



Decision

Matter of: Crosstown Courier Service, Inc.

File: B-421258

Date: December 22, 2022

Steven A. Neeley, Esq., Michael J. Schrier, Esq., and George E. Stewart, Esq., Husch Blackwell, LLP, for the protester.

Natica Chapman Neely, Esq., Department of Veterans Affairs, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision to terminate protester's contract is dismissed where the protest concerns a matter of contract administration that Government Accountability Office does not have jurisdiction to consider.

DECISION

Crosstown Courier Service, Inc., of Chicopee, Massachusetts, protests certain corrective action taken in response to an agency-level protest that it filed in connection with request for quotations (RFQ) No. 36C24222Q0540, issued by the Department of Veterans Affairs (VA) for courier services to be performed at the agency's New York Harbor Healthcare System. Crosstown argues that the agency improperly has terminated a contract awarded to the firm.

We dismiss the protest.

BACKGROUND

This is our third occasion to consider the agency's actions in connection with its efforts to acquire these services. In March 2021, the agency issued a different solicitation (RFQ No. 36C24220Q0977) to acquire these services, and in June 2021, the agency awarded a contract to FG Management Group, LLC. In the wake of that award decision, another concern, Marquis Solutions, LLC, filed a protest with our Office challenging the propriety of the agency's award. We sustained Marquis's protest, finding that the agency's evaluation of quotations and source selection decision did not withstand logical scrutiny; treated firms disparately; and failed adequately to document

the bases for its evaluation and award decision. *Marquis Solutions, LLC*, B-419891, B-419891.2, Sept. 14, 2021, 2021 CPD ¶ 316. We recommended that the agency reevaluate quotations and make a new source selection decision. *Id.* at 7-8.

In response to our first decision, the agency reevaluated quotations and made a new source selection decision, affirming its award to FG Management. In the wake of that award decision, Crosstown first filed an agency-level protest, and thereafter, a protest with our Office, challenging the propriety of the agency's award decision. In response to Crosstown's protest to our Office, the agency advised that it would take corrective action by terminating the contract awarded to FG Management and cancelling the underlying solicitation. Agency Corrective Action Letter, January 6, 2022. The agency further advised that it would reassess its requirements and issue a new solicitation at a later date. *Id.* Based on the agency's proposed corrective action, we dismissed Crosstown's protest as academic. *Crosstown Courier Service, Inc.*, B-419891.3, Jan. 6, 2022 (unpublished decision).

On June 30, 2022, the agency issued the current RFQ. The agency received quotations in response to that solicitation and selected Crosstown as the apparent successful firm. By e-mail dated October 11, the agency forwarded to Crosstown an award document signed by the contracting officer. Agency Report (AR), Exh. 5, Award Notice at 2. The agency required Crosstown to sign a copy of it and return it to the agency.

The agency's contracting officer transmitted the award document via e-mail and requested that Crosstown provide the agency with "the names and background check documentation for the employees you are proposing for this service within 10 days." AR, Exh. 5, Award Notice at 1. That e-mail further represented that if Crosstown did not provide the requested information within the allotted time, the agency would conclude that Crosstown would be considered incapable to meet the performance criteria. *Id.*

By e-mail dated October 13, Crosstown responded to the agency's request for information pertaining to its prospective employees. Crosstown did not transmit the requested information, but instead sent only a letter in which Crosstown disputed the requirement that the requested information had to be provided within 10 days. AR, Exh. 6, E-Mail Correspondence between the Agency and Crosstown at 5-7. Crosstown's letter characterized the agency's request for that information as "a new evaluation criterion not stated in the solicitation." *Id.* at 5.

The agency's branch chief responded to Crosstown's October 13 letter by e-mail that same day. The branch chief essentially took the position that the 10-day requirement was not a new evaluation criterion as Crosstown had characterized it. AR, Exh. 6, E-Mail Correspondence between the Agency and Crosstown at 16. The branch chief characterized the requested information as a requirement that had always been a part of the information that should have been--but was not--submitted with Crosstown's quotation. *Id.* The branch chief therefore characterized the agency's request as leniency on the part of the agency, apparently because the agency had not required

Crosstown to provide the information earlier with its quotation. *Id.* In support of his position, the branch chief's e-mail referenced a portion of the RFQ's instructions that required vendors to submit various training certificates for their drivers as part of their quotation submission. *Id.* at 16; RFQ at 36.

On October 18, Crosstown sent the signed award document to the agency. AR, Exh. 6, E-Mail Correspondence between the Agency and Crosstown, at 11, 13. At that point, a contract between the parties thus was successfully executed.

On October 20, Crosstown sent another e-mail to the agency's branch chief that included a list of six individuals the company represented were ready to perform the contract, but this e-mail did not include the information that the agency had requested. AR, Exh. 6, E-Mail Correspondence between the Agency and Crosstown at 15. By e-mail dated October 21, the contracting officer wrote to Crosstown, stating that the agency still had not received the documentation and certifications for any of Crosstown's drivers. *Id.* at 14-15. The contracting officer paraphrased the solicitation language identified by the branch chief that required vendors to include with their quotations various training certificates that would be required for all drivers that would be performing on the contract. *Id.*

That same day, Crosstown filed an agency-level protest. AR, Exh. 7, Crosstown Agency Level Protest, Oct. 21, 2022. Crosstown once again characterized the 10-day interval for providing the driver certifications as a new evaluation criterion not stated in the solicitation, and requested that the agency forego the deadline. *Id.* at 4-6.

Crosstown's agency-level protest prompted the agency to reexamine the record of its procurement overall. Based on that reexamination, the contracting officer dismissed Crosstown's agency-level protest as academic by e-mail dated October 27, specifically finding that the agency had reviewed the acquisition and noted procurement irregularities that would necessitate rescinding the award to Crosstown, performing a reevaluation of quotations, and making a new source selection decision. AR, Exh. 8, E-Mail from the Contracting Officer to Crosstown.

After receiving the contracting officer's e-mail dismissing its agency-level protest, Crosstown filed a protest with our Office.

DISCUSSION

Crosstown continues to assert that the agency's insistence that it furnish the required certificates amounts to the application of an unstated evaluation criterion. According to Crosstown, the 10-day requirement is not included in the RFQ, and the agency's decision to terminate its contract for failure to meet the requirement amounts to improper action on the part of the agency.

We dismiss this aspect of Crosstown's protest because it involves a matter of contract administration not within our jurisdiction, and thus not subject to our review. Our Bid

Protest Regulations, 4 C.F.R. § 21.5(a) expressly provide as follows: “The administration of an existing contract is within the discretion of the agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. 41 U.S.C. 7101–7109.”

Here, as described above, the record shows that the parties successfully executed a contract on October 18. AR, Exh. 6, E-Mail Correspondence between the Agency and Crosstown at 11, 13. Nothing in the document suggests that award of the contract was conditioned on Crosstown successfully providing the requested information within the 10-day period. An examination of the award document itself shows that it does not include any conditions that would need to be fulfilled as a condition of the contract becoming effective. Instead, the document identifies the contract numbers; the funding obligation number; the initial period of performance, along with the dollar value of the initial award; and the periods of performance and dollar values of the contract’s option years. *Id.* at 13. In addition, the document includes the executing signatures of both the contracting officer and Crosstown’s chief operating officer. In short, the parties accomplished all of the necessary steps to successfully enter into a valid contract.

In addition, the record demonstrates that Crosstown at all times has acted in a manner that shows it understands that it entered into a contract with the agency. For example, Crosstown’s initial letter to the agency objecting to the imposition of the 10-day requirement states that: “Crosstown is pleased to receive award of the Contract and is working diligently to put staff in place within 10 days, as you have requested.” AR, Exh. 6, E-Mail Correspondence between the Agency and Crosstown at 5. That same letter also states: “Crosstown reserves its right to seek an equitable adjustment for these unexpected costs if the VA is unwilling to either extend its ‘10-day readiness deadline,’ or advance the start of performance to an earlier date.” *Id.* 7.

Crosstown’s agency-level protest similarly reflects the firm’s understanding that it had entered into a contract with the agency. In that document, Crosstown stated: “Crosstown files this agency-level protest to preserve its arguments with respect to the VA’s announced *intention to rescind Crosstown’s award* if it does not provide all required driver documentation within the new 10-business day deadline.” AR, Exh. 7, Crosstown Agency-Level Protest at 3 (emphasis supplied).

Finally, in its protest to our Office, Crosstown recognized that it had entered into a contract with the agency that subsequently was rescinded:

The VA’s termination of Crosstown’s contract *before it even began*—the alleged “corrective action”—is based solely on the VA’s 10-day readiness requirement, which was imposed after the VA made award to Crosstown. The requirement is stated nowhere in the RFQ and it cannot be imposed after the fact to justify a rescission of Crosstown’s award.

Protest at 7.

It is thus apparent from the record that the parties entered into a contract, and the dispute raised in Crosstown's protest to our Office concerns a question relating to the administration of that contract, namely, whether the agency properly could have or should have imposed a 10-day deadline for Crosstown to provide the requested information. Because our Office does not have jurisdiction to consider that question, we decline to offer any views on the matter. This aspect of Crosstown's protest is dismissed.

Aside from its argument concerning the contract administration issue discussed above, Crosstown seeks reimbursement of the costs associated with filing and pursuing its current protest with our Office.¹ Crosstown appears to argue that the agency unduly delayed taking corrective action. According to Crosstown, its allegation concerning the 10-day requirement reflects an argument that it claims it made in its earlier protest challenging the award of FG Management. Crosstown therefore suggests that the agency unduly delayed in taking the corrective action it now intends to take.

To the extent Crosstown seeks reimbursement of its protest costs based on its current protest, our Bid Protest Regulations, 4 C.F.R. § 21.8(d) only contemplate that we may recommend payment of a protester's cost of filing and pursuing its protest where our Office determines that a solicitation, proposed award, or award does not comply with statute or regulation. Since our Office does not have jurisdiction to consider Crosstown's challenge to the 10-day requirement, that argument cannot serve as a basis for our Office to recommend that Crosstown be reimbursed its protest costs.

In addition, as discussed above, the agency took corrective action in response to Crosstown's agency-level protest. The fact that Crosstown elected to file a protest with our Office after the agency advised it of its corrective action does not provide a basis for our Office to conclude that the agency unduly delayed taking corrective action in response to its protest filed with our Office.

¹ As noted, the VA has explained to our Office that, based on its review of the procurement record prompted by the filing of Crosstown's agency-level protest, it discovered a host of other problems with the agency's acquisition that would require corrective action. For example, the contracting officer states that, among other things, the agency never made a price reasonableness determination with respect to Crosstown's pricing; did not perform a responsibility determination in connection with the award of a contract to Crosstown; did not evaluate or analyze Crosstown's past performance materials; failed to make a comparative assessment of all the quotations received; and did not execute a source selection decision documenting the basis for the selection decision. See Contracting Officer's Statement, *passim*. The contracting officer also states that, after a further review of the solicitation, the agency identified flaws that require it to amend the solicitation and solicit, obtain and evaluate revised quotations. *Id.* After receiving the agency report, Crosstown requested as relief only that the agency diligently and thoroughly take all of the corrective action identified in the agency report, and that Crosstown be reimbursed its protest costs.

Finally, Crosstown's earlier protest was filed in connection with an entirely different solicitation. To the extent that Crosstown thought the current solicitation continued to include terms that were ambiguous or otherwise improper, Crosstown was required to file a protest prior to the deadline for submitting a quotation in response to the current solicitation. 4 C.F.R. § 21.1(a)(1). Crosstown did not do so, and any argument it may have made in connection with the prior RFQ is immaterial to the terms of the current RFQ. It necessarily follows that the agency's actions under the earlier RFQ--and by extension any arguments Crosstown may have raised in its earlier protest--cannot provide a basis for our Office to conclude that the agency unduly delayed taking corrective action in response to Crosstown's current, or earlier protest.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel