

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2018 IL App (4th) 170694-U

NO. 4-17-0694

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 3, 2018
Carla Bender
4th District Appellate
Court, IL

ACTIVE NETWORK, LLC, n/k/a RA Outdoors, LLC,)	Appeal from the
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
THE DEPARTMENT OF CENTRAL MANAGEMENT)	No. 17MR332
SERVICES; MICHAEL M. HOFFMAN, in His Official)	
Capacity as Director of Central Management Services;)	
THE DEPARTMENT OF INNOVATION AND)	
TECHNOLOGY; HARDIK BHATT, in His Official)	
Capacity as Secretary Designate of Innovation and)	
Technology; THE ILLINOIS EXECUTIVE ETHICS)	
COMMISSION; THE ILLINOIS CHIEF)	
PROCUREMENT OFFICE; and ELLEN H. DALEY, in)	Honorable
Her Official Capacity as Chief Procurement Officer of)	Leslie J. Graves,
General Sales,)	Judge Presiding.
Defendants-Appellees.		

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Harris and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly dismissed plaintiff’s claim for review of the chief procurement officer’s denial of its protest to a request for proposals where the claim was untimely.

¶ 2 In April 2017, plaintiff, Active Network, LLC, now known as RA Outdoors, LLC, filed a two-count complaint against defendants, the Department of Central Management Services; Michael M. Hoffman, in his official capacity as Director of Central Management Services; the Department of Innovation and Technology; Hardik Bhatt, in his official capacity as Secretary Designate of Innovation and Technology; the Illinois Executive Ethics Commission;

the Illinois Chief Procurement Office; and Ellen H. Daley, in her official capacity as chief procurement officer of general sales. We note that, during the pendency of this litigation, Hoffman was succeeded by Timothy McDevitt, in his official capacity as acting Director of Central Management Services, and Bhatt was succeeded by Kirk Lonbom, in his official capacity as acting Secretary of Innovation and Technology. McDevitt and Lonbom have been substituted as defendants. In June 2017, defendants filed a motion to dismiss plaintiff's complaint under both sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2016)). After a July 2017 hearing, the Sangamon County circuit court granted defendants' motion and dismissed plaintiff's complaint with prejudice.

¶ 3 Plaintiff appeals, contending the circuit court erred by finding (1) plaintiff lacked standing to challenge the bid process, (2) plaintiff's complaint was untimely, (3) the Illinois Procurement Code (30 ILCS 500/1-1 *et seq.* (West 2016)) barred the litigation, and (4) the complaint does not state a claim upon which relief may be granted. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On May 27, 2016, the Department of Central Management Services published a request for proposal (No. 22038774), seeking proposals for a statewide permit and licensing solution (hereinafter the Request). Specifically, the Request sought a vendor to provide a single portal for online services for the State of Illinois. At the time of the Request, the State had more than 50 individual or business license and permit applications across agencies. Plaintiff was the vendor selected by the Department of Natural Resources to provide hunting and fishing licenses and a camping reservation system. The Request proposed the following contract structure: “[T]he State will partner with the successful Offeror in a Master Contract, and negotiate individual Statements of Work (SOWs) to design the overall solution architecture, implement a

scalable enterprise platform, and build out agency-level functionality in a phased manner. Multiple SOWs may be executed in parallel.”

¶ 6 In a June 30, 2016, letter, plaintiff filed a protest to the Request with the Chief Procurement Office. Plaintiff asserted the Request (1) circumvented the competitive bidding process for most of the work under the contract and (2) lacked the required specificity to inform bidders as to the scope of the work to be performed. Both the Department of Central Management Services and the Department of Innovation and Technology filed responses to plaintiff’s protest. On October 14, 2016, Daly, the chief procurement officer of general sales, denied plaintiff’s June 2016 protest to the Request. Daly found the Request’s intention to engage in negotiations with the successful bidder for additional work without a competitive bid did not violate Illinois law. She also found the responses refuted plaintiff’s claim of lack of specificity. At the time of the protest’s denial, seven of plaintiff’s competitors had submitted bids in response to the Request.

¶ 7 On December 8, 2016, the State awarded a contract to NICUSA, Inc., pursuant to the Request. A week later, plaintiff sent a letter to the members of the Procurement Policy Board (Board), asking the Board to exercise its discretion under section 5-5(h) of the Illinois Procurement Code (30 ILCS 500/5-5(h) (West 2016)) and place the contract award to NICUSA under review. Plaintiff also filed a December 22, 2016, protest to the contract award to NICUSA with the Chief Procurement Office. The December 2016 protest alleged the Request violated Illinois law. In January 2017, plaintiff filed a supplement to its protest, citing information it received about the bids submitted under the Request. Plaintiff also requested the contract award be vacated. On January 31, 2017, Daley denied the December 2016 protest, noting (1) her position remained unchanged from the first protest and (2) plaintiff was ineligible to challenge

the contract award because it did not submit a proposal in response to the Request.

¶ 8 In March 2017, plaintiff sent a supplemental letter to the Procurement Policy Board and again asked it to place the contract award to NICUSA under review. At its March 16, 2017, meeting, the Board decided not to conduct a formal review of the contract.

¶ 9 On April 11, 2017, plaintiff filed its two-count complaint, seeking a declaratory judgment that “the competitive bidding procedures were not followed” and cancellation of the contract award to NICUSA. In its complaint, plaintiff alleged the chief procurement officer’s protest *decisions* were arbitrary, capricious, an abuse of discretion, and against the manifest weight of the evidence. It also made reference to the Board’s decision. In its prayer for relief, plaintiff requested the court to (1) enter a preliminary and permanent injunction prohibiting the State of Illinois from “executing, or halting the work of,” the contract with NICUSA; (2) “ordering that the Contract be re-bid in accordance with the Illinois Procurement Code;” and (3) ordering the contract with NICUSA be cancelled and declared void. Along with the complaint, plaintiff filed a motion for preliminary injunctive relief, seeking to prevent the execution of the NICUSA contract. The summons was issued on May 9, 2017.

¶ 10 In June 2017, defendants filed a motion to dismiss plaintiff’s complaint under both sections 2-615 and 2-619. Under section 2-619, defendants argued plaintiff lacked standing to bring its cause of action because it did not submit a bid and plaintiff could not demonstrate an injury traceable to the allegedly improper Request. They further argued plaintiff lacked standing to seek review of the denial of its December 2016 protest. Defendants also argued plaintiff’s challenge to the October 2016 protest denial was untimely. Under section 2-615, defendants contended plaintiff’s claims were unfounded because the Request did not avoid competitive bidding. They also asserted plaintiff failed to state a valid due-process claim, the denials of

plaintiff's protests were final, and plaintiff alleged no wrongdoing against the Department of Central Management Services and the Illinois Executive Ethics Commission. Last, defendants argued plaintiff's motion for a preliminary injunction should be denied. Plaintiff filed a response, asserting (1) defendants had a duty to conduct a fair bidding process, (2) its complaint was timely filed, and (3) the Department of Central Management Services and the Illinois Executive Ethics Committee were necessary parties.

¶ 11 On July 18, 2017, the circuit court entered an order maintaining status quo that declared the Request's "Statement of Work #2" should remain unexecuted and any work pertaining to the aforementioned statement of work should not begin prior to July 28, 2017, or such further time as the court may later order. The order further noted it did not pertain to the "Statement of Work #1" or the execution of the contract.

¶ 12 At the conclusion of the July 27, 2017, motions hearing, the circuit court took defendants' motion to dismiss under advisement and ordered the parties to submit proposed orders. It also denied defendants' oral motion to dissolve the order maintaining status quo and continued any remaining motions. On August 21, 2017, the court filed its written order dismissing plaintiff's complaint with prejudice. The court first found plaintiff's complaint must be dismissed for lack of standing because plaintiff failed to submit a bid in response to the Request. The court noted plaintiff does not seek to be awarded the contract or protect a right to continue its current contract and thus plaintiff lacks a distinct and palpable injury fairly traceable to defendants. Additionally, the court found dismissal was warranted because plaintiff failed to timely seek review of the denial of its first protest via a writ of *certiorari*. The court concluded plaintiff failed to exercise reasonable diligence in obtaining service of process prior to the expiration of the six-month statute of limitations. Moreover, the court found dismissal of

plaintiff's claim for review of the chief procurement officer's denial of plaintiff's protest to the contract award was warranted as a matter of law. Last, the court concluded plaintiff failed to state a claim as a matter of law based on its review of the Request and NICUSA's bid submission.

