



Decision

Matter of: Lyon Shipyard, Inc.

File: B-417734.2

Date: October 22, 2019

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Robert K. Colby, Esq., Department of Homeland Security, for the agency.
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DIGEST

Protest challenging an agency's termination of awardee's contract after another disappointed firm filed a protest is dismissed where the agency's decision to terminate the contract did not arise from a defect or impropriety in the award of the contract, and thus the protester's challenge presents a question of contract administration not for our consideration as part of our bid protest function.

DECISION

Lyon Shipyard, Inc. (Lyon), a small business of Norfolk, Virginia, protests the decision of the Department of Homeland Security, U.S. Coast Guard, to terminate a contract for facilities and services necessary to perform dry dock repairs on the U.S. Coast Guard Cutter (USCGC) Dependable awarded to Lyon under request for quotations (RFQ) No. 70Z080-19-Q-P4590400. The protester contends that the agency unreasonably decided to terminate, rather than defend, the award to Lyon when another disappointed vendor filed a post-award protest challenging the award to Lyon.

We dismiss the protest.

BACKGROUND

On April 3, 2019, the Coast Guard issued a solicitation seeking dry dock repairs for the USCGC Dependable, ported in Virginia Beach, Virginia. Contracting Officer's Statement (COS) at 1. Following the receipt and evaluation of quotations, the agency awarded a contract to Lyon on June 26. Id. at 4. On July 2, Gulf Marine Repair Corporation (Gulf), an unsuccessful vendor, filed a protest with our Office. Id. at 5. As

required by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(3)(A), the next day, the agency sent Lyon an email, directing it to cease performance under the contract and suspend any related activities.¹ Id. at 5.

On July 12, the Coast Guard informed our Office that it was taking corrective action, stating that it would terminate the contract awarded to Lyon for the convenience of the government, reevaluate the USCGC Dependable's dry dock requirements and availability schedule, and take appropriate contracting action at a later date. Protest at 2. Lyon, which intervened in Gulf's protest, objected to the corrective action proposed by the agency, arguing that the agency's corrective action appeared to be a pretext to avoid resolving the merits of Gulf's protest. See Lyon's Objection to Proposed Corrective Action (B-417734) at 2-3. Lyon's objection, however, did not provide a basis for our Office to find that the protest would not be rendered academic by the agency's proposed corrective action. As such, on July 22, we dismissed Gulf's protest as academic. Gulf Marine Repair Corp., B-417734, July 22, 2019 (unpublished decision).

On July 23, the Coast Guard terminated Lyon's contract. COS at 5. The agency states that Lyon's contract was terminated "due to the fact that the operating schedule of [the Dependable] could not support a delayed availability start date." Id. As a result, the Coast Guard decided to perform only dockside maintenance between July and October 2019, and indicated that the necessary dry dock repairs would likely be rescheduled for 2020. Id.; Agency Report (AR), Tab 4, Decl. of Commander, Encl. 1, at 4. On July 29, Lyon filed this protest with our Office.

DISCUSSION

Lyon argues that the agency's corrective action taken in response to Gulf's protest, namely, its decision to terminate Lyon's award and "terminate the [s]olicitation" was unreasonable. Protest at 1, 3-4; Comments at 3-4. In this regard, the protester argues that the termination of Lyon's contract appears to be a pretext to avoid resolving Gulf's protest on the merits, and that there was no impropriety in the Coast Guard's original evaluation of quotations, or in its award decision, that would necessitate corrective action. Protest at 3-4. The protester further argues that the agency's corrective action was unreasonable because the Coast Guard failed to consider available alternatives that would have allowed for Lyon's continued performance on the contract during the pendency of Gulf's protest. Comments at 8-14. Lyon asks our Office to conclude that the agency's corrective action was unreasonable and to recommend that the agency re-award to Lyon. Id. at 1.

¹ The CICA stay of contract performance applied because Gulf filed its protest within five days of the conclusion of its requested and required debriefing. 31 U.S.C. § 3553(d)(4)(A)(ii).

