

In the United States Court of Federal Claims

No. 11-217 C
(Filed January 11, 2012)

UNPUBLISHED

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INNOVATION DEVELOPMENT *
ENTERPRISES OF AMERICA, *
INC., *

Plaintiff, *

LAWRENCE A. CRAIN, *

Pro Se Plaintiff, *

v. *

THE UNITED STATES, *

Defendant. *

* * * * *

*Pro Se Bid Protest; Standing;
Motion to Amend and
Supplement the Complaint.*

*Charles H. Crain, Tulsa, OK, for plaintiff Innovation Development
Enterprises of America, Inc.*

Lawrence A. Crain, Defiance, MO, pro se.

*Katy M. Bartelma, United States Department of Justice, with whom were
Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, Deborah A.
Bynum, Assistant Director, Washington, DC, for defendant.*

OPINION AND ORDER

Bush, Judge.

The court has before it two pending motions. On July 8, 2011, defendant moved to dismiss plaintiffs' complaint. On September 13, 2011, after defendant's motion was fully briefed, plaintiffs filed a motion for leave to amend and supplement the complaint. The court stayed defendant's motion pending the resolution of plaintiffs' motion. This opinion will discuss the procedural posture of this case, and will resolve plaintiffs' motion before turning to defendant's motion to dismiss. The court will also provide guidance as to further proceedings in this matter.

PROCEDURAL HISTORY

I. Obtaining Counsel for the Corporate Plaintiff

On April 7, 2011, *pro se* plaintiff Mr. Lawrence A. Crain (Mr. Crain) filed a bid protest complaint in this court, attempting to bring this suit in his own name as well as in the name of his solely-owned corporation, Innovation Development Enterprises of America, Inc. (IDEA). The court ordered Mr. Crain to show cause why a corporation unrepresented by counsel should not be dismissed from his suit, and also informed plaintiff that his standing to bring a bid protest would be subject to challenge because it appeared that he, as an individual, was not an actual or prospective bidder for the contract at issue in his suit. In response to this court's order, Mr. Crain stated that IDEA had obtained counsel, and on June 1, 2011, plaintiff IDEA filed a motion to substitute counsel. IDEA's counsel of record is Charles H. Crain (Counsel Crain).

II. Scope of the Original Complaint

The original *pro se* complaint (Compl.) filed by Mr. Crain included seventy-one paragraphs of factual allegations, five counts, an extensive prayer for relief, and fifty-one attached exhibits. IDEA did not immediately move to amend the complaint so that Counsel Crain could improve or clarify the original complaint. Count 1 of the rather confusing and meandering complaint presented a not unusual bid protest argument that the government had violated the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, tit. VII, §§ 2701-2753, 98 Stat. 1175 (codified at scattered sections of the United States Code),¹ when it issued Contract No. FA7D14-10-P-A010, a sole source contract (bridge contract),

^{1/} Mr. Crain alleged a "negligent[]" violation of CICA. Compl. ¶ 72.

to Harris IT Services Corporation (Harris) on May 18, 2010. Compl. ¶ 72; Def.’s Mot. at 3. The court and defendant were, unsurprisingly, most concerned with this count of the complaint, which stood out among the various narrative flourishes of the complaint because it resembled other protests routinely considered by this court.

Much later in the original complaint, Mr. Crain turned to a discussion of the initial stages of a second procurement. In Count 5 of the complaint, he alleged that the relevant government agencies “did and are conspiring to violate [CICA]” in a new competition for a longer-term contract (task order) to follow the bridge contract. Compl. ¶ 76. The most concrete exhibit relevant to the second procurement is plaintiffs’ Exhibit 42, a “sources sought/market research notice” which plaintiffs found objectionable. *Id.* Ex. 42. That notice was apparently issued on January 13, 2011. *Id.* In the court’s view, the *pro se* complaint was largely focused on a protest of the May 18, 2010 sole source bridge contract, but could be read to have ineffectually referenced a second procurement in its nascent stages as of the early months of 2011. To the extent that the original complaint may have attempted to lodge two bid protests in the same complaint, such a strategy was improper.²

