

**In the United States Court of Federal Claims**

Nos. 14-651C

(Filed: September 23, 2014)

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RLB CONTRACTING, INC,

*Plaintiff,*

v.

THE UNITED STATES,

*Defendant.*

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ORDER

Pending in this bid protest is plaintiff’s challenge to the decision of the Small Business Administration (“SBA”) Office of Hearing and Appeals (“OHA”) sustaining the agency’s NAICS code designation for the work at issue. At oral argument, held this day, we informed the parties that we would sustain plaintiff’s challenge to the OHA decision as well as the underlying determination of the United States Department of Agriculture (“USDA” or “agency”). We notified the parties that we would issue today an injunction and short explanation of our ruling and follow it up with a longer opinion thereafter.

The Solicitation is titled “South Lake Lery Shoreline Protection and Marsh Creation Project.” AR 3. At the time of the initial solicitation, the agency set the work aside for small businesses, under NAICS code 237990, which is for “Other Heavy and Civil Engineering Construction.” 13 C.F.R. § 121.201 (2014) (\$33.5 million dollar size limit). Plaintiff submitted a bid, but award was made to another offeror. That award was protested to the Government Accountability Office on grounds unrelated to this protest, and the agency volunteered to take corrective action. It canceled the award and rebid the project, once again using code 237990.

Rather than rebidding, plaintiff and another bidder challenged at OHA

the agency's failure to invoke an exception to code 237990 for dredging and surface cleanup. If that exception applies, the size limit is \$25.5 million, rather than \$35.5. *Id.* OHA denied the appeal, stating that the principle purpose of the solicitation was not dredging but rather more general heavy and civil engineering construction. OHA based its decision on the narrative description of work items and the agency's characterization of other elements of the solicitation.

Plaintiff filed a protest in this court on July 24, 2014. Along with its complaint, plaintiff filed a motion for a preliminary injunction. The agency agreed to stay award pending resolution of this protest. The parties filed cross-motions for judgment on the administrative record, and we heard oral argument on September 23, 2014. Plaintiff challenges both the CO's decision not to invoke the dredging exception and OHA's affirmance of that decision.

We were presented by plaintiff during oral argument with two documents not present in the Administrative Record ("AR") submitted by the agency. They are a letter sent to plaintiff after the first competition, informing RLB that it was unsuccessful and informing it of the breakdown of costs of the successful bid. The second document was a spreadsheet presented to plaintiff during its post-award debriefing showing a comparison of cost breakdowns by work item for the government's internal estimate, RLB's price, and the successful awardee's price. Those documents show that both the agency and other offeror anticipated the majority of the costs of the project to be attributed to the work item 7, Excavation, Marsh Creation Dredging.

Although not part of the Administrative Record, these documents highlight one of plaintiff's arguments and support our view that both the agency's and SBA's decisions were irrational; they were both based on faulty or incomplete information. As a result, the following is ordered:

1. The agency's internal cost estimate and the information it presented at plaintiff's debriefing should have been included in the agency's administrative record submitted to this court. We order the Administrative Record supplemented to include them and consider them a proper basis on which to make our decision.

2. The SBA's decision in the NAICS appeal of RLB Contracting, SBA No. NAICS-5577, was incorrect as a matter of law because the OHA judge failed to apply the standard as set out in 13 C.F.R. § 121.402(b)(1) and (b)(2). The OHA decision does not give "primary consideration" to "the relative value

and importance of the components of the procurement” and did not concern itself with whether the agency classified the procurement “according to the component [of work] which accounts for the greatest percentage of contract value.” 13 C.F.R. § 121.402(b)(1)-(b)(2) (2014). The fact that a number of other work elements beside dredging were present says nothing about which items of work predominate. In addition, it is undisputed that some of the factual assumptions in the OHA decision were based on erroneous information. That decision must be set aside because it is arbitrary, capricious and otherwise not in accordance with the law.

3. The contracting officer’s decision not to apply the dredging exception to NAICS code 237990 was irrational because the agency ignored its own revision of internal cost estimates. Although the information available at the time of the initial determination may have justified the decision not to apply the smaller standard, defendant admits that this information was faulty. It was irrational for the agency to ignore the revised estimates and other relevant information after it became available. The CO is not shielded from the result of her error simply by the fact that she did not know it was error at the time the mistake was made. That error should have been corrected before the resolicitation, or a third, corrected solicitation should have been issued. For aught that appears, the information available to the agency should have made it clear that a majority of the contract value was dedicated to dredging.

4. Accordingly, the agency is enjoined from making an award under the current solicitation, No. AG-7217-S-14-0007, until after the contracting officer has made a new determination of whether the dredging exception applies. The agency may continue with the current solicitation only if it determines that the dredging exception does not apply.

5. The court is satisfied that failure to enjoin the award under the present circumstances would be prejudicial to plaintiff, and that the agency has not demonstrated that any possible prejudice to it or the public outweighs prejudice to the plaintiff.

6. The contracting officer is ordered to make a new determination of whether the dredging exception applies based on all available current information. If item 7, Excavation, Marsh Creation Dredging, is the most valuable item of work, the contracting officer must give primary consideration to it.

7. Plaintiff’s motion for judgment on the administrative record is

granted; defendant's cross-motion for judgment on the administrative record is denied. Entry of final judgment is deferred pending our issuance of an opinion more fully explaining our reasoning.

s/Eric G. Bruggink  
ERIC G. BRUGGINK  
Judge