In the United States Court of Federal Claims

No. 09-788C
Filed: March 24, 2010

CREATION UPGRADES, INC.,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

ORDER

GRANTING DEFENDANT'S
CROSS-MOTION FOR JUDGMENT ON THE
ADMINISTRATIVE RECORD

Plaintiff, Creation Upgrades, Inc., is an unsuccessful bidder in a solicitation involving the proposed sale of surplus real estate by the United States Navy. Plaintiff alleges that irregularities in the way the Navy conducted the solicitation unlawfully prevented plaintiff from receiving the contract award. Plaintiff now asks the court to: (i) declare plaintiff's bid the highest qualifying bid; (ii) direct the sale and transfer of the property to plaintiff; and (iii) award plaintiff bid preparation costs and attorney's fees. Defendant denies that plaintiff is entitled to any relief.

The case is now before the court on the parties' cross-motions for judgment on the administrative record. For the reasons set forth below, the court rules in defendant's favor.

I.

On March 1, 2010, while this case was in briefing, the United States Court of Appeals for the Federal Circuit issued an opinion in Resource Conservation Group, LLC v. United States, No. 2009-5091, 2010 WL 681363 (Fed. Cir. Mar. 1, 2010), a decision that fundamentally altered the reach of this court's bid protest jurisdiction and thus the remedies available in this case. In particular, the Federal Circuit held that the declaratory and injunctive relief identified in 28 U.S.C. § 1491(b) (2006)[1] may be exercised only where the challenged solicitation involves a "procurement." The court in turn defined a procurement as limited to the "process of acquiring property or services," id. at *4, and concluded that such a definition does not include a solicitation for the lease of government property as it "strains the ordinary meaning of 'procurement' to extend that definition to encompass a situation in which it is the government that is seeking to lease its own property," id. at *3.

Although the instant case involves the sale rather than the lease of government-owned property, the Federal Circuit's reasoning in Resource Conservation applies with equal force here. As in Resource Conservation, the present solicitation is concerned with the disposition rather than the acquisition of government property and therefore cannot be considered a "procurement" under 28 U.S.C. § 1491(b)(1). It follows then that those elements of plaintiff's complaint that seek declaratory and injunctive relief must be dismissed for lack of jurisdiction.

The Resource Conservation court further declared, however, that its ruling did not disturb the court's historical bid protest jurisdiction, i.e., jurisdiction relating to actions seeking the recovery of bid preparation costs based on an allegation that the government had failed to consider an offeror's bid honestly and fairly and thus had violated an implied contract of fair dealing. See Heyer Products Co. v. United States, 140 F. Supp. 409, 412–13 (Ct. Cl. 1956). The court noted that this historical jurisdiction had been exercised both in procurement and nonprocurement solicitations—i.e., solicitations involving the disposal of government property—and

[1] This court's bid protest jurisdiction is set forth at 28 U.S.C. § 1491(b)(1), a statutory provision that authorizes the court "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 the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." The statute specifies that in addressing such an action, the court "may award any relief that [it] considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs." 28 U.S.C. § 1491(b)(2).

remained in place as a viable basis for the pursuit of relief in the case then before it.

In view of the Federal Circuit's ruling in Resource Conservation, this court offered plaintiff an opportunity to amend its complaint—facts permitting—to pursue relief under the more narrow jurisdictional grounds remaining available to it, namely, a suit for the recovery of bid preparation costs based on an alleged violation of the implied contract of fair dealing. Plaintiff, however, chose not to amend its complaint. Instead, on March 16, 2010, plaintiff filed a response to defendant's cross-motion for judgment on the administrative record which neither acknowledged the intervening change in law represented by Resource Conservation nor demonstrated an awareness of the limitation on remedies that ruling imposes. We are left then with a response brief which, in the main, is not focused on the law as it presently stands. Adopting the most liberal reading of plaintiff's complaint, however, we are able to discern some minimal allegations that are sufficient to make out a claim of arbitrary government action in the evaluation of plaintiff's bid. Given these allegations, and in the interest of fairness, we therefore proceed with our consideration of this case within the framework of the government's implied obligation to consider a bid honestly and fairly.

II.

On March 14, 2008, the Navy issued a solicitation announcing the public sale of two parcels of surplus government real estate ("Parcel I" and "Parcel II") involving approximately 2,006 acres of the former (now closed) Roosevelt Roads Naval Station located in Ceiba, Puerto Rico. The solicitation informed bidders that they could submit sealed bids for either parcel individually or for the two parcels combined. The solicitation further explained that the government had established a minimum acceptable bid for each parcel (referred to as the "reserve price") and additionally noted that the government retained the right to reject any or all bids and to proceed with an online auction in the event that the bids received did not meet or exceed the reserve price. The solicitation identified 2:00 p.m. Eastern Daylight Time on April 30, 2008, as the deadline for the receipt of bids.

In conjunction with the issuance of the solicitation, the Navy adopted an "Award Plan" establishing the in-house procedures to be followed in the evaluation of bids. The Award Plan identified the reserve price for Parcel II (the parcel at issue in this litigation) as $36,650,000, the appraised fair market value of the property. Additionally, the Award Plan provided that "[i]n no instance shall the Government accept a conforming high bid that is less than 80% of the established Bid Reserve Amount(s)" and directed that "[i]n the event the highest conforming bid is between 80% and 99% of the Reserve, the Government shall first attempt to negotiate with the highest conforming bidder(s) and afford that bidder the opportunity to raise the

submitted bid to an amount equal to the Reserve." The Award Plan went on to specify, however, that if the negotiation process was unsuccessful, the government reserved the right to conduct an online auction.

The Award Plan also contained a section titled "Pre-Bid Opening Procedures" which directed the Navy, upon receipt of a bid (at the location specified in the solicitation), to prepare a "bid receipt verification sheet" that "will be date/time stamped, signed by the Realty Specialist/Base Closure Manager and notarized."

The Navy received two bids in response to the solicitation. The first, a bid of $4,000,000 for Parcel I submitted by Industrial Realty Group, LLC, was rejected because the accompanying bid-deposit check was not in the form required by the solicitation. The second, a bid of $27,027,000 for Parcel II submitted by plaintiff, was also rejected because the amount offered was less than 80 percent of the reserve price. The Navy advised plaintiff of the rejection of its bid on May 13, 2008.

III.

As discussed above, this court's jurisdiction to grant relief in bid protest actions arising out of a solicitation involving the sale or lease of government property is now confined to the question of whether the government breached its implied obligation to consider a bid honestly and fairly. Resource Conservation, 2010 WL 681363. Plaintiff offers two arguments that we regard as coming within this limited jurisdictional framework.

First, plaintiff contends that the Navy compromised the integrity of the solicitation process by failing to establish the reserve price until after the receipt of bids. Specifically, plaintiff contends that the Navy did not formally incorporate the reserve price into the Award Plan until April 29, 2008—the date plaintiff claims it submitted its bid. Plaintiff maintains that the Navy, by acting in this belated fashion, cast doubt on the status of the reserve price as an independently determined value and thereby compromised the integrity of the solicitation itself. Based on its consequent suspicion of price manipulation, plaintiff maintains that it was unlawfully deprived of the competitive advantage inherent in its bid.

Plaintiff's argument, however, is unsupported by the facts. The record shows that the Navy initially had planned to sell the property at issue through an online auction, the details of which were set out in a solicitation issued in August 2007. At that time, the property had an appraised fair market value of $41,970,000. As a result of the downturn in the real estate market beginning in the latter half of 2007, however, the Navy decided to cancel the solicitation and to obtain a new appraisal for the property.

On March 14, 2008, while the reappraisal process was ongoing, the Navy issued the instant solicitation, which proposed the sale of the property through a sealed-bid procedure subject to a reserve price. On April 10, 2008, the award team approved the final details of the Award Plan, with the exception of the reserve price, which it left blank pending the result of the reappraisal process. Several days later, on April 18, 2008, the General Services Administration ("GSA") provided the Navy with a preliminary value for the property of $36,650,000. Although this figure remained subject to final certification by GSA, GSA advised the Navy on April 25, 2008, that "[i]f you need to drop numbers into your Sales Planning Package, please use the following[:] Capehart Parcel [Parcel II] = $36,650,000." Thereafter, on April 28, 2008, GSA provided the Navy with its final certification of the recommended appraisal value. The following day, on April 29, 2008, the Award Plan received its final approval from the Director of the Navy's Base Realignment and Closure ("BRAC") Program Management Office.

As noted at the start of this discussion, plaintiff maintains that the Navy did not establish the reserve price until after the receipt of bids. This assertion, however, is incorrect. The facts, as set forth above, demonstrate that the reserve price was provided to the Navy by mid-April 2008, was incorporated into the Award Plan on April 25, 2008, and received final certification on April 29, 2008. The record additionally shows that plaintiff's bid was not received by the Navy's BRAC Program Management Office until April 30, 2008, the date indicated on the notarized bid receipt verification sheet. Based on these facts, we can give no credit to plaintiff's allegations.

Plaintiff's second argument is equally unavailing. Plaintiff maintains that because its bid was within what it describes as "the zone of consideration," the Navy had an obligation to conduct negotiations to determine whether a mutually agreeable purchase price could be achieved. Plaintiff argues that the Navy's failure to initiate such negotiations deprived plaintiff of a fair consideration of its bid.

Under the terms of the solicitation, however, the government retained the right to reject any or all bids received in response to the sale process. Specifically, under the heading "Type and Terms of Sale," the solicitation informed bidders that the government had established a minimum acceptable bid price for the sale parcels and that "[i]n the event the Government does not receive a satisfactory bid that is at least equal to its Reserve Price, the Government reserves the right to reject the sealed-bids submitted, and conduct online auctions for Sale Parcels I and/or II." This same right was expressed in more specific procedural detail in the Award Plan as follows:

> In the event the highest conforming bid is less than the established Government Bid Reserve Amount, the Government has

> reserved the right to either (a) award the sale of the parcel to the bidder submitting the highest bid, (b) negotiate with the bidder(s) submitting the highest bid with the intent of achieving the established Reserve Price, (c) reject the bids received and proceed with an online auction, or (d) reject all bids with no further action under this [invitation for bids].

Additionally, and perhaps most relevant to plaintiff's argument, are the conditions for negotiation adopted in the Award Plan: "In no instance shall the Government accept a conforming high bid that is less than 80% of the established Bid Reserve Amount(s) . . . . In the event the highest conforming bid is between 80% and 99% of the Reserve, the Government shall first attempt to negotiate with the highest conforming bidder(s) and afford that bidder the opportunity to raise the submitted bid to an amount equal to the Reserve." Since plaintiff's bid did not meet the requisite dollar threshold for which the initiation of negotiations was authorized (plaintiff's bid was less than 80 percent of the reserve price), the Navy cannot be faulted for rejecting plaintiff's bid without attempt at negotiation.

CONCLUSION

For the reasons set forth above, those elements of plaintiff's complaint seeking equitable relief pursuant to 28 U.S.C. § 1491(b)(1) are dismissed for lack of jurisdiction. The remainder of plaintiff's complaint is dismissed for lack of merit, i.e., for failing to demonstrate that its bid was not honestly and fairly considered. Defendant's cross-motion for judgment on the administrative record is therefore granted. The clerk shall enter judgment accordingly.

s/John P. Wiese
John P. Wiese
Judge