¶ 13 On September 19, 2017, plaintiff filed a motion for leave to amend to substitute a party. It noted that, as part of a transaction between Global Payments, Inc., and Vista Equity Partners, the outdoor division of what was Active Network, LLC, became RA Outdoors, LLC. Thus, plaintiff contended RA Outdoors, LLC, should be substituted as plaintiff. The circuit court granted plaintiff leave to substitute the party. Also, on September 19, 2017, plaintiff filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 14 II. ANALYSIS

¶ 15 Initially, we address defendants' assertion we should strike plaintiff's brief and dismiss its appeal because plaintiff failed to include a proper statement of facts. Specifically, they contend the plaintiff's statement of facts is incomplete and argumentative. We decline to strike plaintiff's brief but will disregard any improper argument in the statement of facts.

¶ 16 In this case, plaintiff first challenges the circuit court's dismissal with prejudice of its complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2016)). With a section 2-619 motion to dismiss, the movant admits the sufficiency of the complaint but asserts an affirmative matter that defeats the claim. *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, ¶ 40, 32 N.E.3d 583. We review a circuit court's grant of a section 2-619 motion to dismiss *de novo*. *Leetaru*, 2015 IL 117485, ¶ 41, 32 N.E.3d

583.

¶ 17 A. Illinois Procurement Code

¶ 18 Section 20-75 of the Illinois Procurement Code (30 ILCS 500/20-75 (West 2016)) addresses disputes and protests and provides “[t]he chief procurement officers shall by rule establish procedures to be followed in resolving protested solicitations and awards and contract controversies, for debarment or suspension of contractors, and for resolving other procurement-related disputes.” Section 1.5550(a) of Title 44 of the Illinois Administrative Code (44 Ill. Adm. Code 1.5550(a) (2014)) states the following:

“a) Procurement-Related Protests Allowed

- 1) Any person may submit a protest related to the notice of the procurement, the solicitation document, any pre-bid/proposal meeting and any decision to reject a late bid or proposal.
- 2) Any person who has submitted a bid or proposal may protest a decision to reject the person’s bid or proposal or to award to another person.”

Thus, the rule provides for two distinct types of procurement-related protests and defines who can file each type of protest. Section 1.5550 further addresses the procedures for filing a protest, hearing a protest, and resolving a protest. 44 Ill. Adm. Code 1.5550(b)-(f) (2014).

¶ 19 Section 20-70 of the Illinois Procurement Code (30 ILCS 500/20-70 (West 2016)) addresses the finality of the chief procurement officer’s determinations. Unless otherwise stated in the Illinois Procurement Code, the chief procurement officer’s determination is “final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.” 30 ILCS 500/20-70 (West 2016). This court has held the aforementioned language provides for circuit court review of a chief procurement officer’s decision. See *Chester Bross Construction Co. v.*

Department of Transportation, 2014 IL App (4th) 130164, ¶ 23, 8 N.E.3d 527 (addressing the circuit court’s ability to review a chief procurement officer’s finding cause existed for the Department of Transportation’s suspension of a contractor). The Illinois Procurement Code does not provide for the application of the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2016)). Illinois courts have held “ ‘a writ of *certiorari*, rather than a declaratory judgment action, is the proper means to challenge an administrative decision to which the Administrative Review Law does not apply.’ ” *Board of Education of Woodland Community Consolidated School District 50 v. Illinois State Charter School Comm’n*, 2016 IL App (1st) 151372, ¶ 44, 60 N.E.3d 107 (quoting *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 683-84, 941 N.E.2d 347, 362 (2010)). However, if seeking review of the chief procurement officer’s decision, the pleading of a declaratory judgment cause of action is not fatal to a claim for review. See *Board of Education*, 2016 IL App (1st) 151372, ¶ 44.

