In the United States Court of Federal Claims

No. 04-694 C
Filed June 10, 2005

HDM CORP.,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

OPINION AND ORDER

GEORGE W. MILLER, Judge.

This matter is before the Court on defendant's motion to dismiss the second and third counts of plaintiff's amended complaint, filed on March 24, 2005. Plaintiff filed an opposition brief on April 29, 2005. Defendant filed a reply brief on May 9, 2005. Oral argument was deemed unnecessary. For the reasons set forth below, defendant's motion to dismiss is DENIED.

BACKGROUND[1]

On February 1, 1999, the U.S. Department of Health and Human Services, acting through the Centers for Medicare and Medicaid Services ("CMS")[2] invited companies to submit proposals for a "Coordination of Benefits" ("COB") contract.[3] Am. Compl. ¶ 24. Plaintiff HDM

[1] The recitation of facts in this section does not constitute findings by the Court. All of the stated facts are either undisputed or alleged and assumed to be true for the purposes of the pending motion.

[2]CMS was previously known as the Health Care Financing Administration or "HFCA."

[3]Request for Proposal No. HFCA-99-0003/DSS.

Corp. ("HDM"), a company that handles Medicare crossover claims,[4] was invited to submit a bid for the COB contract. Included with the Request for Proposal cover sheet were representations that the successful bidder of the COB contract would not be responsible for the creation of crossover claims files. *Id.* ¶¶ 25-27. Because the RFP did not inform potential bidders that crossover claims would be a part of the contract awarded to the successful bidder, HDM did not submit a bid. *See id.* ¶ 29.

The COB contract was awarded to GHI in November, 1999. Def's Mot. Dismiss Second & Third Claims at 2. On August 15, 2003 and February 6, 2004, CMS announced the implementation of a new regulatory regime consolidating Medicare crossover claims. *Id.* ¶ 32. Under the new regulatory regime, a monopoly was to be granted to the COB contractor over all Medicare crossover claims. Am. Compl. ¶ 32. This modification to the COB contract was to be executed without a competitive bidding process. *Id.* ¶ 33. HDM, facing the elimination of a major segment of its business, filed suit in the United States Court of Federal Claims on April 20, 2004. In its original complaint, HDM alleged that CMS's actions constitute a taking of HDM's property based on the Fifth Amendment to the United States Constitution.

HDM later filed an amended complaint on February 8, 2005, in which it asserted two grounds for relief in addition to its taking claim. First, HDM alleged that CMS violated the Competition in Contracting Act ("CICA") by extending the COB agreement without first going through the required competitive bid process. *Id.* ¶ 19. Second, HDM alleged that "CMS's decision to modify the COB Agreement to add [Medicare crossover claims] without first permitting full and open competitive bidding was . . . not in accordance with the law." *Id.* ¶ 53.

On March 24, 2005, the Government filed a motion to dismiss HDM's second and third claims. In this motion, the Government argues that the United States Court of Federal Claims does not have jurisdiction to adjudicate HDM's second and third claims because HDM is not an "interested party" within the meaning of the Tucker Act, 28 U.S.C. § 1491(b)(1) (2000). Specifically, defendant argues that HDM lacks standing because it has neither demonstrated that it is currently capable of performing the entire COB contract nor has it alleged that it would have submitted a bid had the Medicare crossover function been originally included in the COB contract. HDM filed a brief in opposition to the Government's motion to dismiss HDM's second and third claims on April 29, 2005. In its brief, HDM argues that it is an "interested party" under the Tucker Act and that the arguments asserted by the United States constitute an incorrect reading of the law. Br. Opp. Def.'s Mot. Dismiss Pl.'s Second & Third Claims, at 5-9.

[4] Medicare Crossover involves electronic coordination of healthcare benefit claims and concerns people eligible for both Medicare and Medicaid. These claims are processed through Medicare and then "cross over" to supplemental insurers and Medicaid for further coverage, usually for Medicare co-payments and deductibles.

