In the United States Court of Federal Claims

No. 09-673C
(Filed: June 25, 2010)

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RN EXPERTISE, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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ORDER

In this bid protest, RN Expertise, Inc. ("RN") challenges the Department of the Navy's decision to cancel a solicitation for urine collection services needed for drug testing. Allegedly, RN was the presumptive awardee when the Navy abruptly decided to cancel the solicitation and acquire the services via interagency agreement. Am. Compl. ¶¶ 12-14. RN alleges that the Navy has violated the Competition in Contracting Act ("CICA"), 10 U.S.C. § 2304, and related provisions of the Federal Acquisition Regulation ("FAR"). Am. Compl. ¶¶ 34-38.

When RN moved to supplement the Administrative Record, the Government argued in opposition that the proposed supplementary materials postdated the contracting officer's decision to cancel the solicitation. RN then filed an Amended Complaint adding the allegation that the Navy's post-cancellation conduct has violated CICA and the FAR. The Government then moved to dismiss RN's "claim that the Navy's actions subsequent to the cancellation of the solicitation violated" CICA and the FAR. Def.'s Partial Mot. to Dismiss ("Def.'s Mot.") 1. After briefing concluded on the Motion to Dismiss and Motion to Supplement the Administrative Record, RN moved to file a second amended complaint. The Government opposed that Motion, reiterating the arguments it made in its Partial Motion to Dismiss. As explained below, the Court denies the Government's Partial Motion to Dismiss, grants in part and denies in part RN's Motion to Supplement the Administrative Record, and grants RN's Motion for Leave to File a Second Amended Complaint.

I. Defendant's Partial Motion to Dismiss

In considering the Government's Partial Motion to Dismiss, the Court assumes the veracity of all well-pleaded factual allegations in RN's Amended Complaint. *See Nw. La. Fish & Game Preserve Comm'n v. United States*, 574 F.3d 1386, 1390 (Fed. Cir. 2009). In its

Motion, the Government asks the Court to "dismiss for lack of jurisdiction RN Expertise's claim that the Navy's actions subsequent to the cancellation of the solicitation violated the Competition in Contracting Act, 10 U.S.C. § 2304, and various provisions of the Federal Acquisition Regulation related thereto." Def.'s Mot. 1. The Court understands the Government to be referring to paragraph 38 of RN's Amended Complaint, which states, "Defendant's actions, subsequent to the cancellation of the RFP, to obtain the services covered by the RFP violate the Competition in Contracting Act, 10 USC 2304, and sections 5.201, 6.002 and 6.101 of the Federal Acquisition Regulation." Am. Compl. ¶ 38.

In its Amended Complaint, RN bases jurisdiction on 28 U.S.C. § 1491(b)(1). Am. Compl. ¶ 2. Section 1491(b)(1) gives the Court "jurisdiction to render judgment on an action by an interested party objecting to . . . any alleged violation of statute or regulation in connection with a procurement or proposed procurement." 28 U.S.C. § 1491(b)(1). The Government makes two arguments as to why § 1491(b)(1) does not cover RN's allegations of post-cancellation violations of CICA and related regulations. First, the Government argues that RN lacks standing. Alternatively, even if RN has standing, the Government argues that the Court lacks jurisdiction because these claims are not "in connection with a procurement or proposed procurement," as required by § 1491(b)(1). Neither argument is persuasive.

Only an "interested party" has standing to bring a case under § 1491(b)(1). *See* 28 U.S.C. § 1491(b)(1) ("jurisdiction to render judgment on an action by an interested party"). Under both § 1491(b)(1) and CICA, "interested party" means "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2)(A); *Am. Fed'n of Gov't Employees, AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001).

The Government asserts that RN lacks standing to challenge the Navy's use of an interagency agreement. Def.'s Mot. 5. According to RN, "Defendant is mischaracterizing Plaintiff's claims. Plaintiff is not challenging Defendant's use of an inter-agency agreement, but Plaintiff is alleging a 'violation of statute or regulation in connection with a procurement or a proposed procurement.'" Pl.'s Opp'n 9. The Court agrees with RN. RN claims that violations of statute and regulation have kept it from receiving award of a contract it otherwise would have been awarded and performed. Thus, RN is an actual or prospective offeror whose direct economic interest is affected by the Navy's acquisition decisions, and it has standing to bring this case.

Alternatively, the Government argues that the Court lacks jurisdiction because the alleged violation is not "in connection with a procurement or proposed procurement," as required by § 1491(b)(1). Again, the Court disagrees. The Federal Circuit has described "[t]he operative phrase 'in connection with'" as "very sweeping in scope." *RAMCOR Servs. Group, Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999). A procurement "includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 403(2); 10 U.S.C. § 2302(3); *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008). There is no question that the Navy was in the midst of a procurement at the time it cancelled the solicitation for which RN claims it would have been awarded a contract. RN has

sufficiently made out a claim describing a procurement process that continued beyond the cancellation of the solicitation. It is in connection with that procurement that RN is alleging violations of statute and regulation Accordingly, RN's claims are within the Court's § 1491(b)(1) jurisdiction. The Government's Partial Motion to Dismiss is denied.

II. Plaintiff's Motion to Supplement the Administrative Record

After the Government filed the Administrative Record, RN moved to supplement that filing with six additional items. The administrative record is presumptively limited to the record the Navy had before it at the time it made the decisions RN now challenges. *See Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009). "[S]upplementation of the record [is] limited to cases in which 'the omission of extra-record evidence precludes effective judicial review.'" *Id.* (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005)).

The Court finds that RN has failed to show that effective judicial review will be precluded by omitting (1) the declaration of RN's CEO, Ms. Steele, dated 12/17/2009; (2) emails exchanged between RN and Department of the Interior ("DOI") contracting official Mr. Hipkins; and (3) DOI's determination and findings for adding Navy civilian testing to a DOI contract. The Court denies RN's Motion as to these three items because RN has not shown that any of them were part of the record before the Navy or that they are necessary for the Court to evaluate whether the decisions made by the Navy were arbitrary and capricious.

However, the Court finds that the following three items that RN moves the Court to include are properly a part of the Administrative Record: (1) a contract with Quest Laboratory that is part of the interagency agreement relevant here and is referenced in the Administrative Record; (2) any determination and findings made by the Navy pursuant to FAR 17.503; and (3) any orders[1] placed directly with contractors or with DOI under the interagency agreement to fulfill the Navy's requirements. The Court finds that these three items describe what was, or could easily have been, before the Navy at the time it made the decisions RN challenges. Accordingly, the Court grants RN's Motion to Supplement the Administrative Record as to these three items.

III. Plaintiff's Motion for Leave to File a Second Amended Complaint

After briefing on the Government's Motion to Dismiss and RN's Motion to Supplement the Administrative Record, RN moved for leave to file a second amended complaint. The Rules of the United States Court of Federal Claims ("RCFC") provide that leave to file an amended complaint shall be freely given when justice so requires. RCFC 15(a). Under this standard, leave may be denied for reasons such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

[1] If the orders are extremely voluminous and the Government believes producing all of them would be more burdensome than probative, the Government may propose an arrangement to produce a summary or representative sample of the orders.

The Government opposes this Motion on the basis that to allow the amendment would be futile because, in the Government's view, the Court lacks jurisdiction to hear the claims RN seeks to add by amendment. As RN points out, the Government's opposition here is essentially a reiteration of its Partial Motion to Dismiss. Pl.'s Reply 2, June 14, 2010. In light of the Court's denial of the Government's Partial Motion to Dismiss and rejection of the arguments asserted therein, the Government's arguments that amendment would be futile are not persuasive.

The Government's Partial Motion to Dismiss is denied. RN's Motion to Supplement the Administrative Record is granted in part and denied in part. RN's Motion for Leave to File a Second Amended Complaint is granted. RN's Second Amended Complaint shall be filed by July 7, 2010.

s/ Edward J. Damich
EDWARD J. DAMICH
Judge