

In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 10-50C

(Filed: May 3, 2010)

* * * * *

**ESKRIDGE RESEARCH
CORPORATION,**

Plaintiff,

v.

THE UNITED STATES,

Defendant,

**BOWHEAD SCIENCE AND
TECHNOLOGY, LLC,**

Defendant-Intervenor.

* * * * *

**ORDER REQUIRING CERTIFICATION OF THE ADMINISTRATIVE RECORD
UNDER RULE 52.1**

Pending before the court is a motion filed by the plaintiff, Eskridge Research Corp. (“ERC”), for supplementation of the administrative record filed by the defendant, the United States (“government”). The motion was filed in response to the government’s motion for judgment on the record in connection with the decision of the United States Corps of Engineers (“USACE” or “agency”) to allow the intervenor, Bowhead Science and Technology, LLC (“Bowhead”), to continue performing a contract for security services pending a re-evaluation of proposals and potential revised award by the

contracting officer (“CO”). Bowhead was awarded and began performing the contract at issue in September 2009. In November 2009, the agency announced its decision to re-evaluate proposals and make a new award decision if necessary. At the same time the agency stated that it would allow Bowhead, which had begun performing work for the agency, to continue performing the contract during the re-evaluation period.

In the present action, ERC challenged the award to Bowhead and the decision to allow Bowhead to continue performance during the re-evaluation period. In ruling on the government’s motion to dismiss the case in its entirety, the court determined that ERC’s claims regarding the award to Bowhead had to be dismissed on the grounds that they were moot following the agency’s decision to re-evaluate proposals, but determined that the court had jurisdiction to consider ERC’s objection to the agency’s decision to allow Bowhead to provide security services during the re-evaluation period. In addition, the court considered and then denied ERC’s request for preliminary injunctive relief, in which it sought to set aside the agency’s decision to allow Bowhead to provide security services during the re-evaluation period. Eskridge Research Corp. v. United States, 2010 WL 1253650 (Fed. Cl. March 12, 2010). In the decision, the court set forth a briefing schedule for resolving the plaintiff’s claim seeking a permanent injunction to have ERC replace Bowhead during the re-evaluation period. Pursuant to the court’s order, the government filed the thirty-three page administrative record on March 22, 2010.

ERC claims that the administrative record filed by the government in support of its

decision to retain Bowhead’s services during the re-evaluation period is not complete and it asks that the court order the government to supplement the record. ERC also challenges the record on the grounds that it was not certified by the agency as required by Rule 52.1 of the Rules of the Court of Federal Claims (“RCFC”). For the reasons that follow, the motion to supplement the administrative record with the materials identified by ERC is denied. However, the agency will be required to comply with Rule 52.1.

STANDARD OF REVIEW

Motions to supplement the administrative record are governed by the Federal Circuit’s recent decision in Axiom Resource Management, Inc. v. United States, 564 F.3d 1374 (Fed. Cir. 2009). In Axiom, the Federal Circuit emphasized that “the parties’ ability to supplement the administrative record is limited,” 564 F.3d at 1379, and that the “focus of judicial review of agency action remains the administrative record, which should be supplemented only if the existing record is insufficient to permit meaningful review consistent with the [Administrative Procedure Act],” id. at 1381. Determination of whether to order supplementation of the administrative record depends on whether supplementation is “necessary in order not ‘to frustrate effective judicial review.’” Id. (quoting Camp v. Pitts, 411 U.S. 138, 142-43 (1973)); see also Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1338 (Fed. Cir. 2001). Supplementation is also justified “when it is necessary for a full and complete understanding of the issues.” Blue & Gold Fleet, LP v. United States, 70 Fed. Cl. 487,

494 (2006), aff'd, 492 F.3d 1308 (Fed. Cir. 2007). “[S]upplementation of the administrative record ultimately ‘must be extremely limited, lest the admission of evidence not considered by the agency below and its consideration by the court convert the arbitrary and capricious standard into effectively de novo review.’” DataMill, Inc. v. United States, 2010 WL 1221245, at *6 (Fed. Cl. Mar. 5, 2010) (quoting Murakami v. United States, 46 Fed. Cl. 731, 735 (2000), aff'd, 398 F.3d 1342 (Fed. Cir. 2005) (internal quotation marks removed)).

At issue here, more specifically, is the plaintiff’s claim that the agency did not provide a complete administrative record. It is well-settled that “[a]bsent clear evidence to the contrary, an agency is entitled to a presumption that it properly designated the administrative record.” Cape Cod Hosp. v. Sebelius, 677 F. Supp. 2d 18, 26 (D.D.C. 2009) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977)). The key question is whether the record is complete as to the challenged agency action. See Personal Watercraft Indus. Ass’n v. Dep’t of Commerce, 48 F.3d 540, 546 n.4 (D.C. Cir. 1995) (stating that record was complete as to the challenged agency decision and additional documents pertaining to other agency decisions was “neither need[ed] nor want[ed]”); DataMill, 2010 WL 1221245, at *14 (“The administrative record need not be supplemented with statements [that] have no bearing” on the agency’s challenged decision).

Finally, in order to ensure that the record is complete, the agency must certify the record. Under RCFC 52.1(a), “[w]hen proceedings before an agency are relevant to a decision in a case, the administrative record of those proceedings must be certified by the agency and filed with the court.” RCFC 52.1(a) (emphasis added).

