In the United States Court of Federal Claims

No. 10-716C

(Filed: February 7, 2011)

(NOT TO BE PUBLISHED)

NILSON VAN & STORAGE, INC.,	)
Plaintiff,	)
v.	)
UNITED STATES,	)
Defendant.	)

Francis M. Mack, Richardson, Plowden & Robinson, P.A., Columbia, South Carolina, for plaintiff.

James Sweet, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the briefs were Tony West, Assistant Attorney General, Civil Division, Jeanne E. Davidson, Director, and Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C.

OPINION AND ORDER

LETTOW, Judge.

In this post-award bid protest, Nilson Van & Storage, Inc. ("Nilson Van") challenges the United States Army's award of a contract to Ken Krause Company ("Krause") for the preparation, shipment, and storage of property belonging to Army personnel. Nilson Van previously filed a protest with the Government Accountability Office ("GAO"), which protest was denied on August 19, 2010. *See Nilson Van & Storage, Inc.*, No. B-403009, 2010 CPD P 198, 2010 WL 3328658 (Comp. Gen. Aug. 19, 2010). Nilson Van then filed this suit on October 20, 2010. The government has moved to dismiss pursuant to Rules 12(b)(1) and (6) of the Rules of the Court of Federal Claims ("RCFC"), and Nilson Van has responded by filing an amended complaint and by moving to compel the government to file the administrative record of the challenged procurement action.

BACKGROUND[1]

The Army at Fort Bragg, North Carolina, issued Solicitation No. W91247-09-B-0005, Inbound Racking and Crating ("Solicitation"), on July 2, 2009. Am. Compl. ¶ 2. Two offerors responded, Nilson Van and Krause. *Id*. ¶ 3. Krause was selected, and Nilson Van filed a timely protest with GAO on June 4, 2010. *Id*. ¶¶ 5-6. Among other things, Nilson Van contended that Krause was not an eligible awardee because it did not have appropriate licenses and approvals for the activity, and that the Army had not properly inspected Krause's facilities to insure that they met the requirements of the Solicitation. *Id*. ¶ 6; *see also Nilson Van*, 2010 WL 3328658, at *1-*2.[2]

In the proceedings before GAO, an agency report was received from the Army's Contracting Officer, Am. Compl. Ex. K, but GAO denied a request by Nilson Van for a protective order and did not allow Nilson Van's counsel to examine portions of the agency report and documents attached to that report, which portions had been redacted as containing protected material. *Id*. ¶¶ 7, 9. The administrative record was not submitted to GAO, apart from those documents which were appended to the agency report. *Id*. GAO denied the protest, "conclud[ing] that [Krause's] alleged failure to meet the authorization requirement did not render it ineligible for award." *Nilson Van*, 2010 WL 3328658, at *2. In rendering this result, GAO ruled that use of the term "prospective contractors" in the Solicitation meant that the authorization and licensing requirements of the Solicitation "appl[ied] only to the awardee," not bidders, and did so "only after award." *Id*. at *1-*2. GAO also rejected Nilson Van's claim that no proper inspection had been conducted of Krause's facilities, opining that Nilson Van had provided no factual basis or support for its contention. *Id*. at *2. On October 1, 2010, GAO denied a request by Nilson Van for reconsideration. Am. Compl. ¶¶ 11, 12.

JURISDICTION

Much of Nilson Van's amended complaint focuses on alleged errors by GAO in reaching its decisions to proceed on the basis of a truncated administrative record and to deny access by Nilson Van's counsel to competitively sensitive information. Am. Compl. ¶¶ 16-23. The government contends that the court lacks subject matter jurisdiction to review GAO's procedural and substantive decisions. Def.'s Mot. to Dismiss ("Def.'s Mot.") at 6 (citing *Unisys Corp. v. United States*, 90 Fed. Cl. 510, 517 (2009); *Centech Group, Inc. v. United States*, 78 Fed. Cl. 496, 498 (2007)).[3] This fundamental proposition is beyond dispute, and

[1]For purposes of resolving defendant's motion, the court presumes that the allegations in Nilson Van's amended complaint are true. This recitation is provided as a background for the pending motions and does not constitute findings of fact by the court. However, unless otherwise noted, the circumstances set out appear to be undisputed.

[2]The Solicitation required that the contractor's warehouse have an acceptable automatic sprinkler system, a supervised fire detection and reporting system, and an installed and accredited fire protection system. *Nilson Van*, 2010 WL 3328658, at *2.

[3]In addition, the government initially contested Nilson Van's complaint on the basis that it failed to contain "'a short and plain statement of the grounds for the [c]ourt's jurisdiction.'"