DISCUSSION

I. Jurisdiction Over Bid Protests

The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, §§ 12(a), 12(b), 110 Stat. 3870, 3874 (1996), amended the Tucker Act and provided the United States Court of Federal Claims with post-award bid protest jurisdiction for actions filed on or after December 31, 1996. *See* 28 U.S.C. § 1491(b)(1)-(4) (2000). The statute provides in pertinent part:

> Both the Unite[d] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or to the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. § 1491(b)(1) (2000);[5] *Northrop Grumman Corp. v. United States*, 50 Fed. Cl. 443, 455 (2001). In this case, HDM is not challenging an award. Rather, it is claiming that there has been a violation of statutory requirements for competition in government procurement. *See CW Gov't Travel, Inc. v. United States*, 61 Fed. Cl. 559, 566-67 (2004); *Northrop Grumman,* 50 Fed. Cl. 443. Such actions, which ask the court to direct new solicitation of and competition for government contract work alleged to result from a cardinal change in a previously awarded contract, are within this court's jurisdiction. *CW Gov't Travel*, 61 Fed. Cl. at 667; *Northrop Grumman,* 50 Fed. Cl. 443; *see also AT&T Comms., Inc. v. Wiltel, Inc.*, 1 F.3d 1201 (Fed. Cir. 1993).

II. Standard of Review for Motion to Dismiss

The plaintiff bears the burden of establishing a court's subject matter jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *CC Distributors,* 38 Fed. Cl. at 774. In considering a challenge to its jurisdiction, a court assumes as true all well-pleaded facts alleged in the complaint and construes those facts in the light most favorable to the

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[5] As of January 1, 2001, this court assumed sole jurisdiction over bid protest actions. Pub. L. 104-320, § 12(d), 110 Stat. 3870, 3875 (1996) ("(d) SUNSET.– The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress.").

plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled in part on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982); *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000). When the underlying facts alleged to establish jurisdiction are at issue, a court may examine evidence outside the face of the pleadings to resolve its jurisdiction. *McNutt*, 298 U.S. at 189; *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993).

III. Standing to Bring A Bid Protest

A. The Legal Test

In order to maintain a bid protest action, a protestor must be an "interested party." 28 U.S.C. § 1491(b)(1). The Tucker Act, however, does not define the term "interested party." The United States Court of Appeals for the Federal Circuit, therefore, has adopted the definition of "interested party" set forth in CICA. *Northrop Grumman*, 50 Fed. Cl. at 455-56 (citing *Am. Fed'n of Gov't Employees v. United States*, 258 F.3d 1294, 1300-02 (Fed. Cir. 2001)). CICA defines an "interested party" as "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." *Id.*; 31 U.S.C. § 3551(2).

The court relies on a two-part test to determine whether a party qualifies as an interested party. First, "plaintiff must stand in some connection to the procurement." *CCL*, 39 Fed. Cl. 780, 790 (1997). Second, plaintiff "must have an economic interest" in the procurement. *Id.* The court has held that "where a claim is made that the government violated CICA by refusing to engage in a competitive procurement, it is sufficient for standing purposes if the plaintiff shows that it likely would have competed for the contract had the government publicly invited bids or requested proposals." *CCL*, 39 Fed. Cl. at 790. Additionally, "a party's standing depends on its interest only in the proposed initial solicitation for the new work. The court will determine standing based on whether the protesting contractor could compete for the *new contract work* and whether it has an economic interest in such work, unhindered by the restrictions applicable when a bidder protests a solicitation that has already taken place." *Northrop Grumman*, 50 Fed Cl. at 456 (citing *CCL*, 39 Fed. Cl. at 790) (emphasis added). If the court finds that there has been a violation of CICA, it may remedy the violation "by carving the modification out of the contract and requiring that the work be solicited as a separate contract." *CESC Plaza Ltd. P'ship v. United States*, 52 Fed. Cl. 91, 93-94 (2001); *see also CW Gov't Travel*, 61 Fed. Cl. at 570.

In a CICA case, failure to submit a proposal on the original contract work is not fatal to standing. *See CW Gov't Travel*, 61 Fed. Cl. at 570; *Northrop Grumman*, 50 Fed. Cl. 443, 456 (2001); *CCL*, 39 Fed. Cl. at 790. In *CW Gov't Travel*, *CCL*, and *Northrop Grumman*, the protestor had not bid on the original contract, yet the court found that the protestor had standing. The court in *CCL* explained that

> CCL did have a connection with the procurement. The work that it contends should have been competed was work that it wanted to

> do. Not only has CCL stated it would likely have submitted a proposal, but it was performing the very work that it alleges DISA illegally diverted to BDM. By not being able to compete, it potentially lost a contract. As the court held in *ATA Defense Industries v. United States*, 38 Fed. Cl. 489, 495 (1997), judicial review of procurement methods should not be thwarted through the wooden application of standing requirements. CCL has standing.

CCL, 39 Fed. Cl. at 790. Likewise, the court in *Northrop Grumman* reasoned that

> [a]lthough Lockheed did not submit a proposal on the original contract work, its protest is not based on wrongdoing by defendant in awarding the original contract to Raytheon. Instead, along with Northrop, Lockheed argues that the relaxing of the alleged NDI requirement in this contract amounts to a cardinal change, and therefore a new procurement must be executed based on the contract work as changed . . . . Lockheed has standing, therefore, if it shows that it would participate as a bidder for, and have an economic interest in, only that new uncompeted work, not the work as contemplated by the original procurement. *See Phoenix Air*, 46 Fed. Cl. at 102.

Northrop Grumman, 50 Fed. Cl. at 456. Additionally, in *CW Government Travel*, this Court held that despite having not bid on the original DTS DTR-6 contract, plaintiff Carlson had standing to challenge the modification adding traditional travel services to the DTS DTR-6 contract because Carlson had "competed for an won numerous DoD contracts for traditional travel services" in the past and would be a viable bidder in a traditional travel services procurement. *CW Gov't Travel*, 61 Fed. Cl. at 570.

Thus, contrary to the assertions of the Government, HDM need not show that it could have competed for the original contract, nor must it show that it could compete for the contract as modified. Rather, it must show only that it could compete for the out-of-scope work if that work were to be solicited. It is under this framework that we analyze whether HDM is an interested party with standing to protest the addition of crossover claims to the COB contract.

B. HDM Has Standing to Protest the Crossover Work

The first requirement that HDM must meet in order to have standing is that it stand in some connection to the procurement. *CCL*, 39 Fed. Cl. at 790. Here, HDM has a connection to the procurement because it is a prospective bidder on government contracts involving Medicare crossover claims. Like the protestor in *CCL*, HDM contends that the work it alleges CMS should have opened up to competition was work that it wanted to do. *See id.;* Am. Comp. ¶¶ 49-50. HDM has also asserted both that it would have submitted a proposal had the Medicare crossover work been competed and that it performs the very work that the CSA allegedly diverted illegally

to the COB contractor. Am. Compl. ¶¶ 47, 50. There is no question that HDM would have competed for a procurement consolidating all Medicare crossover claims had the government publicly invited bids or requested proposals.

That HDM did not submit a bid for the original COB contract does not defeat HDM's claims. To have standing, HDM need only show that it likely would have competed for the contract had the government publicly invited bids. *See Northrop Grumman*, 50 Fed Cl. at 456 (citing *CCL*, 39 Fed. Cl. at 790). As previously noted, HDM has alleged that it would have competed for a contract consolidating all Medicare crossover claims had it been afforded the opportunity. Furthermore, because a party's standing depends on its interest only in the new work, HDM's standing to bring suit is unaffected by its desire to submit a bid only on the Medicare crossover work. *See id.*

The second requirement that HDM must meet in order to have standing is that it have an economic interest in the procurement. *CCL*, 39 Fed. Cl. 780, 790 (1997). Here, HDM has alleged facts that show that it has an economic interest in a procurement involving the consolidation of all Medicare crossover claims. A significant portion of HDM's business is derived from Medicare crossover claims. Am. Compl. ¶ 22. HDM has invested substantially in developing technology so that it may conduct such business. *Id.* ¶ 7. HDM alleges that it faces the elimination of its entire Medicare crossover claim business if all Medicare crossover claims are consolidated and a monopoly over this service is granted to another company. HDM also alleges that if this consolidation occurs, it will "[g]reatly diminish or completely destroy the value of its Property." *Id.* ¶ 9. HDM has plead facts establishing that it is an interested party. Therefore, HDM has standing to maintain its second and third claims.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss is DENIED. Pursuant to the Court's Order dated June 2, 2005, briefing of plaintiff's Motion for Partial Summary Judgment was stayed pending resolution by the Court of the instant motion. Having resolved defendant's motion to dismiss, the Court ORDERS that briefing of plaintiff's Motion for Partial Summary Judgment resume. Defendant shall file an Administrative Record by July 11, 2005. Further, defendant shall file a response to plaintiff's Motion for Partial Summary Judgment by July 25, 2005.

IT IS SO ORDERED.

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GEORGE W. MILLER
Judge