DISCUSSION

ERC seeks to supplement the administrative record filed by the government with a declaration by Jeff Eskridge (“Mr. Eskridge”) previously submitted with the plaintiff’s motion for a preliminary injunction, 280 pages of documentation the government submitted with its response to the plaintiff’s motion for a preliminary injunction, and, more generally, “any and all documents related to [USACE’s] decision to initially issue a contract award to Bowhead” and “any and all documents related to [USACE’s] decision to issue corrective action”¹ Pl.’s Mot. for Suppl. of the Admin. R. (“Pl.’s Mot.”) 3-4. These documents, the plaintiff argues, would “assist meaningful review” of the propriety of the agency’s decision. *Id.* at 4. Further, the plaintiff argues that the government has failed to properly certify the administrative record as is required under RCFC 52.1.

In response, the government argues that the declaration of Mr. Eskridge that the plaintiff seeks to have included in the administrative record post-dates the challenged agency decision, and so is not within the scope of the court’s review of that decision.

¹The plaintiff also requests “any[and] all documents related to [USACE’s] determination to allow Bowhead to keep performance of the contract during the corrective action,” which the government concedes, and the court agrees, is the set of documents relevant to the plaintiff’s claim remaining before the court. *See* Def.’s Opp’n to Pl.’s Mot. to Suppl. the Admin. R. 3.

Further, the government contends that the record it has filed is the complete record pertaining to the CO's decision to allow Bowhead to continue performance of the contract during the period of corrective action. The government argues that the additional documents that the plaintiff seeks to add to the administrative record are irrelevant to the claim remaining before the court, which is a discrete decision unrelated to the decisions to award the contract to Bowhead in the first instance and then to undertake corrective action. The government does not address the plaintiff's argument regarding certification of the administrative record.

The court finds that the plaintiff has not established a basis for supplementing the record to include the declaration of Mr. Eskridge because the declaration is irrelevant to the question of whether USACE's decision to retain Bowhead's services during the re-evaluation period was legitimately based on security concerns. The information was not before the agency and therefore could not have been considered by the agency at the time of the decision.² See Axiom, 564 F.3d at 1379 (quoting Camp, 411 U.S. at 142).³ As for the plaintiff's contention that the record should include all documents related to the decision to award the contract to Bowhead, there is no basis for supplementing the record because that decision is not before the court. Similarly, the decision to conduct corrective

²Indeed, the plaintiff concedes that this declaration is "new evidence." Pl.'s Reply in Further Supp. of Mot. for Suppl. of Admin. R. 3.

³In this connection, the court notes that while Mr. Eskridge objects to Bowhead's decision to employ former ERC employees, he does not contend that Bowhead is not properly providing the security services necessary to protect the USACE facilities at issue.

action by re-evaluating its award decision is not before the court. As noted in the court's decision denying the plaintiff's motion for a preliminary injunction, ERC's posture is akin to a situation in which a disappointed bidder filed a GAO protest in time to secure an automatic stay and the agency decided to override that automatic stay upon a finding that "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting." 31 U.S.C. § 3553(c)(2) (2006). In such cases, and more generally in cases involving procurement decisions, courts review an agency's decisions under an arbitrary and capricious standard based upon the record before the agency at the time of the decision.⁴ See Nortel Gov't Solutions, Inc. v. United States, 84 Fed. Cl. 243, 246 (2008). As the court in Personal Watercraft explained, the court does not need every document in the agency's file in the record, only those documents relevant to the decision that is properly before the court. Personal Watercraft, 48 F.3d at 546 n.4; see also RCFC 52.1(a) (requiring filing of a record including only proceedings before an agency that are "relevant to a decision in a case"(emphasis added)). In view of the foregoing, the plaintiff's motion to supplement the record with the materials it has identified is denied.

⁴Specifically, this review of an automatic stay override involves ensuring that the agency considered (1) "whether significant adverse consequences will necessarily occur if the stay is not overridden;" (2) "whether reasonable alternatives to the override exist;" (3) "how the potential cost of proceeding with the override, including the costs associated with the potential that the GAO might sustain the protest, compare[] to the benefits associated with the approach being considered for addressing the agency's needs;" and (4) the impact of the override on competition and the integrity of the procurement system, as reflected in CICA. Nortel Gov't Solutions, Inc. v. United States, 84 Fed. Cl. 243, 247 (2008) (quoting Reilly's Wholesale Produce v. United States, 73 Fed. Cl. 705, 711 (2006)).

Although the plaintiff has not established a basis for supplementation of the administrative record with the materials it has identified, the court agrees with the plaintiff that the government has failed to properly certify the filed administrative record. Therefore, the court cannot be sure that it has all of the documents pertaining to the decision to retain Bowhead's services in order to ensure security at the subject USACE facilities during the re-evaluation period. The government must provide the necessary certification under RCFC 52.1 before the plaintiff is required to file its motion for judgment on the record. The government shall file this certification, together with any additional materials relevant to the decision to allow Bowhead to continue to perform for security reasons during the re-evaluation period, according to the schedule set forth below.

CONCLUSION

For the above reasons, the plaintiff's motion for supplementation of the administrative record with the material identified and for certification of the administrative record is **DENIED-IN-PART** and **GRANTED-IN-PART**. The schedule as to resolution of the decision to allow Bowhead to perform the contract during the period of corrective action is as follows:

May 10, 2010

Defendant shall file a certification of the administrative record together with any additional documents relevant to the decision to continue to have Bowhead provide security services based on the security needs of the USACE.

May 24, 2010

Plaintiff shall file its motion for judgment on the administrative record.

June 7, 2010

Defendant and intervenor shall file their responses to the plaintiff's motion and their cross-motions for judgment on the administrative record.

June 21, 2010

Plaintiff shall file its reply and its response to the defendant's and intervenor's cross-motions for judgment on the administrative record.

July 6, 2010

Defendant and intervenor shall file their replies.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge