

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Contract Dispute of)	
)	
Zullo Building Maintenance, Inc.)	Docket No. 13-ODRA-00676
)	
Pursuant to Solicitation DTFAWN-11-C-00190)	

DECISION AND ORDER ON DISCOVERY

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) on a motion filed by the Federal Aviation Administration (“FAA”) Northwest Mountain Region (“Region”) for a protective order to limit discovery (“Motion”). For the reasons discussed herein, the ODRA grants the Motion in part.

The Motion arises from a Contract Dispute (“Dispute”) filed by Zullo Building Maintenance, LLC (“Zullo” or “ZBM”) on November 6, 2013. The Dispute concerns Contract DTFAWN-11-C-00190 (the “Contract”), which the Region awarded on January 21, 2011 for janitorial services at the Salt Lake City Air Route Traffic Control Center (“ARTCC”) and Child Care Center in Salt Lake City, Utah. *Status Conference Memorandum*, dated December 12, 2013.

The Dispute challenges the non-exercise of the third option year of the Contract. Specifically, Zullo challenges the Region’s “refusal to stay or cancel the bid process for the replacement of [the] Contract ... until such time as ZBM’s charges of misleading and discriminatory actions to not exercise the next option year were [sic] investigated and the results made public.” *Dispute* at 1.¹

¹ Another claim, filed by Zullo on September 25, 2013, 13-ODRA-00675, concerned a deduction of \$10,753.52 taken from an amount invoiced under the Contract. That matter was settled pursuant to Alternative Dispute Resolution and dismissed on January 18, 2014.

The Dispute contends that a contracting official employed by the Region acted without authority by “engaging in conduct prejudicial to the Government and losing independence or impartiality.” *Dispute* at 1. The Dispute further alleges that a second official, the Contracting Officer, failed to address and respond to a letter from Zullo, which challenged the decision not to exercise the next option year of the Contract. *Id.* In this regard, Zullo alleges that the Contracting Officer’s decision was based on “untrue, misleading, and discriminatory information.” *Id.* at 2.

As a remedy, Zullo requests that its “next two option periods [be] allowed under this contract” or alternatively, that it be paid “\$86,410.00 which represents ZBM’s profit (\$79,410.00) if the remaining two option years had been exercised in addition to the unamortized portion of equipment purchased (\$7,000.00) to perform this contract.” *Id.* The Dispute also requests that the first official be “investigated for racial discrimination and reprimanded as the results of the investigation deems appropriate.” *Id.*²

Following the filing of the initial Dispute, the ODRA received a supplemental filing from Zullo on November 18, 2013 (“Supplemental Filing”), which alleged more facts in support of its assertions of bad faith. The Supplemental Filing references the follow-on procurement, in which Zullo unsuccessfully participated, and the Region’s award of a contract to another company. *Supplemental Filing* at 1; *Status Conference Memorandum*, dated December 12, 2013. In this regard, Zullo asserts it was informed by the Contracting Officer in a post-award debriefing that the evaluation team had determined Zullo’s past performance to be acceptable, even though “performance difficulties” had been cited as the reason for not exercising the option year of its Contract. *Supplemental Filing* at 2; *Dispute* at 1. Zullo argues that the inconsistency between these two assessments of its performance is an indication of bad faith. *Supplemental Filing* at 2. Zullo also alleges that the Contracting Officer’s decision not to “stay or cancel the [follow-on] solicitation to replace ZBM’s contract was made in bad faith.” *Id.*

² The ODRA is a statutorily authorized adjudicative body. 49 U.S.C. §40110(d)(4). It does not have an investigative function concerning employee disciplinary actions.

Although the parties attempted to resolve the matter consensually through the use of an Alternative Dispute Resolution (“ADR”) process, these efforts proved unsuccessful and the adjudication commenced on February 12, 2014. The Region filed a response to the Dispute on March 13, 2014 (“Product Team Response”). In a Status Conference convened on April 1, 2014, the ODRA established a schedule for adjudication which included a schedule for discovery. Subsequently, on April 11, 2014, the deadline for the submission of discovery requests was extended until May 15, 2014 pursuant to an unopposed request from Zullo.

On May 16, 2014, the ODRA received the Region’s Motion in response to a discovery request Zullo served on May 15, 2014 (“Discovery Request”). The Motion requests a protective order authorizing the Region to limit its responses only to the first 25 interrogatories and first 10 requests for production of documents contained in the Discovery Request. *Motion* at 1. In support of the Motion, the Region argues that Zullo’s Discovery Request contains “numerous requests which appear calculated to be unreasonable and unduly burdensome for the agency” and “seek[s] documents which should already be in its possession.” *Motion* at 2, ¶¶ 7 and 8. The Region further argues that while many of the individual requests are “objectionable as irrelevant, cumulative, duplicative, and unduly burdensome, it is appropriate under [ODRA Procedural] Rule 17.33(g)(1) to limit the total number of interrogatories and requests for production.” *Id.* at ¶ 9. In this regard, the Region cites authorities governing other adjudicatory forums which limit the use of interrogatories to 25, including subparts. *See, e.g.*, Rule 33(a) of the Federal Rules of Civil Procedure; Rule 33(a)(1) of the Rules of the United States Court of Federal Claims; and *Ingalls Shipbuilding Division, Litton Systems, Inc.* ASBCA No. 17717, 73-2 BCA 10,205 (1973); *Bay Area Crane-Hoist, Inc.*, 87-BCA 19828 (1987). *Motion* at 3. The Region contends that it would be inappropriate for the amount of discovery in the instant matter to exceed the amount which would be allowed in “major litigation in Federal District Court and in the Court of Federal Claims.” *Id.*

Pursuant to 14 C.F.R. § 17.9, Zullo filed an opposition to the Region’s Motion on May 30, 2014 (“Opposition”). In the Opposition, Zullo argues that its Discovery Request is

reasonably calculated to lead to the discovery of relevant evidence regarding whether the Contracting Officer's decision not to exercise the third option year of its contract was made in bad faith. *Opposition* at 1.

The ODRA Procedural Regulation at 14 C.F.R. § 17.33(e) implements the ODRA's statutory authority to control the scope and conduct of discovery in adjudications of contract disputes under the FAA's Acquisition Management System ("AMS").³ While neither the Federal Rules of Civil Procedure, nor decisions of the boards of contract appeals are binding on the ODRA when deciding discovery issues, the ODRA looks to these types of decisions and the Federal Rules Civil Procedure as persuasive authority where they do not conflict with the AMS. *Protest of Systems Atlanta, Inc., 10-ODRA-00530; Protest of CNI Aviation, LLC, 07-ODRA-00428; Contract Dispute of Huntleigh USA Corporation, 04-TSA-008 and 06-TSA-025.*

Under the Federal Rules of Civil Procedure, discovery may be had with respect to any non-privileged matter that is relevant to any party's claim or defense and may be limited when it is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." *Fed. R. Civ. P.* 26(b)(1). Requests for discovery also must be reasonably calculated to lead to the discovery of admissible evidence that is relevant to a claim or defense; or with good cause shown, the general subject matter of the dispute. *Id.* Considerations in determining the proper scope of discovery include whether the burden or expense of the proposed discovery outweighs its likely benefit, the needs of the case, the amount at issue, the resources of the parties, the importance of the issues at stake, and the importance of the information in resolving the issue presented. *Fed. R. Civ. P.* 26(b)(2)(c)(3). Moreover, discovery may be denied "when a party requests voluminous discovery where only a small fraction of the produced documents may be relevant." *United States v. Kellogg Brown & Root Servs., Inc., 284 F. R. D. 22, 42; 2012 U.S. Dist.*

³ 49 U.S.C. Section 40110(d)(4) sets forth the ODRA's adjudicative authority for contract disputes, and among other sections, references 49 U.S.C § 46102, which requires these adjudicative proceedings to be subject to subchapter II of chapter 5 of title 5 [5 USCS §§ 551 *et seq.*] *i.e.*, the Administrative Procedure Act ("APA").

