In The United States Court of Federal Claims

NOT FOR PUBLICATION

No: 03-1214C

May 27, 2005

NIGHT VISION CORP.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER

Plaintiff has petitioned the court to supplement the administrative record in conjunction with its bid protest claim (Count V of the First Amended Complaint).[1] Plaintiff seeks to add to the administrative record two large binders containing thousands of pages of exhibits, affidavits, and deposition transcripts.[2] Plaintiff asserts that these documents "are necessary to address the issues raised in the government's brief and rebut the [g]overnment's arguments," and are "necessary to both

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[1] Plaintiff's First Amended Complaint consists of five counts. Count I alleges that defendant breached its Small Business Innovation Research Program ("SBIR") contracts with plaintiff by disclosing to third parties plaintiff's proprietary technical data in violation of SBIR statutes and regulations allegedly incorporated into the contracts. Compl. at 23-25. Count II alleges that defendant breached its SBIR contracts with plaintiff by declining to enter into a Phase III SBIR contract in violation of statutes and regulations allegedly incorporated into the contracts. Compl. at 25-27. Count III alleges that defendant breached an oral contract it allegedly formed with plaintiff to award it a Phase III SBIR contract in the event that plaintiff successfully completed its Phase II SBIR contract. Compl. at 27-28. Count IV alleges that defendant's decision not to award plaintiff a Phase III SBIR contract violated its implied duty of good faith and fair dealing. Compl. at 28-29. Count V, plaintiff's bid protest related to Air Force Contract No. 00-01-HE, alleges that defendant's award of the contract to Insight Technology, Inc. ("Insight") instead of plaintiff was "patently unreasonable, arbitrary, and capricious." Compl. 29-31.

[2] According to plaintiff, these documents "are exhibits, affidavits, and deposition testimony included in the appendix to Plaintiff's Motion for Summary Judgment, previously filed in this matter." Pl. Amend. Mot. Supp. Rec. at 2.

demonstrate the arbitrariness of the [g]overnment's actions and to support NVC's case on the [g]overnment's lack of good faith." Pl. Amend. Mot. Supp. Rec. at 2-3. Moreover, plaintiff asserts that these additional documents "demonstrate that the Air Force's decision to employ the competitive procedures embodied in Solicitation No. 00-01-HE were made in bad faith, in violation of the SBIR statutes and regulations, and the duties owed to NVC by the Air Force." *Id.* at 3.

The court has jurisdiction over plaintiff's bid protest claim under the Tucker Act, 28 U.S.C. § 1491(b). Bid protests involve review on the record under the Administrative Procedure Act's arbitrary, capricious, abuse of discretion, or "otherwise not in accordance with law" standard of review. 5 U.S.C. § 706(2)(A).

Generally, the court's review of the administrative record should be confined to the record "already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985)("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court"). However, under limited circumstances, the court may permit the parties to supplement the administrative record to "preserve a meaningful judicial review." *Rust Constructors, Inc. v. United States*, 49 Fed. Cl. 490, 496 (2001).

Esch v. Yeutter, 876 F.2d 976, (D.C. Cir. 1989), lists circumstances that may justify supplementing the administrative record:

> (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.

Id. at 991 (quoting Stark & Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 345 (1984)). In several cases, this court has cited to this list of exceptions to the general rule prohibiting supplementation of the administrative record.[3] *See, e.g.*, *North Carolina Division of Services for the Blind v. United States*, 53 Fed. Cl. 147, 158 (2002); *MVM, Inc. v. United States*, 46 Fed. Cl. 126, 135 n.14 (2000); *Aero Corporation, S.A., v. United States*, 38 Fed. Cl. 408, 411 (1997); *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 342 (1997).

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[3] Some opinions call the exceptions listed by *Esch* "factors," as if *Esch* established a multi-factor test. *See, e.g.*, *North Carolina Division of Services for the Blind v. United States*, 53 Fed. Cl. 147, 158 (2002); *MVM, Inc. v. United States*, 46 Fed. Cl. 126, 135 n.14 (2000)). However, because any single *Esch* exception could potentially be a sufficient basis to supplement the administrative record, discussion of *Esch* "factors" seems to lack precision.

Furthermore, this court has acknowledged that the administrative record in the contract award context "is something of a fiction" because "due to the absence of a formal record, the agency has to exercise some judgment in furnishing the court with the relevant documents." *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 350 (1997). Indeed, "allowing the agency to retroactively delineate the scope of review may preclude the 'substantial inquiry' and 'thorough, probing, in-depth review' the court must perform to determine whether the agency's action was arbitrary and capricious." *Mike Hooks, Inc. v. United States*, 39 Fed. Cl. 147, 156 (1997). Thus, "this court has adopted a flexible approach both in putting together the evidence that will be considered and in discovery, balancing the limited nature of the court's review with the competing need to recognize potential exceptions to treating the agency's submission as the four corners of the inquiry." *Cubic*, 37 Fed. Cl. at 350.

In addition to allowing supplementation of the record to preserve meaningful judicial review, this flexible approach permits supplementation with "relevant information that by its very nature would not be found in an agency record—such as evidence of bad faith, information relied upon but omitted from the administrative record, or the content of conversations." *Orion International Technologies v. United States*, 60 Fed. Cl. 338, 344 (2004)(footnotes omitted). *Orion*'s emphasis on "relevant information" is significant: documents not shown to be relevant to the bid protest at hand will not be added to the administrative record.

Count V of the amended complaint challenges defendant's evaluation of plaintiff's bid related to Solicitation (PRDA) No. 00-01-HE and award of the related contract to Insight instead of plaintiff. Compl. at 30. Thus, plaintiff's bid protest requires the court to consider: (1) whether plaintiff has suffered a significant prejudicial injury (*see Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999)) and (2) whether defendant's award of the contract at issue to Insight instead of plaintiff was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A)).

Plaintiff has failed to truly engage the law regarding supplementation of the administrative record. Plaintiff had not made a persuasive argument that supplementing the administrative record is necessary in the present case to "preserve a meaningful judicial review." *Rust*, 49 Fed. Cl. at 496. Plaintiff's unsupported and sweeping statements that all of the thousands of pages of documents it would add to the record are "necessary" are insufficient. Likewise, plaintiff has not made a detailed argument about why any particular document that it seeks to add to the administrative record qualifies under one or more of the *Esch* exceptions. At most, plaintiff may have made the broad assertion that all of the documents it has submitted qualify as "evidence arising after the agency action [that] shows whether the decision was correct or not." *Esch*, 876 F.2d at 991. However, this is far from clear given both the quantity and variety of the documents plaintiff seeks to add to the administrative record and the brevity of plaintiff's motion to supplement—and the court declines to speculate on plaintiff's behalf. Plaintiff has also failed to argue why it should benefit from the flexible approach to the administrative record described in *Cubic*, 37 Fed. Cl. at 350, and *Orion*, 60 Fed. Cl. at 342-44.

Count V of the amended complaint challenges defendant's evaluation of plaintiff's bid related to Solicitation (PRDA) No. 00-01-HE and award of the related contract to Insight Technology, Inc. ("Insight") instead of plaintiff. Compl. at 30. However, plaintiff's motion to

supplement acknowledges that the documents plaintiff would add to the administrative record raises a bid protest claim not included in the amended complaint—a challenge that "the Air Force's decision to employ the competitive procedures embodied in Solicitation No. 00-01-HE were made in bad faith, in violation of the SBIR statutes and regulations, and the duties owed to NVC by the Air Force." Pl. Amend. Mot. Supp. Rec. at 2-3. While plaintiff might have challenged the legality of defendant's decision to employ competitive procedures instead of proceeding with a Phase III SBIR contract when that decision was made over five years ago, it appears to be far too late for plaintiff to bring this challenge.[4] Of course, this point is academic because plaintiff did not raise a bid protest challenge to defendant's decision to employ competitive procedures in its complaint.[5] Lacking any apparent relevance to the bid protest that is properly before the court, the documents plaintiff has submitted to the court will not be added to the administrative record.

Moreover, the court has other serious doubts that plaintiff's motion fails to address regarding the relevance of many of the documents at issue here. Defendant solicited bids related to the contract at issue in December 1999 and awarded the related contract to Insight in April 2000. Yet plaintiff would add to the administrative record several documents regarding events that occurred long after that period, including documents related to both Insight's performance under the contract at issue in plaintiff's bid protest and a separate solicitation in which plaintiff was prepared to serve as a subcontractor to an unsuccessful bidder.

The court may consider evidence that came to light after the time of contract award. *See MVM*, 46 Fed. Cl. at 135-36. However, this does not relieve plaintiff from the burden of demonstrating that supplementation of the record is appropriate under the rules discussed above. It is far from clear to the court that evidence regarding a subsequent solicitation or Insight's performance under the contract is relevant in any way to either the prejudice or substance inquiries that the court must conduct in the bid protest at hand. Certainly plaintiff has failed to make a persuasive argument that these subsequent events and the related documents are relevant to its bid protest claim.

Accordingly, plaintiff's motion to supplement the administrative record is **DENIED**.

IT IS SO ORDERED.

s/ *Lawrence J. Block*
Lawrence J. Block
Judge

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[4] *See CC Distributors, Inc. v. United States*, 38 Fed. Cl. 771, 782 (1997) (discussing duty of contractors to seek timely "resolution of problems, inconsistencies, and discrepancies apparent in solicitations").

[5] It is true that Count IV of plaintiff's complaint alleges that defendant violated its implied duty of good faith and fair dealing when it decided not to award plaintiff a Phase III SBIR contract. However, the possibility that the documents plaintiff would add to the administrative record might be relevant to Count IV does not help plaintiff, because Count IV is not a bid protest under 28 U.S.C. § 1491(b) that requires record review under the APA standard.