

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 05-711-C

(Filed: July 25, 2005)

ASIA PACIFIC AIRLINES,)
)
Plaintiff,)
)
v.)
)
UNITED STATES,)
)
Defendant,)
)
CORPORATE AIR, ALPINE AIR, and)
ALOHA AIRLINES, INC.)
)
Intervening-Defendants.)

ORDER

Pending before the court is Plaintiff's Motion for Limited Discovery, filed on July 15, 2005 regarding aspects of the solicitation at issue in this case. Plaintiff, Asia Pacific Airlines ("Asia Pacific") requests depositions of (1) the Contracting Officer, (2) members of the evaluation team, and (3) United States Postal Service ("USPS") personnel in Hawaii with decision-making authority, as well as (4) written discovery regarding USPS emergency procedures and authority for the procurement of air transport of mail. Asia Pacific seeks, among other things, to fill a gap in the administrative record respecting why it was deemed qualified to participate in the online auctions but thereafter was disqualified and its bid was elided from consideration. The government opposes any discovery, claiming that Asia Pacific has failed to demonstrate that the record is materially defective. The government further argues that to the extent the court permits limited discovery, such discovery should be limited to the contracting officer and the contracting officer's supervisor. The intervenors did not file any briefs on plaintiff's motion and chose to rely on the arguments made by the government.

When an explanation of a contracting officer's decision is required for meaningful judicial review, a reviewing court has the power, and in some cases may have the obligation, to require such an explanation. *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1338 (Fed. Cir. 2001) (citing *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990); *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). The agency's decision is entitled to a presumption of regularity, which may be rebutted by record evidence "suggesting that the agency

decision is arbitrary and capricious.” *Id.* As a matter of general administrative law, the standard course for supplementing an inadequate record is to remand the agency action under review to the agency. However, in bid protest cases, providing for a deposition of the contracting officer may prove far more efficient. *Id.* at 1339. Such depositions may enable the court to satisfy its statutory duty to “give ‘due regard’ to ‘the need for expeditious resolution of the action.’” *Bannum, Inc. v. United States*, 404 F.3d, 1346, 1356 (Fed. Cir. 2005) (quoting 28 U.S.C. § 1491(b)(3)).

Asia Pacific has satisfied its burden to obtain limited discovery. The USPS’s *volte-face* is unexplained, except insofar as it acknowledges that its invitation to Asia Pacific to participate in the online auctions was a mistake. The USPS provided a letter dated June 21, 2005, which retrospectively and summarily explains its subsequent rejection of Asia Pacific’s bid and revised proposals. When there is a reasonable possibility that a contracting officer may have taken into account information beyond that in the administrative record, supplementation of the record is appropriate. *See J.C.N. Constr. Co. v. United States*, 60 Fed. Cl. 400, 404-05 n.8 (2004) (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)). Given the circumstances, Asia Pacific’s motion for discovery is granted to the extent that it may depose the contracting officer, Patricia Jordan, and the contracting officer’s immediate supervisor, Leslie Griffith. The contracting officer and her superior should have the information needed to fill the gap that now exists in the administrative record. No additional discovery should be necessary. In that regard, the relevant authorization for emergency procedures is likely publicly available and easily accessible to plaintiff. Accordingly, Asia Pacific’s motion is GRANTED IN PART and DENIED IN PART.

In addition, the court suspended the briefing schedule previously entered on July 5, 2005, pending a status conference held on July 19, 2005. *See* Order of July 18, 2005. By this order, the court amends the Scheduling Order of July 5, 2005 with the newly agreed-upon schedule proffered by the parties at the status conference. Further proceedings in this case shall take place as follows:

<u>Event</u>	<u>Deadline</u>
Plaintiff’s Motion for Judgment on the Administrative Record	August 8, 2005
Defendant’s and Intervenors’ Cross-Motions for Judgment on the Administrative Record, and Responses to Plaintiff’s Motion	August 15, 2005
Plaintiff’s Reply and Response to Defendant’s and Intervenors’ Cross-Motions	August 19, 2005
Defendant’s and Intervenors’ Reply	August 23, 2005
Trial on Equitable Issues and Argument on All Issues	August 31, 2005, 10:00 a.m.

The trial and argument shall take place in the National Courts Building, 717 Madison

Place, N.W., Washington, D.C. The courtroom in which the trial and argument will take place shall be posted in the lobby of the building.

It is so ORDERED.

Charles F. Lettow
Judge