III. Overview of Pending Motions

Defendant’s Motion to Dismiss, filed July 8, 2011, largely focuses on plaintiffs’ standing to bring a bid protest of the bridge contract, and also presents other arguments concerning the claims presented in the *pro se* complaint. Plaintiffs’ motion, filed September 13, 2011, presents two requests. First, plaintiffs seek leave to file an amended complaint which would address some of defendant’s challenges to the original complaint. Second, plaintiffs seek leave to supplement the complaint so that they may protest the procurement of the task order, a procurement which has progressed to include the issuance of a solicitation and, apparently, to the close of bidding for the task order. *See* Pls.’ Mot. ¶ 8. For the reasons discussed below, plaintiffs’ motion is granted in part and denied in part, and defendant’s motion is granted in part and denied in part as moot.

DISCUSSION

^{2/} Defendant argues that the 2011 task order “procurement is not properly part of the [original] complaint.” Def.’s Reply at 7. The government states that it would be highly burdensome, confusing and prejudicial to the government to prosecute two bid protests in one action. *Id.* at 8. The court agrees, as discussed *infra*.

I. Plaintiffs' Motion to Supplement and Amend the Complaint

A. Amendment

In plaintiffs' view, amendment of the complaint is needed to "respon[d] to objections and issues which were identified" in defendant's motion to dismiss. Pls.' Mot. ¶ 5. Plaintiffs acknowledge that this court has no jurisdiction to review the bid protest decisions of the Government Accountability Office (GAO), and have, in consequence, deleted Count 4 from the original complaint in their proposed amended complaint. Plaintiffs have also amended a substantial number of the factual allegations in the complaint, and have altered the legal claims in Counts 1-3 of the original complaint.

Defendant argues that amendment of the complaint is "unnecessary" and "superfluous," but "does not object to the amendment" of the complaint proposed by plaintiffs. Def.'s Resp. at 1. Defendant cites precedent which binds this court when it considers a motion to amend a complaint.³ *Id.* at 2. Unless there are reasons for the court to exercise its discretion to deny a plaintiff's request for leave to amend a complaint, leave should be freely given. *See, e.g., Te-Moak Bands of W. Shoshone Indians of Nev. v. United States*, 948 F.2d 1258, 1260 (Fed. Cir. 1991) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Here, defendant has not argued that amendment of the complaint is futile or that plaintiffs' proposed amendment of the complaint would unduly prejudice the government. The court thus grants leave for an amended complaint to be filed in this case, and will provide instructions for the filing of the amended complaint below.

B. Supplementation of the Complaint to Contest the 2011 Task Order Procurement

Plaintiffs' proposed supplemented complaint substantially modifies Count 5 of the complaint and attaches eight new exhibits, all of which are documents dated after April 7, 2011.⁴ Supplementation of the complaint, according to plaintiffs,

^{3/} Plaintiffs, in contrast, rely on precedent from the United States Court of Appeals for the Ninth Circuit which does not bind this court.

^{4/} Plaintiffs also attached a "not strictly new" exhibit (Exhibit 60), expanding an original exhibit (Exhibit 43), to provide all seven pages, not just the first page, of a seven-page email
continue...

will permit plaintiffs to “introduce new evidence, exhibits, and allegations regarding additional [governmental] actions which occurred after the” April 7, 2011 filing of plaintiffs’ original complaint. Pls.’ Mot. ¶ 6. Plaintiffs further assert that “this Supplemented/Amended Complaint will give the Court a complete, organized, compelling . . . body of evidence upon which it can make a just ruling.” *Id.* ¶ 15.

Defendant asserts that plaintiffs’ request to supplement the complaint, to the extent that it seeks to broaden the scope of this bid protest to include a second contested procurement (the 2011 task order procurement), should be denied. Def.’s Resp. at 3 n.2. If supplementation is permitted, defendant requests that “any supplementation be conditioned on the separate consideration of each procurement.” *Id.* at 5. Defendant persuasively argues that separate bid protest cases, with separate administrative records, would be the best way to process plaintiffs’ bid protest claims. Def.’s Reply at 8. The court agrees with defendant. The orderly and efficient litigation of bid protests before this court would be impossible if a plaintiff were allowed to protest, in one complaint, a particular procurement *and* any later re-procurements of the same services. *Cf.* Compl. at 35 (seeking a declaratory judgment that the award of the 2010 sole source bridge contract was contrary to law, and seeking to enjoin the government “from proceeding with any solicitation of proposals and/or any award of a [later, related] contract; [or] from expending any additional funds on any . . . related procurement”).

The court cannot allow the current bid protest of the 2010 bridge contract procurement to also challenge a distinct procurement, the 2011 task order procurement, one that occurred after this case was filed. As experienced litigators before this court are well aware, a government contractor must protect its right to challenge a new and distinct procurement by filing a separate bid protest of the new procurement, even if that contractor is already before this court protesting an earlier procurement regarding the same work requirement. *See, e.g., Infrastructure Def. Techs., LLC v. United States*, 81 Fed. Cl. 375, 384 (2008) (noting that the protestor in that case, already protesting one procurement, then filed a separate case to protest a bridge contract for the same work requirement that was issued while the initial bid protest was proceeding in this court). Here, the issuance of the solicitation of bids for the task order occurred well after the original complaint was filed in this case, and plaintiffs should have separately filed a bid protest in this

⁴/ ...continue
message. Pls.’ Mot. Supp. Exs. at 99.

court at that time if they wished to obtain relief from this court. That second bid protest is not currently before the court, and must be filed separately to challenge the 2011 task order procurement.⁵

This court must freely grant supplementation of a complaint where the later events referenced in the supplemented complaint form “part of the same claim” presented in the original complaint. *E.g., Intrepid v. Pollock*, 907 F.2d 1125, 1129-30 (Fed. Cir. 1990). Here, however, there was no proper bid protest in the original complaint of the 2011 task order procurement. The only bid protest properly before the court in the original complaint was the protest of the 2010 sole source bridge contract. Supplementation of the complaint in these circumstances is not appropriate.

II. Defendant’s Motion to Dismiss the Complaint

Because an amended complaint is to be filed in this suit, the government’s motion to dismiss the original complaint is now largely moot. Plaintiffs have indicated that their claims will change, as evidenced by the deletion of Count 4 and the substantial revisions of many paragraphs and counts of the proposed amended complaint. For these reasons, the court denies most of defendant’s motion to dismiss as moot.

One aspect of the original complaint, however, cannot be rescued by the amended complaint proposed by plaintiffs.⁶ Mr. Crain, as an individual, lacks standing to bring a bid protest of the 2010 bridge contract.⁷ This court is bound by the precedent provided by *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366 (Fed. Cir. 2002) (*Myers*), which holds that “standing is a threshold jurisdictional issue.” *Id.* at 1369. *Myers* also states that to establish standing, a

⁵/ Whether this newly-filed bid protest, or plaintiffs’ motion to supplement and amend the complaint, could be viewed as timely challenges to the 2011 task order procurement is a question not before the court at this time.

⁶/ Although the court addresses only one of defendant’s jurisdictional challenges to the original complaint in this opinion, this is not meant to suggest that the court rejects the government’s other challenges as invalid. The court simply finds that those challenges may be more appropriately addressed upon a fuller record, after IDEA has had the opportunity to amend the complaint.

⁷/ Mr. Crain lacks standing to protest the 2011 task order procurement for the same reasons.

plaintiff protesting a sole source procurement bears “the burden of establishing that it had a substantial chance of receiving the award[.]” *Id.* at 1370. Plaintiffs have failed to meet this burden as regards Mr. Crain’s standing in this bid protest.⁸

Plaintiffs’ only substantive argument regarding Mr. Crain’s *personal* capacity to be awarded the 2010 bridge contract is that he could have won that contract “personally as a sole-proprietor.” Pls.’ Resp. ¶ 27. In support of this argument, plaintiffs state that Mr. Crain functioned as an “individual/sole proprietor” from 1999 to 2007. Pls.’ Show Cause Resp. at 5 n.2. Plaintiffs concede, however, that “the prospective bidder [for the 2010 bridge contract] would likely have been” IDEA. *Id.*