¶ 20

B. Plaintiff’s Complaint

¶ 21

In this case, plaintiff filed both types of protests established in section 1.5550(a) of title 44 of the Illinois Administrative Code, and the chief procurement officer denied both of them. Plaintiff’s complaint is convoluted and difficult to decipher. It appears to combine the two protests into one long appeal process. Plaintiff further contends it is simply seeking a declaratory judgment but also makes allegations suggesting administrative review. In its complaint, plaintiff alleges the chief procurement officer’s protest *decisions* were arbitrary, capricious, an abuse of discretion, and against the manifest weight of the evidence. It also makes reference to the Board’s decision. In count I of its complaint, plaintiff asserts the competitive bidding procedures were not followed, and in count II, it asserts the contract award should be cancelled.

¶ 22 Despite all of its convoluted arguments in its complaint and in its appellate briefs, plaintiff is essentially seeking review of the October 2016 denial of its protest of the Request. While plaintiff denies it is seeking administrative review, that is the only possible cause of action available to plaintiff. The finality language of section 20-70 of the Illinois Procurement Code (30 ILCS 500/20-70 (West 2016)) prevents any collateral challenge to the denial of plaintiff's protests, which would include any cause of action asserting the denial of an alleged right to a fair bidding process based on the same claims raised with the chief procurement officer. Additionally, plaintiff could not protest the contract award under section 1.5550(a)(2) of title 44 of the Illinois Administrative Code (44 Ill. Adm. Code 1.5550(a)(2) (2014)) because it did not file a bid.

¶ 23 C. Timeliness

¶ 24 Plaintiff contends the circuit court erred by finding his complaint was untimely. It asserts the chief procurement officer's decisions were not final until its protests were resolved and its administrative remedies were exhausted. Plaintiff lists the date of resolution of its protests as December 8, 2016, and the date for its exhaustion of remedies as March 16, 2017. Plaintiff cites no case law in support of its assertion.

¶ 25 Section 1.5550(a) of title 44 of the Illinois Administrative Code (44 Ill. Adm. Code 1.5550(a) (2014)) clearly defines two separate types of protests and, in no way, suggests the second type of protest is a continuation of the first. Moreover, section 20-70 of the Illinois Procurement Code (30 ILCS 500/20-70 (West 2016)) provides a determination of the chief procurement officer under the code is final and conclusive. Thus, when the chief procurement officer denied plaintiff's protest of the Request on October 14, 2016, it was a final decision as to that protest and the time for seeking review of that decision commenced. As stated, plaintiff

cites no authority the chief procurement officer's decision had to be reviewed by the Board.

¶ 26 With writs of *certiorari* seeking review of an agency decision, Illinois courts have recognized a six-month period for filing the writ. See *Chicago Title Land Trust Co. v. Board of Trustees of Village of the Barrington*, 376 Ill. App. 3d 494, 502, 878 N.E.2d 723, 729 (2007) (citing *Yeksigian v. City of Chicago*, 231 Ill. App. 3d 307, 310, 596 N.E.2d 10, 13 (1992)). Moreover, Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) provides that, if a plaintiff fails to exercise reasonable diligence to obtain service on a defendant after the expiration of the applicable statute of limitations, the court may on its own motion dismiss the cause with prejudice as to that defendant. In considering the plaintiff's exercise of reasonable diligence, the court must review the totality of the circumstances. Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 27 In this case, plaintiff filed its complaint on April 11, 2017 (three days before the end of the six-month period), and did not cause summons to issue until May 9, 2017. The circuit court concluded plaintiff did not exercise reasonable diligence in obtaining service on defendants. On appeal, plaintiff challenges neither the applicability of Rule 103(b) nor the circuit court's finding plaintiff failed to exercise reasonable diligence in obtaining service. Thus, plaintiff has forfeited any such challenge. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2017) ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Accordingly, we will not disturb the circuit court's untimely finding. Additionally, we emphasize time is of the essence in cases such as this where the bidding process continues and a contract is awarded to a third party.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the Sangamon County circuit court's judgment.

¶ 30 Affirmed.