Cinpac and its would-be Government protector, it would appear as a practical matter that Cinpac's absence from this suit would impair its ability to protect its interests. The crucial facts in this law suit pertain to Cinpac, itself, that is, to Cinpac's manufacturing capacity --



the determinant of Cinpac's threshold eligibility as a bidder which is here challenged -- and to its conduct in representing itself to the Government as a qualified bidder.

The alternative basis under Rule 19(a)(2) for finding that a third party is a person to be joined if feasible is also available in this suit. The Government will be subject to a substantial risk of incurring inconsistent obligations by reason of Cinpac's claimed interest if Cinpac is not joined in the present suit. Should plaintiff succeed here in enjoining the Government's performance of its contract with Cinpac, the Government could still conceivably be liable under the contract for Cinpac's costs as well as certain profits, and at the same time be obliged to recommence the entire contract with a new vendor. See B.K. Instrument v. United States, 715 F.2d 713, 731 (2d Cir. 1983)(Friendly, J.).

Should there be any doubt that a party in Cinpac's position is a necessary party under the express criteria set forth in Rule 19(a), the Second Circuit in a case almost directly on point has provided additional guidance. In B.K. Instrument v. United States, 713 F.2d 713, 730-732 (2d Cir. 1983) a disappointed bidder challenged a contract award made by the Government and requested as relief a court order that the Government defendant cease performance of its contract with the successful bidder. The successful bidder, although named in the suit, was never served. The district court dismissed the suit stating that plaintiff lacked standing to

sue, and never reached the issue of the absent successful bidder's status under Rule 19. On appeal though, while the circuit panel's holding focused on the basic standing issue, the lurking issue of the successful bidder's status under Rule 19 was fully considered. To the panel "it seem[ed] clear" upon considering the third party's crucial interest in the subject matter and the outcome of the law suit, that "[the successful bidder] me[t] the criteria of Rule 19(a)." Id. at 731. Having arrived at this conclusion, the court then cited approvingly a district case, also a suit against the Government by an aggrieved bidder, where Rule 19 joinder of the absent successful bidders had in fact been ordered. Id., citing A. & M. Gregos, Inc. v. Robertory, 384 F.Supp. 187 (E.D.Pa. 1974).

In the instant litigation it seems clear that although Cinpac is a necessary party under Rule 19(a), it cannot be ordered joined in this action. Defendant asserts, and plaintiff has not disputed, that Cinpac's lack of contacts with New York State precludes this court's assertion of personal jurisdiction. Thus, since joinder cannot be ordered, we must turn to the question of whether Cinpac is an indispensable party within the meaning of Rule 19(b) such that in equity and good conscience this action should be dismissed.

The second half of Rule 19 expressly sets forth some of the main factors to be considered by the court in

making this determination. They include:

first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

As to each of these considerations the facts in this case fall on the side of Cinpac's indispensibility.

To begin with, as has already been discussed above in considering Cinpac's status under the first half of Rule 19, there is significant prejudice to Cinpac of a judgment rendered in its absence. Not only can the Government not be counted upon to represent Cinpac's interests to the end, but also, the determinative factual issue in this case -- whether Cinpac was a qualified bidder -- hinges on Cinpac's own industrial capacity and the truthfulness of its application, evidence which Cinpac, itself, is in the best position to develop. The second factor listed in Rule 19(b) weighs similarly on the side of dismissal. The absolute nature of the relief sought by plaintiff and, indeed, that might be unavoidable should plaintiff succeed in proving its quite damaging allegations, precludes any possibility of shaping the judgment to avoid prejudice to Cinpac. The third factor, that of the questionable "adequacy" of any judgment rendered in Cinpac's absence is also troublesome. It appears this law

suit will offer no final resolution of the contentions it has raised. Already, Cinpac has promised that should plaintiff ultimately prevail here, Cinpac will, itself, sue the Government to vindicate its perceived contract rights. Finally, as to the fourth factor listed in Rule 19(b), plaintiff will still possess an adequate remedy if this action is dismissed for nonjoinder. There is no jurisdictional or venue obstacle, see 28 U.S.C section 1391(e)(1)(a)(venue), to bringing this same suit in Ohio where Cinpac is located and where it can thus be joined as a defendant. In addition, a Pennsylvania forum, to which even plaintiff can state no obstacle other than the general delay inherent in recommencing this suit, also appears to be available.

Recognizing perhaps this heavy balance in favor of dismissal under the criteria of Rule 19(b), plaintiff attempts to invoke an apparent exception to the Rule. Plaintiff argues that dismissal under Rule 19(b) is inappropriate in this case because it is essentially one for the vindication of a public right, i.e., that government agencies obey the law in awarding procurement contracts, and furthermore, that in so following the law, they advance its underlying policies.

In the context of such public right litigation, it is quite true, the fact that some third party may be adversely affected by the outcome of the law suit does not by itself make this third party indispensable for purposes of mandatory dismissal under Rule 19. See Kirkland v. New York State Dept.



of Correctional Services, 520 F.2d 420, 424 (2d Cir. 1975) (challenge to civil service examination as unconstitutionally discriminatory; prior successful test takers, though they could be adversely affected by suit's outcome, were not indispensable parties possessing a right to be joined in the suit); Sansom Committee v. Lynn, 366 F.Supp. 1271, 1280-1281 (E.D.Pa. 1973) (challenge to HUD on legality of urban development plan; university owner of property in designated area who would be adversely affected if plan were stricken not an indispensable party); Natural Resources Defense Council v. Tennessee Valley Authority, 340 F.Supp. 400 (S.D.N.Y. 1971), rev'd on other grounds, 459 F.2d 255 (2d Cir. 1972) (challenge to restrain TVA from purchasing and using strip mined coal without complying with statutory requirement of environmental impact statement; coal vendors whose contracts would be suspended (but not abrogated) under plaintiff's requested relief not indispensable parties under Rule 19).

These public right cases are inapposite to the present law suit. This is first of all because the nature of the litigation, as well as of the public rights at issue in Kirland, Sansom, and Natural Resources Defense Council, are distinguishable. Plaintiff's singular and predominant motive of commercial gain in this litigation place it in a different class from the Kirland, Sansom, and Natural Resources Defense Council plaintiffs. More importantly, in the instant case the impact on the general public of the agency improprieties

alleged is not nearly as direct or visible as the public repercussions in Sansom or Natural Resources Defense Council, nor does it rise to the constitutional level alleged in Kirkland.

The most significant distinction for Rule 19 purposes between the instant case and the public right line of cases, however, goes not to the nature of the right being vindicated, but to the nature of the effect on the absent third parties. The impact of this litigation on Cinpac if plaintiff is successful here will be much more direct, exclusive, certain and drastic than the impact on any of the third parties in the above "public right" cases assessing the "indispensability" of absent third parties.

That a third party successful bidder in a disappointed bidder law suit against the Government is not equivalent for "indispensability" purposes to the adversely affected third parties in other "public right" litigation contexts also seems clear from Second Circuit dicta in B.K. Instrument, 718 F.2d 713 supra, the disappointed bidder litigation already cited in this court's previous discussion of Rule 19(a). The panel in B.K. Instrument did not itself make a determination as to whether Rule 19(b) mandated dismissal of the law suit -- but only because the record was unclear as to whether jurisdiction existed over the absent third party such that Rule 19(a) joinder could be ordered. However, the court strongly suggested that if on remand the

third party were found not to be amenable to process, Rule 19(b) would oblige the district court to dismiss plaintiff's claims for injunctive and declaratory relief directly affecting the absent third party. Id. at 732.


In the instant situation no one disputes that the affected third party, Cinpac, is not amenable to this court's jurisdiction, and clearly the relief requested by plaintiff here would have as direct and necessary an effect on the absent third party as was the case in B.K. Instrument. Accordingly, it seems quite fair to assume under B.K. Instrument in particular, as well as by the express criteria of Rule 19(b), that notwithstanding the public interest implicated in this litigation generally, the instant case is one that calls for dismissal under Rule 19(b).

#### CONCLUSION

This court having found the absent third party, Cinpac, to be a necessary party within the meaning of Rule 19(a), to be not amenable to the jurisdiction of this court, and to be an indispensable party within the meaning of Rule 19(b), this law suit is dismissed without prejudice pursuant

to Fed. R. Civ. P. 12(b)(7) for failure to join an indispensable party.

Dated: New York, New York  
May 27, 1986

  
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CONSTANCE BAKER MOTLEY  
Chief Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MAY 30 1986

-----X  
FREEDOM, N.Y., INC.,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.  
-----X

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: 86 Civ. 1963 AND MR

ORDER

Defendant's motion to dismiss this suit pursuant to Fed. R. Civ. P. 12(b)(7) for failure to join an indispensable party within the meaning of Fed. R. Civ. P. 19(b) is hereby granted. An opinion by this court will issue separately. Accordingly, plaintiff's suit is dismissed without prejudice.

So ordered.

Dated: New York, New York  
May 9, 1986

*Constance Baker Motley*  
CONSTANCE BAKER MOTLEY  
Chief Judge

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May 30, 1986

Mr. Henry Thomas, President  
Freedom, N.Y., Inc.  
1600 Bronxdale Avenue  
Bronx, New York 10462

Re: Freedom v. United States

Dear Mr. Thomas:

Enclosed is a copy of Judge Motley's decision and order regarding the above-referenced case.

Sincerely yours,

*Jayanne M. Pulaski*

Jayanne M. Pulaski  
Secretary to Neil H. Ruttenberg

jmp

Enclosures