The record shows that IDEA, not Mr. Crain as a sole proprietor, was and is the business entity that could possibly have bid on the 2010 sole source bridge contract. *See, e.g.*, Compl. ¶ 2 (“IDEA’s protests”), ¶ 7 (“IDEA’s bid”), ¶ 20 (“IDEA made a decision to compete as prime”), ¶ 22 (“IDEA took special care to insure that our Central Contractor Registry [and certifications were up to date]”). These allegations are the same in the proposed amended complaint. The record is devoid of evidence that Mr. Crain currently is the sole proprietor of a business entity that would have been a qualified bidder for the 2010 bridge contract. To quote *Myers* on the showing required of a bid protestor as to its standing:

The mere fact that it might have submitted a bid in a competitive procurement is not sufficient. Although it need not show that it would have received the award in competition with other hypothetical bidders, it must show that it would have been a qualified bidder.

275 F.3d at 1370-71. Plaintiffs have not shown that Mr. Crain, acting individually or as the sole-proprietor of a business entity, was an interested party who has

⁸/ Plaintiffs’ legal arguments regarding their standing to bring this bid protest are currently scattered throughout several documents – the original complaint, plaintiffs’ response to this court’s show cause order, plaintiffs’ response to defendant’s motion to dismiss, plaintiffs’ appendix to plaintiffs’ response to defendant’s motion to dismiss, and plaintiffs’ reply to defendant’s response to plaintiffs’ motion. Although plaintiffs apparently rely on this constellation of scattered arguments, *see* Pls.’ Resp. ¶¶ 22, 26, 30, it is not the function of the court, or of defendant, to review a multitude of documents on the docket, and their appendices, to discern each and every potentially relevant argument raised by plaintiffs. The court has attempted to review all of plaintiffs’ arguments, but relies principally on those properly presented in the relevant brief.

standing to bring this bid protest.

Plaintiffs have presented numerous arguments that Mr. Crain has other claims to present in this suit that go beyond his bid protest claim. Pls.' Resp. at 6; Pls.' Show Cause Resp. ¶ 7. To the extent that Mr. Crain's claims in the original complaint include tort claims or due process claims, the court agrees with defendant that there is no jurisdiction in this court for such claims. Def.'s Reply at 5. The court finds that Mr. Crain has no standing to bring this bid protest, and that he brings no other claims within this court's jurisdiction. For this reason, defendant's motion to dismiss is granted in part, as to the dismissal of Mr. Crain as a party to this suit.⁹

III. Further Proceedings

Should IDEA choose to file a bid protest of the 2011 task order procurement, the government and IDEA may wish to coordinate scheduled filings in the two bid protests. For this reason, the court will not set a briefing schedule for the parties at this time. The court notes that certain milestones will need to be reached, and describes these milestones briefly here. The court also notes that this case will be converted to electronic filing through the court's case management/electronic case filing (CM/ECF) system as of the date of this order. Counsel Crain must obtain a CM/ECF account to file documents in either suit.

A. Plaintiff's Amended Complaint Filed

Plaintiff IDEA shall electronically file an amended complaint that presents its claims with respect to the 2010 bridge contract. The amended complaint may expand Exhibit 43 to seven pages, but no documents dated after April 7, 2011 shall be attached as exhibits to the amended complaint.¹⁰ Further, the paragraphs referenced in Count 5 of the complaint should not be amended to reference events occurring after April 7, 2011. In other words, plaintiff IDEA may not expand the scope of the complaint filed in this case to encompass procurement activities

⁹/ Mr. Crain's interests as sole-owner of IDEA will continue to be represented by Counsel Crain, as they have been since June 8, 2011.

¹⁰/ Plaintiff IDEA should not rely on previously filed exhibits. The amended complaint and its exhibits must be filed together on the same date. These filings will replace and supersede the original complaint and its exhibits. The amended complaint may retain the paragraph numbering scheme of the original complaint, but any underlining and highlighting shall be removed from the new document filed with the court.

related to the 2011 task order which were conducted after April 7, 2011.

B. Plaintiff's New Complaint Filed with the Clerk's Office

If plaintiff IDEA chooses to pursue a second bid protest in this court regarding the 2011 task order procurement, a new complaint must be filed with the court.¹¹ Any new complaint should be tailored to challenge only the second procurement, the 2011 task order procurement. In other words, any new complaint should be focused on facts and claims that are directly related to the government's more recent procurement activities for the 2011 task order.

C. Administrative Record(s) Filed

To streamline the proceedings in this case, and in any companion case not yet filed, defendant shall file an administrative record of the procurement decision that is the subject of the bid protest. Although defendant may again challenge the complaint(s) on jurisdictional grounds and for failure to state a claim upon which relief may be granted, the court will consider such challenges along with, where appropriate, the merits of plaintiff IDEA's allegations of error. The administrative record(s) will provide the court with jurisdictional facts as well as the material facts needed to efficiently address all of the legal arguments presented by the parties.

D. Dispositive Motions Filed

Once the administrative record is filed in one or both protests, the court would entertain cross-motions for judgment on the administrative record, filed in each case pursuant to Rule 52.1(c) of the Rules of the United States Court of Federal Claims (RCFC).¹² Defendant's motion may be a combined motion to dismiss and motion for judgment on the administrative record. The court requires sequential briefing, with this sequence: (1) plaintiffs' motion; (2) defendant's motion/response; (3) plaintiffs' reply/response; and (4) defendant's reply.

^{11/} This new case, if any, shall be filed according to this court's rules, as would any case brought before this court. Plaintiff IDEA must include a "Notice of Directly Related Case," as required by RCFC 40.2. The Clerk's Office shall assign any such new case to the undersigned judge.

^{12/} The court notes that plaintiffs have misunderstood RCFC 10(b), which applies to pleadings, not dispositive motions. *See* Pls.' Resp. at 2 n.2; Pls.' Mot. at 4 n.2.

CONCLUSION

Plaintiffs' motion to amend and supplement the complaint is granted in part and denied in part. Defendant's motion to dismiss the complaint is granted in part and denied in part as moot. The parties shall confer and propose, in a joint status report, a schedule for the filing of an amended complaint, and for the filing of a bid protest complaint in a separate case, if plaintiff IDEA chooses to contest activities in the 2011 task order procurement occurring after April 7, 2011. The parties shall also propose a date for the filing of a second joint status report, some time after the filing of the complaint(s), which would inform the court of the parties' proposed schedule for the filing of the administrative record(s) and of dispositive motions. The court also converts this case to electronic filing.

Accordingly, it is hereby **ORDERED** that

- (1) Plaintiffs' Motion to Supplement and Amend Complaint, filed September 13, 2011, is **GRANTED** in part, as to complaint amendments permitted by this order, and **DENIED** in part, as to supplementation of the complaint to challenge procurement activities related to the 2011 task order occurring after April 7, 2011;
- (2) Defendant's Motion to Dismiss, filed July 8, 2011, is **GRANTED** in part, as to the dismissal of Mr. Lawrence A. Crain as plaintiff, and is **DENIED** in part, as moot as to defendant's other challenges to the original complaint;
- (3) The Clerk shall **DISMISS** plaintiff Lawrence A. Crain from this case, for lack of jurisdiction over his claims;
- (4) The Clerk shall **CONVERT** this case to electronic filing under the court's CM/ECF system, as of the date of this order;
- (5) The parties shall **CONFER** and defendant shall **FILE a Joint Status Report** on or before **January 27, 2012** setting forth:
 - (a) A proposed filing deadline for the filing of plaintiff IDEA's amended complaint;
 - (b) A proposed filing deadline for the filing of plaintiff IDEA's new bid protest complaint, if any; and,

- (c) A proposed filing deadline for a second Joint Status Report which would set forth an agreed-upon schedule for the filing of the administrative record(s) and dispositive motions.

LYNN J. BUSH
Judge