Our Office considers bid protest challenges to the award or proposed award of contracts. 31 U.S.C. § 3552. Therefore, we generally do not review matters of contract administration, which are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the Court of Federal Claims. Bid Protest Regulations, 4 C.F.R. § 21.5(a). An agency's decision to terminate a contract for the convenience of the government is generally a matter of contract administration that falls outside of GAO's bid protest jurisdiction. 4 C.F.R. § 21.5(a); American Material Handling, Inc., B-406739, Aug. 14, 2012, 2012 CPD ¶ 234 at 3. As a limited exception to that rule, our Office will consider the termination of a contract where the agency's decision to terminate arises from a defect or impropriety in the award of the contract. See Optimum Servs., Inc., B-401051, Apr. 15, 2009, 2009 CPD ¶ 85 at 2; Freedom Graphic Sys., Inc., B-277305, Sept. 22, 1997, 97-2 CPD ¶ 82 at 2. In such cases, we examine the award procedures that underlie the termination action for the limited purpose of determining whether the initial award was improper and, if so, whether the corrective action taken is proper. Optimum Servs., Inc., *supra*, at 2-3; Phenix Research Prods., B-292184.2, Aug. 8, 2003, 2003 CPD ¶ 151 at 3.

Here, Lyon does not allege, and the record does not demonstrate, that the agency's decision to terminate Lyon's contract stemmed from a perceived defect or impropriety in the award of the contract. Instead, the Coast Guard's decision to terminate Lyon's contract was the direct result of Lyon's inability to start performance because of the protest filed by Gulf. With performance of Lyon's contract stayed for the duration of Gulf's protest, a period of up to 100 days from the filing date of the protest, the agency determined that the potential delay would create a material disruption to the timing of its scheduled maintenance plans. Specifically, the delay would require the agency to alter its dry-docking plans for the USCGC Dependable, creating a ripple effect on its plans for other vessels in line for repair. COS at 5; Memorandum of Law (MOL) at 3; AR, Tab 4, Decl. of Commander, Encl. 1, at 4. Rather than wait for the resolution of the protest, the agency decided to terminate Lyon's contract for dry dock repairs, perform dockside maintenance at the vessel's homeport in Virginia Beach, and reschedule the dry dock work for some period in calendar year 2020. *Id.* This had the advantage of allowing the agency to use some of the dry dock funds for the dockside repairs while the vessel is in its homeport. COS at 5. This record makes clear that the agency's decision to terminate Lyon's contract resulted from the Coast Guard's post-award assessment of the potential operational delays associated with the stay of performance associated with Gulf's protest, not a defect or impropriety in the award of the contract to Lyon.

As noted above, Lyon does not argue that the Coast Guard's termination decision was the result of a perceived flaw in the underlying evaluation or award decision. Comments at 1 (stating "The Agency's corrective action leading to the cancellation was not taken because of any impropriety in the award of a contract to Lyon."). Rather, the protester chafes at what was essentially the agency's business decision not to defend against the protest filed by Gulf, and to instead pursue an alternative procurement approach to address the consequences of the stay of Lyon's contract. Lyon marshals numerous arguments expressing its dissatisfaction with the agency's analysis of the choices it faced, focusing in particular on the agency's failure to consider continuing with

performance of its contract by overriding the CICA stay, as an agency may do under 31 U.S.C. § 3553(d)(3)(C), in lieu of terminating its contract. See Comments at 8-14.

These arguments, however, concern the agency's post-award business decision that continuing with performance of Lyon's contract was not in the government's best interest; they do not fall within the limited exception under which we will consider whether a contract termination was reasonable, i.e., whether an agency reasonably decided that a defect or flaw in the underlying evaluation and award decision warranted termination of a protester's contract. In other words, Lyon's challenge essentially presents a question of whether the Coast Guard breached its contractual obligations when it terminated Lyon's contract for convenience due to the schedule disruptions occasioned by Gulf's protest. Because the protest challenging the Coast Guard's termination of Lyon's contract presents a question of contract administration, which we do not consider as part of our bid protest function, we dismiss the protest. 4 C.F.R. § 21.5(a).²

The protest is dismissed.

Thomas H. Armstrong
General Counsel

² Lyon also argues that we should consider whether the Coast Guard advanced a reasonable basis for cancelling the underlying RFQ. We find no merit to this argument. First, this argument is wholly derivative of Lyon's protest allegations challenging the termination of its contract, which we do not consider for the reasons set forth above. Second, and most importantly, the Coast Guard has not cancelled the solicitation. Here, the award of the contract to Lyon effectively extinguished the RFQ. To the extent the Coast Guard elected not to amend or otherwise revive the solicitation by, for example, conducting a reevaluation of proposals, there is no cancellation decision for our Office to review, only a request to review a matter of contract administration--the agency's decision to terminate a contract.