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Decision

Matter of: Crowley Government Services, Inc.

File: B-421982

Date: December 19, 2023

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DIGEST

1. Protest is dismissed where the matter involved is the subject of litigation before a court of competent jurisdiction.

2. Protest is dismissed where allegation that the agency failed to investigate an impaired objectivity organizational conflict of interest inherent in the solicitation fails to state a factually or legally sufficient basis for protest.

DECISION

Crowley Government Services, Inc. (Crowley), of Jacksonville, Florida, protests the terms of request for proposals (RFP) No. HTC711-23-R-R009, issued by the Department of the Air Force, on behalf of the United States Transportation Command (USTRANSCOM), for freight transportation services in the continental United States and Alaska, Puerto Rico, and Canada on occasion. The protester contends that the solicitation improperly makes the contract to be awarded subject to General Services Administration (GSA) audit pursuant to the Transportation Act of 1940, 31 U.S.C. § 3726(b).¹ The protester also alleges that the USTRANSCOM failed to

¹ The Transportation Act amended the Interstate Commerce Act (ICA)--originally enacted in 1887 to regulate the railroad industry, see Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), and amended since to cover other modes of transportation--to include post-payment audits and notices of overcharge for transportation-related

(continued...)

investigate and resolve an impaired objectivity organizational conflict of interest (OCI) inherent in the solicitation.

We dismiss the protest.

BACKGROUND

USTRANSCOM provides transportation support to the Department of Defense (DOD).² MOL at 1. In support of this function, USTRANSCOM issued the defense freight transportation services (DFTS) II solicitation on July 27, 2023, in accordance with FAR parts 12 and 15. Agency Report (AR), Tab 11, Conformed RFP at 1, 35-36.³ The solicitation contemplated a single indefinite-delivery, indefinite-quantity contract to be awarded on a best-value tradeoff basis for a total of seven years; the value of the contract is not to exceed \$2.3 billion. Conformed RFP at 3-9, 19, 36. DFTS II is the “follow-on” contract to DFTS I, awarded to Crowley for \$2.23 billion in 2017 and expected to end on July 31, 2024. COS at 2.

The DFTS I contract has been the source of much litigation between the government and Crowley relevant to this protest. In brief, the DFTS I contract requires Crowley to support “[g]overnment agency reviews and audits of all services and support provided,” but does not otherwise specify any government audit procedures. AR, Tab 26, DFTS I Contract, PWS at 66. The Defense Contract Audit Agency does not audit DOD transportation contracts; however, the Defense Travel Regulations (DTR) include a chapter on DFTS contracts that states the GSA performs post-payments audits of DFTS-eligible freight. COS at 5; MOL at 2, 4 (citing DTR, ch. 213, para. E.1.h.). Moreover, the Transportation Act authorizes GSA to “conduct pre- and post-payment audits of transportation bills of *any* Federal agency.” 31 U.S.C. § 3726(b) (emphasis added).

Within the framework of GSA’s post-payment audits under the Transportation Act, GSA may deduct from future payments due to the contractor amounts that GSA’s audit

services provided to the government, such as those at issue in this protest. See Transportation Act, ch. 722, 54 Stat. 954 (1940), as amended 31 U.S.C. § 3726. The parties refer to the Transportation Act and the ICA interchangeably; for the sake of clarity, we will also refer to this statutory scheme as the Transportation Act.

² DOD procures transportation services under the ICA as government bills of lading or tender agreements, or pursuant to the Federal Acquisition Regulation (FAR). See Memorandum of Law (MOL) at 4; Contracting Officer’s Statement (COS) at 5; see also 49 U.S.C. §§ 10721, 13712; FAR 47.000(a)(2).

³ The solicitation was amended seven times; references herein to the RFP are to the conformed version provided by the agency. The only amendment relevant for the purposes of this protest is amendment 1, revising the performance work statement (PWS). AR, Tab 12, RFP amend. 1, PWS.

identifies as overcharges already paid to the contractor. 31 U.S.C. § 3726(d). To the extent that the contractor disputes the overcharges, the Transportation Act provides that GSA will adjudicate disputes between the contracting agency and the contractor. *Id.* § 3726(c)(1).