LEXIS 124010. In this regard, Rule 26(b)(2) of the Federal Rules of Civil Procedure protects against “overly burdensome discovery requests, discovery of cumulative materials, and overly costly discovery requests.... Rule 26(b), although broad, has never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition.” *Kellogg Brown & Root Services, Inc.* at 43, citing *Murphy v. Deloitte & Touche Group Ins. Plan*, 619 F.3d 1151 (10th Cir. 2010).⁴

The issue presented in this case is whether the Contracting Officer’s decision not to exercise the third option year was made in bad faith or constituted an abuse of discretion. It is well established that the government has discretion to determine whether or not to exercise the option years contained in the option clause unless such decision is motivated by bad faith. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062. Relief may be granted for the Government’s decision not to exercise an option only if the contractor can prove that the decision was made in bad faith or was so arbitrary or capricious as to constitute an abuse of discretion. *Id.* Notably, proof of bad faith requires more than evidence of contract administration lapses, coordination failures, interpretative errors, or incompetence. *Federal Data Corporation*, DOTCAB No. 2389, 91-3 B.C.A. (CCH) ¶ 24,063, citing *Nolan Brothers, Inc. v. United States*, 405 F.2d 1250, 1253 (1969) (“[A]n incorrect reading of the contract by Government officials is not tantamount to malice or bad faith.”). Rather, a bad faith claim requires “egregious conduct, specific intent to injure, malice, or conspiracy.” *Contract Dispute of Astornet Technologies, Inc.*, 08-ODRA-00466.

In the instant matter, the ODRA considers as relevant and appropriate only those requests seeking information relative to any possible bad faith actions which had an impact on the Contracting Officer’s decision to not exercise the third option year of Zullo’s Contract. The ODRA finds that most of Zullo’s Discovery Request seeks information that broadly pertains to matters of routine contract administration, delegations, letters of appointment, position descriptions and durations of assignments of regional officials. *See, e.g.*,

⁴ *See also* Notes of the Advisory Committee Rules on the 2000 Amendment of Fed. R. Civ. P. 26 (discussing the need to limit inappropriately broad discovery to matters relevant to parties’ claims or defenses).

Interrogatories 1-6, 7-9, 10-13. The Discovery Request further seeks personal or confidential records relative to regional officials' calendars, leave status and training, as well as the names, addresses, phone numbers, and emails of a broad assortment of individuals, including regional personnel, visitors to, and other contractors performing work (or who potentially could perform work) at the facility. *See, e.g., Interrogatories* 3, 6, 9, 21, 24, 45, 47, 55, 90, 91, 94, 96, 99, 100, 101, 102, 104 and 107. The Discovery Request additionally seeks procurement records for building maintenance services which were procured outside of Zullo's Contract. *See, e.g., Interrogatories* 38, 39, 46, 50, 51, 55, 56, 78, and 91. The Discovery Request also seeks documents that Zullo should already have in its possession, or information that significantly pre dates the date of contract award, January 21, 2011. *For examples of the former, see Interrogatories* 72 and 73; *for examples of the latter, see Interrogatories* 14-15, 72 and 93.

The ODRA is not persuaded by Zullo's arguments that its Discovery Request should be considered proper in that it seeks "foundational, factual information" to establish a "basis for subsequent discovery by a request for production or by deposition" in order to "clarify and insure that the information ... [is] supplemented with pertained [sic] documentation and identify [sic] the people who may have information." *See, e.g., Opposition arguments in support of Interrogatories* 1-38. Rather, the ODRA concludes that Zullo's Discovery Request is insufficiently tailored in terms of time frames and scope of subject matter. As a consequence, the information it seeks is overly broad, unduly burdensome for the Region to produce, and not reasonably calculated to lead to the discovery of relevant, admissible evidence.

For these reasons, the Region's Motion to limit discovery is granted in part. The ODRA further finds that the Discovery Request can be appropriately narrowed and hereby directs the Region to produce to Zullo all documents in its possession, custody, or control, within 30 days of the date of this Order, that have not been provided to Zullo

already, and which are responsive to the following 25 requests: Nos. 19, 22, 25, 31, 33, 35, 37, 39, 40, 42, 43, 46, 48, 49, 58, 60, 62, 64, 66, 68, 70, 72, 74, 75, and 109.⁵

-S-

Marie A. Collins
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

June 12, 2014

⁵ This is an interlocutory decision. It will become final and appealable upon the issuance of the final order at the conclusion of the adjudication.