Nilson Van concedes as much. Hr'g Tr. 7:20-25 (Jan. 28, 2011).[4] When this court exercises jurisdiction over a bid protest under 28 U.S.C. § 1491(b), it considers the protest independently of any prior protests that may have occurred before the agency or before GAO. *See, e.g.*, *PGBA, LLC v. United States*, 60 Fed. Cl. 196, 203-04 (2004), *aff'd*, 389 F.3d 1219 (Fed. Cir. 2004); *see also* 31 U.S.C. § 3556 ("This subchapter [31 U.S.C. §§ 3551-57, establishing a procurement protest system before GAO] does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Claims Court.").

However, any prior protests before an agency or GAO are not ignored by the court. Appendix C to this court's rules provide that "core documents relevant to a protest case may include, as appropriate, . . . the record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement." RCFC App. C, ¶ 22(u). Indeed, by statute, certain documents concerning a protest before GAO are required to be submitted as part of the administrative record subject to review by this court. *See* 31 U.S.C. § 3556 ("[T]he [agency] reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review."). The court in rendering its decision on a protest takes any prior GAO decision into account but does not accord it weight apart from its power to persuade. *See Gentex Corp. v. United States*, 58 Fed. Cl. 634, 636 n.3 (2003) ("Although GAO decisions are not binding on this [c]ourt, the [c]ourt recognizes GAO's longstanding expertise in the bid protest area and accords its decisions due regard.").

Consequently, the extensive allegations in Nilson Van's amended complaint regarding errors and defects in GAO's actions are to some considerable extent surplusage. Nonetheless, the existence of those allegations does not provide a basis to dismiss Nilson Van's amended complaint. Any decision in that regard depends upon the viability of Nilson Van's claim of prejudicial error in the Army's procurement actions. Explicitly, "Nilson [Van] is asking that the [c]ourt review the [a]gency's procurement decision." Hr'g Tr. 7:21-22.

FAILURE TO STATE A CLAIM

The government contends that "the allegations . . . in the amended complaint . . . are insufficient to state a claim for . . . relief here, . . . [*i.e.*,] that there was a procurement impropriety." Hr'g Tr. 7:8-11. Nilson Van responds that it continues to claim that prior to the award Krause did not possess the requisite and appropriate licenses and approvals and the agency did not properly inspect Krause's facilities to insure that they complied with requirements of the Solicitation. Hr'g Tr. 8:1 to 11:3. The government acknowledges the

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Def.'s Mot. at 4-5 (quoting RCFC 8(a)(1)). However, that defect was corrected in plaintiff's amended complaint. *See* Am. Compl. at 1.

[4]Subsequent citations to the hearing held on January 28, 2011 omit references to the date of the hearing.

potential validity of these claims as a conceptual matter but objects that Nilson Van has not identified any particular standards or regulations that allegedly were contravened. Hr'g Tr. 11:7-11.

To some extent, the requirements of the Solicitation that may be at issue are set out in the GAO decision. *See Nilson Van* , 2010 WL 3328658, at *1. Beyond that, Nilson Van's amended complaint is only partially forthcoming in this regard because it cites a sole specific requirement that allegedly was violated by the Army in the procurement, *see* Am. Compl. ¶ 6.b, but it otherwise does not identify the provisions or requirements that were supposedly contravened. Both parties acknowledge that this deficiency could be cured by an appropriate further amendment of the complaint. Hr'g. Tr. 11:20 to 12:11. As to amendment, the court is guided by the provisions of RCFC 15(a)(2) stating that "[t]he court should feely give leave [to amend] when justice so requires." This is a case in which amendment seems fully appropriate, and thus the court will allow a second amended complaint to be filed.

CONCLUSION

For the reasons stated, the government's motion to dismiss is DENIED, without prejudice to any future filing by the government of a motion for a more definite statement under RCFC 12(e) if Nilson Van should file a second amended complaint that does not identify the provisions of the Solicitation and applicable regulations that are claimed to have been contravened. Nilson Van's motion for a protective order is GRANTED, and the court will enter an appropriate protective order in due course.[5]

In these circumstances, the following schedule shall be adopted to govern future proceedings in this case:

Event	Due Date
Plaintiff's second amended complaint	February 25, 2011
Defendant's filing of the administrative record of the procurement being challenged	March 11, 2011
Telephonic status conference to address submission of cross-motions for judgment on the administrative record	March 16, 2011 at 10:00 a.m.

[5]Nilson Van's motion to compel the government to provide access to the administrative record is DENIED as premature because there is no showing that Nilson Van's counsel will be denied access to that record under the terms of the protective order to be entered. The government's motion to strike plaintiff's response filed January 20, 2011 is DENIED, but the government's concomitant motion for leave to file a sur-reply is GRANTED, and the sur-reply tendered with that motion shall be deemed filed as of the date of its submission, January 24, 2011.

It is so ORDERED.

s/ Charles F. Lettow
Charles F. Lettow
Judge