Pursuant to the above authority, GSA has performed post-payment audits of Crowley's DFTS I contract shipment invoices. MOL at 2. GSA issued notices of overcharge (NOCs) to Crowley and withheld payments due under the DFTS I contract. Protest at 16. Crowley disputed GSA's contract interpretation and filed several claims with the contracting officer in accordance with the contract's disputes clause, FAR 52.233-1, which provides that the contract is subject to the Contract Disputes Act. *Id.* In three final decisions, the contracting officer agreed with Crowley that GSA's interpretation of the DFTS I contract and the overcharges identified were invalid, but the contracting officer still directed Crowley to seek relief through the Transportation Act's dispute resolution process. *Id.* at 16-17.

On August 30, 2021, Crowley filed a complaint against GSA in the U.S. District Court for the District of Columbia seeking a declaratory judgment and injunctive relief.⁴ Crowley's complaint at the district court raised two questions: (1) whether GSA is statutorily authorized to audit Crowley under the DFTS I contract pursuant to the Transportation Act; and (2) whether GSA's audits of invoices and issuance of NOCs that are contrary to the contracting officer's final decisions violate the Contract Disputes Act's finality clause, 41 U.S.C. § 7103(g). AR, Tab 22, Motion for Speedy Declaratory J. Hr'g, *Crowley Gov't Servs., Inc. v. Gen. Servs. Admin.*, No. 21-CV-2298 (BAH) (D.D.C. 2023) at 20-25.⁵ On July 28, 2023, the court issued an opinion holding that "GSA properly exercised its broad delegation of statutory authority under [the Transportation Act] when conducting post-payment audits of the DFTS [I] Contract." AR, Tab 23, *Crowley Gov't Servs., Inc. v. Gen. Servs. Admin.*, No. 21-CV-2298 (BAH) (D.D.C. July 28, 2023) at 54. The court also held that disputes arising from NOCs issued in the exercise of GSA's audit authority are properly channeled through the contracting officer and the Contract Disputes Act, which empowers the contracting agency with the final decision-making authority. *Id.* Both Crowley and GSA have appealed the district court decision to the

⁴ Initially, the district court dismissed Crowley's complaint for lack of subject matter jurisdiction, but the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the action. AR, Tab 23, *Crowley Gov't Servs., Inc. v. Gen. Servs. Admin.*, No. 21-CV-2298 (BAH) (D.D.C. July 28, 2023) at 1, 12. The court of appeals held that Crowley's complaint at the district court was not "'at its essence' contractual because Crowley does not seek to enforce or recover on the contract with [USTRANSCOM], nor does it seek monetary relief." *Id.* at 12 (citations omitted). The court of appeals further held that the district court "has jurisdiction of the action under the [Administrative Procedure Act, 5 U.S.C. §§ 701-706,] and general federal question statute." *Id.*

⁵ Citations to the record for this document use the Adobe PDF or Microsoft Word pagination of the electronic document provided in the agency report.

U.S. Court of Appeals for the District of Columbia Circuit.⁶ AR, Tab 24, *Crowley Gov't Servs., Inc. v. Gen. Servs. Admin.*, No. 21-CV-2298 (BAH) (D.D.C. 2023), *appeal docketed* (D.C. Cir. Aug. 16, 2023); Comments at 16.

As noted above, USTRANSCOM issued the DFTS II solicitation on July 27, 2023. On August 8, after the district court issued its opinion with respect to Crowley's DFTS I contract, USTRANSCOM amended the PWS "to give effect to the holding of that decision." COS at 5. As relevant here, the amended PWS states that "[t]his contract is subject to GSA audits pursuant to 31 U.S.C. § 3726 (the Transportation Act, as amended) and Title 41 CFR Part 102-118 (as amended)." AR, Tab 12, PWS at 32. USTRANSCOM included the GSA Transportation Act audit language in the DFTS II solicitation expressly "so that all Offerors that proposed on the solicitation were aware that such GSA audits could occur and could build risk into their rates if so desired." COS at 7. The solicitation also incorporates by reference FAR clause 52.233-1, Disputes. Conformed RFP at 10.

On September 1, before the proposals were due, Crowley filed an agency-level protest challenging the solicitation terms--specifically, the inclusion of the Transportation Act audit language--and arguing USTRANSCOM failed to investigate, consider, and resolve an impaired objectivity OCI. AR, Tab 16, Agency-Level Protest. USTRANSCOM did not amend the solicitation to address Crowley's allegations by September 8, the deadline for receipt of proposals. Protest at 21-22. [DELETED] offerors, including Crowley, timely submitted proposals. *Id.* at 22; COS at 8. This protest followed.

DISCUSSION

Crowley alleges that USTRANSCOM unlawfully includes the Transportation Act and GSA's implementing regulations in the solicitation. Crowley also contends that USTRANSCOM failed to investigate, consider, and resolve a significant potential OCI inherent in the solicitation. For the following reasons, we dismiss the protest.

⁶ Crowley also filed a related complaint on May 27, 2021 at the U.S. Court of Federal Claims (COFC) appealing the contracting officer's final decisions and disputing GSA's statutory authority to conduct audits, issue NOCs, and withhold payment, under the Transportation Act of DFTS I. AR, Tab 20, Complaint, *Crowley Gov't Servs., Inc. v. United States*, No. 21-1405-PEC (Fed. Cl. 2021) at 10-11; AR, Tab 21, First Amended Complaint, *Crowley Gov't Servs., Inc. v. United States*, No. 21-1405-PEC (Fed. Cl. 2021) at 20-21. To date, the court has not issued a decision.

Concurrent Jurisdiction

Our Office will not decide a protest where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction. 4 C.F.R. § 21.11(b); *Blue Rose Consulting Grp., Inc.*, B-421229, Nov. 22, 2022, 2022 CPD ¶ 291 at 2 (dismissing protest grounds involving issues that are the subject of litigation pending before a district court); *DynCorp Int'l LLC*, B-411126.4 *et al.*, Dec. 20, 2016, 2017 CPD ¶ 333 at 22-23 (dismissing protest grounds involving issues which are the subject of litigation decided by a district court and under appeal at the circuit court of appeals). Even where the issues before the court are not the same as those raised in our Office by a protester or are brought by a party other than the protester, we will not consider the protest if the court's disposition of the matter would render a decision by our Office academic. *Harrington, Moran, Barksdale, Inc.*, B-401934.2, B-401934.3, Sept. 10, 2010, 2010 CPD ¶ 231 at 2 n.2 (dismissing protest grounds challenging the issuance of five out of eight challenged task orders because the five task orders were challenged by another protester at COFC, and even though the issues raised in the COFC protest were unrelated to the issue before GAO, the COFC's disposition of that protest could render a decision by our Office academic). We defer to a court's resolution of similar issues in order to obviate the risk of an inconsistent resolution of the issues between the forums. *Intuitive Research & Tech. Corp.*, B-416820, Oct. 11, 2018, 2018 CPD ¶ 355 at 2 (citing *Robinson Enters.--Req. for Recon.*, B-238594.2, Apr. 19, 1990, 90-1 CPD ¶ 402 at 2; *Snowblast-Sicard, Inc.*, B-230983.2, Aug. 30, 1989, 89-2 CPD ¶ 190 at 2).

USTRANSCOM contends that dismissal is appropriate here because the "matter" involved in Crowley's challenge to the terms of the solicitation was (and is) the subject of litigation before a court of competent jurisdiction, and the court's disposition renders any decision by our Office on Crowley's protest academic. As explained below, we agree with the agency.

In its protest, Crowley argues that the solicitation unlawfully includes the Transportation Act and its attendant GSA audit process in a FAR-based contract. Protest at 22-30. In this regard, Crowley contends that the Transportation Act can only be applied to ICA contracts (and not FAR-based contracts, which are subject to the Contract Disputes Act); according to the protester, it is impossible to apply the Transportation Act and the Contract Disputes Act to the same contract because these statutes have mutually exclusive dispute resolution procedures. *Id.* at 22. Crowley also argues that including the Transportation Act in the solicitation violates the Contract Disputes Act because, in Crowley's view, the Transportation Act unlawfully diverts contract payment disputes from the contracting officer, who is the only government official who can issue a final decision on contract issues under the Contract Disputes Act, to the GSA. *Id.* at 39-42.

Crowley's district court complaint raised the same two issues; the district court decided those issues, and the district court decision has been appealed to the court of appeals. As set forth above, Crowley argued first that "GSA does not have authority to audit a FAR-based contract subject to the [Contract Disputes Act]", and second, that "GSA's

ongoing audits and NOCs violate the [Contract Disputes Act's] finality clause." AR, Tab 22, Motion for Speedy Declaratory Judgment Hearing, *Crowley Gov't Servs., Inc. v. Gen. Servs. Admin.*, No. 21-CV-2298 (BAH) (D.D.C. 2023) at 20-25. The district court held that the Transportation Act "by its plain terms" empowers GSA to audit the DFTS I contract specifically, and that "no aspect of the [Contract Disputes Act] conflicts with GSA's authority to conduct pre- and post-payment audits" generally. AR, Tab 23, *Crowley Gov't Servs., Inc. v. Gen. Servs. Admin.*, No. 21-CV-2298 (BAH) (D.D.C. July 28, 2023) at 46-47. Next, the district court held "Crowley's dispute with GSA's issued NOCs plainly falls within the scope of the [Contract Disputes Act]" because there is no dispute between USTRANSCOM, the contracting agency, and Crowley that would invoke GSA's adjudicative authority under § 3726(c), and because "the [Contract Disputes Act] is expressly incorporated as the dispute resolution process agreed-to by the contracting parties." *Id.* at 51-53. In other words, the Transportation Act does not improperly channel the audit dispute resolution process to the GSA and away from the contracting officer in contravention of the Contract Disputes Act. *See id.* at 54.

Because the matters decided by the district court--and under appeal--concern the same facts and issues that our Office would be required to address in a decision responding to the merits of Crowley's protest regarding the lawfulness of incorporating the Transportation Act in the DFTS II solicitation, the arguments raised by Crowley's protest are not for consideration by our Office in accordance with section 21.11(b) of our Bid Protest Regulations. Even if the court of appeals accepts Crowley's position and reverses the district court decision, USTRANSCOM could decide to amend the solicitation in accordance with the court of appeals decision, which would render our decision academic. Accordingly, we dismiss Crowley's protest ground objecting to incorporation of the Transportation Act into the solicitation.

Impaired Objectivity OCI

Crowley also alleges that USTRANSCOM improperly failed to investigate, consider, and avoid OCIs inherent in the solicitation. Specifically, Crowley argues that under the Transportation Act, GSA outsources its audit function to a third-party contractor paid exclusively from the collected overcharge amount, which incentivizes GSA's audit contractor to find overcharges. Crowley argues therefore that an impaired objectivity OCI is inherent in the solicitation because GSA's audit contractor is in a position to provide recommendations that will directly benefit itself. Protest at 34-38. USTRANSCOM contends that the alleged conflict Crowley identifies does not give rise to an OCI under the FAR. MOL at 28-35.

The FAR requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be categorized into three groups: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. As relevant here, an

impaired objectivity OCI arises where a firm's ability to render impartial advice to the government would be undermined by the firm's competing interests. FAR 9.505(a); *Inquiries, Inc.*, B-418486, *et al.*, May 27, 2020, 2020 CPD ¶ 182 at 11. The concern in such impaired objectivity situations is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated. *Inquiries, Inc.*, *supra*.

The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. *Guident Techs., Inc.*, B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7; *see also Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009). A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. *TeleCommunication Sys. Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3.

We first note that GSA's Transportation Audit Division performs the audits under the Transportation Act and, in accordance with the act, the division is funded by the overpayments collected. 31 U.S.C. § 3726(e) ("Expenses of transportation audit post[-]payment contracts and contract administration, and the expenses of all other transportation audit and audit-related functions conferred upon the Administrator of General Services, shall be financed from overpayments collected from carriers on transportation bills paid by the [g]overnment and other similar type refunds, not to exceed collections."). GSA contracts with third parties to perform its audit function. MOL at 30. Under the Transportation Act "[p]ayment to any contractor for audit services shall not exceed 50 percent of the overpayment identified by contract audit." 31 U.S.C. § 3726(e).

Here, Crowley fails to identify any facts indicating the existence of an actual or potential OCI. GSA conducts its post-payment audits as contemplated by Congress and as authorized by the statute. In our view, there can be no impaired objectivity OCI when the contract audit function is performed pursuant to a statutory scheme enacted by Congress.

Moreover, Crowley's arguments concern an alleged conflict with respect to the performance of GSA's third-party audit contracts, not the DFTS II contract. For an impaired objectivity OCI to exist related to the DFTS II contract, the contractor performing the audit for GSA would also need to submit an offer for the DFTS II contract. Otherwise, the GSA contractor is simply not in a situation where competing interests exist with respect to performing the DFTS II contract. The protester has made no allegation that GSA's audit contractor has also submitted a proposal for the DFTS II contract.

Based on Crowley's failure to identify any hard facts or legal theory demonstrating the existence or potential existence of an OCI, we dismiss this allegation for failing to state a valid basis of protest. 4 C.F.R. § 21.5(f); *see Trailboss Enters., Inc.*, B-415970 *et al.*,

May 7, 2018, 2018 CPD ¶ 171 at 11; *DGC Int'l*, B-410364.3, Apr. 22, 2015, 2015 CPD ¶ 136 at 7.

The protest is dismissed.

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