



Decision

Matter of: Aurora Storage Products, Inc.

File: B-415628

Date: December 1, 2017

Patrick J. Reeks for the protester.

John R. Caterini, Esq., and Kristen Bucher Hahn, Esq., Department of Justice, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that agency improperly eliminated quotation from consideration is dismissed as untimely where protester failed to file its protest within 10 days of learning its basis for protest, and where the agency did not act adversely with respect to the protester's agency-level protest.

DECISION

Aurora Storage Products, Inc., of Aurora, Illinois, protests the issuance of a General Services Administration (GSA) Federal Supply Schedule (FSS) task order to Tenssco Corp., of Dickson, Tennessee, under request for quotations (RFQ) No. DJJE-17-RFQ-1066, issued by the Department of Justice (DOJ) for file storage systems. The protester argues that the agency improperly eliminated its quotation from consideration for award, failed to timely notify Aurora of the award decision, and failed to adequately respond to Aurora's agency-level protest.

We dismiss the protest as untimely.

The RFQ was issued on August 4, 2017, pursuant to Federal Acquisition Regulation (FAR) subpart 8.4, to acquire high density file systems for three floors. On August 21, Mid-Atlantic Filing Distributors submitted a quotation in response to the RFQ. The

protester asserts that Mid-Atlantic, as Aurora's authorized GSA dealer, submitted the quotation on behalf of Aurora.¹

The agency reviewed the submitted quotation and determined it ineligible for award because Mid-Atlantic does not hold a GSA FSS contract. Dismissal Req. at 2. On September 26, the agency issued the subject task order to Tenssco. On October 10, the contracting officer informed Aurora of the DOJ's award decision.

On October 13, Aurora filed a timely agency-level protest with the contracting officer. The protest requested a "thorough review" of the award decision and an "immediate cessation of all contract activities related to this order." Agency-Level Protest at 1. The agency-level protest challenged the agency's failure to consider the submitted quotation, the agency's award to the higher-priced Tenssco, and the agency's failure to provide prompt notice of the award to Aurora.

On October 17, the contracting officer acknowledged Aurora's protest and stated that she would provide a response as soon as possible. Dismissal Req., Ex. A, Email Chain, at 4. The protester responded by stating "[t]hank you for your acknowledgment but I have forwarded basically the same request to the [Office of the Inspector General (OIG)]. My intent was to stay within Justice at this time but I'm asking for an OIG review." Id. at 3. The contracting officer responded to this email by asking if the protester was withdrawing its agency-level protest.² Aurora replied that it was not withdrawing its protest, but explained that "[w]e are protesting through the Department of Justice OIG. We do not expect a review from you personally but rather from your OIG." Id. at 2.

On October 24, the contracting officer responded to this email by clarifying that an allegation submitted to the OIG would be handled differently than an agency-level protest:

Please understand that the OIG does not typically review and handle protests. They may review your allegations as they would any allegation,

¹ The parties dispute whether the quotation, which was transmitted by Mid-Atlantic, can be ascribed to Aurora. For purposes of this decision, we need not decide this question. For ease of reference, we refer to the quotation as the "submitted quotation."

² Under FAR § 33.103, protesters may request review of an agency-level protest by either the contracting officer or "at a level above the Contracting Officer." Neither this provision, nor the DOJ's acquisition regulations, provides for agency-level protests to be decided by the OIG. See id.; see also 48 C.F.R. §§ 2833.101-.103 (DOJ acquisition regulations setting forth that agency-level protests are to be decided by the contracting officer or by the agency protest official). Accordingly, to the extent a complaint is submitted to an agency's OIG for review, it is not considered a "protest" as that term is understood under FAR § 33.103 and our Bid Protest Regulations.

in accordance with their ordinary internal procedures and priorities, but the extent to which they will consult your views or keep you informed of any findings is within their discretion. They also may decline to consider your allegations at all, and may or may not inform you of this decision.

Please confirm that you nevertheless still do not want a written decision from me but instead wish to pursue this through the OIG. (Even if you do not want a written decision from me I will nevertheless review your allegations to ensure that there has not been any impropriety, and take appropriate corrective action if I conclude there has, but I will not inform you of my decision or otherwise follow the agency protest procedures or timetables in Federal Acquisition Regulation Part 33 and Justice Acquisition Regulation Part 33.)

Id. at 1-2.

On October 25, Aurora responded that “we do not wish to withdraw our protest,” but also stated that “a review by the [c]ontracting [o]fficer, while advisable internally would be of little use to those protesting. More directly, it is your actions and decisions that we are protesting.” Id. at 1.

On October 30, Aurora filed the instant protest with our Office. Aurora alleges that the agency improperly eliminated its quotation from consideration for award after incorrectly determining that the quotation was submitted by Mid-Atlantic, rather than on behalf of Aurora. The protester also alleges that the DOJ failed to timely notify Aurora of the award decision and failed to adequately respond to Aurora’s agency-level protest, including by failing to suspend performance of the awarded task order during the pendency of the agency-level protest.

The agency asserts that the protest is untimely because the protester withdrew its agency-level protest and did not file its protest with our Office until more than 10 days after notification of the award decision. Our Bid Protest Regulations contain strict rules for the timely submission of protests. In this respect, our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Where a protest first has been filed with a contracting activity, any subsequent protest to our Office, to be considered timely, must be filed within 10 calendar days of “actual or constructive knowledge of initial adverse agency action.” 4 C.F.R. § 21.2(a)(3). The term “adverse agency action” means any action or inaction on the part of a contracting agency that is prejudicial to the position taken in a protest filed there. 4 C.F.R. § 21.0(e).

Aurora filed this protest on October 30, which was 20 days after the agency informed it of the issuance of the task order to Tennsco. Accordingly, we find that the protester did not file its protest with our Office within 10 calendar days of when it knew, or should have known, of its protest bases.³

The protester asserts that its protest is nonetheless timely because Aurora filed it within 10 calendar days of learning of “actual or constructive knowledge of initial adverse agency action.” Resp. to Dismissal Req. at 3; see also 4 C.F.R. § 21.2(a)(3). In this regard, the protester asserts that on October 25, the contracting officer provided Aurora with a “less than adequate response” to its protest by stating that the OIG does not typically review protests and that the OIG may choose to consider Aurora’s allegations, or may decline to consider the allegations. Resp. to Dismissal Req. at 3; see also Dismissal Req., Ex. A, Email Chain, at 1-2.

Based on our review, we do not agree that the contracting officer’s statements, which simply amount to an explanation of the OIG review process, constitute “adverse agency action.” In this regard, we note that the contracting officer is not the OIG, and does not purport to know, or be conveying, the OIG’s view on the allegations raised by Aurora. Nor do the contracting officer’s statements convey what action, if any, the OIG will ultimately take in response to Aurora’s allegations. Moreover, even if the statements had conveyed what the likely outcome of the OIG investigation would be, we note that the OIG’s review of, and investigation into, the allegations raised by Aurora is not a “protest” as that term is understood under FAR § 33.103 and our Bid Protest Regulations. See supra note 2. Thus, the ultimate action taken by the OIG, whether adverse to Aurora or not, will be separate and apart from the DOJ’s handling of Aurora’s agency-level protest. Accordingly, we find no basis to conclude that the contracting officer’s statements regarding the OIG review process constituted notice of an adverse agency action.⁴

Nor do we find that the agency’s decision to consider the protester’s agency-level protest to be withdrawn constitutes adverse agency action. In this regard, we note that, although the protester represented that it did not wish to withdraw its agency-level protest, it also disavowed its protest by repeatedly stating that it was not seeking a

³ To the extent that the protester challenges the agency’s failure to suspend performance of the task order during the pendency of the agency-level protest, see generally FAR § 33.103(f), this issue does not affect the validity of the award to Tennsco and thus does not provide a basis for us to sustain the protest. See Military Agency Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 at 8.

⁴ We note that the protester does not assert that the contracting officer’s representation that she may not issue a written decision “or otherwise follow the agency protest procedures or timetables in Federal Acquisition Regulation Part 33 and Justice Acquisition Regulation Part 33” constituted an adverse agency action. Dismissal Req., Ex. A, Email Chain, at 1-2.

decision from the contracting officer and instead wanted the OIG to review its allegations. These statements clearly indicate that Aurora did not wish the agency to decide its protest in accordance with the procedures set forth in FAR § 33.103. See FAR § 33.103(d) (providing for agency-level protests to be decided by the contracting officer or by a designated official at a level above the contracting officer). Instead, Aurora asked for its allegations to be decided by the DOJ OIG, which is not an official designated to receive agency-level protests. See supra note 2. In our view, these disavowals constituted a constructive withdrawal of Aurora's agency-level protest since the protester indicated it no longer wished for a decision under the auspices of FAR § 33.103.

Generally, our Office does not consider a withdrawal of an agency-level protest to be an adverse agency action.⁵ In this regard, our Bid Protest Regulations define an adverse agency action as any action or inaction by an agency that is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid or proposal despite a pending protest; or agency acquiescence in continued and substantial contract performance. 4 C.F.R. § 21.0(e). A withdrawal, however, is an action taken by the protester, not the agency, and therefore, even if the result is ultimately prejudicial to the protester's position, it does not constitute an adverse agency action.

Because the instant protest was not filed either (1) within 10 calendar days of when Aurora first learned of its basis to protest, or (2) within 10 calendar days of actual or constructive knowledge of initial adverse agency action, we find the protest to be untimely.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁵ We note that the withdrawal at issue here does not involve a situation where the agency's adverse view of the agency-level protest can be inferred in light of the period of time that has elapsed without a written decision.