



Decision

Matter of: MD Helicopters, Inc.

File: B-417379

Date: April 4, 2019

Brett W. Johnson, Esq., Colin Ahler, Esq., and Derek Flint, Esq., Snell & Wilmer LLP, for the protester.

Jennifer S. Zucker, Esq., Melissa P. Prusock, Esq., and Daniel D. Straus, Esq., Greenberg Traurig, LLP, for Sikorsky Aircraft Corp.; Scott M. McCaleb, Esq., Sarah B. Hansen, Esq., and Jon W. Burd, Esq., Wiley Rein LLP, for The Boeing Co., the intervenors.

Debra J. Talley, Esq., Department of the Army, for the agency.

Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of the agency's evaluation of proposals for the award of other transaction agreements pursuant to the authority of 10 U.S.C. § 2371b is dismissed because our Office generally does not review protests of awards, or solicitations for awards, of other transaction agreements.

DECISION

MD Helicopters, Inc., a small business, of Mesa, Arizona, protests the decision of the Department of the Army, U.S. Army Futures Command, not to enter into a phase one other transaction agreement (OTA) pursuant to 10 U.S.C. §2371b with MD Helicopters under solicitation No. W911W6-19-R-0001, for the development of a future attack reconnaissance aircraft competitive prototype.¹ MD Helicopters argues that the Army unreasonably evaluated its proposal, and otherwise failed to reasonably promote small business participation in accordance with 10 U.S.C. § 2371b(d)(1).

¹ Under the provisions of 10 U.S.C. § 2371b, the Secretary of the Army is authorized to enter into OTAs for prototype projects. As we have previously recognized, OTAs issued under this authority are not procurement contracts and do not fall under the provisions of the Federal Acquisition Regulation. Blade Strategies, LLC, B-416752, Sept. 24, 2018, 2018 CPD ¶ 327 at 1-2.

We dismiss the protest because we do not review the award of non-procurement instruments issued under an agency's OTA authority.

Under the Competition in Contracting Act of 1984 (CICA), and our Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such award. See 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). In circumstances where an agency has statutory authorization to enter into "contracts . . . [or] other transactions," we have concluded that agreements issued by the agency under its "other transaction" authority "are not procurement contracts," and therefore we generally do not review protests of the award or solicitations for the award of these agreements under our bid protest jurisdiction. Blade Strategies, LLC, B-416752, Sept. 24, 2018, 2018 CPD ¶ 327 at 2; Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22 at 3. With respect to a procurement involving an OTA, our review is limited to a timely pre-award protest that an agency is improperly using its other transaction authority to procure goods or services. 4 C.F.R. § 21.5(m); Blade Strategies, LLC, supra. MD Helicopters' protest, however, concerns the agency's evaluation of proposals and award decision, which are not within our bid protest jurisdiction.

MD Helicopters opposes dismissal of its protest arguing that 4 C.F.R. § 21.5(m) provides that "GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts" (emphasis added), and, therefore, we should exercise our "considerable discretion" to hear its protest challenging the evaluation of its OTA proposal. Protester Opp. to Request for Dismissal at 3-4. This argument is without merit. As addressed above, our Office's bid protest jurisdiction was established by Congress in CICA. Our Office does not enjoy broad discretion to modify or expand our jurisdiction beyond the grant provided by Congress. As discussed above, CICA limits our jurisdiction to reviewing protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such award. See 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). As addressed above, OTAs are not procurement contracts. Blade Strategies, LLC, supra.

With respect to the use of the term "generally" in 4 C.F.R. § 21.5(m), contrary to MD Helicopters' argument, the term is not intended to connote some reserved discretion for GAO to consider hearing cases involving the award or proposed award of an OTA, or other non-procurement agreement. Rather, it connotes that GAO may, in limited circumstances, hear a protest that tangentially impacts an agency's award or proposed award of other than a procurement contract. In this regard, with respect to OTAs, our Office will review whether an agency has failed to comply with its statutory OTA authority, and therefore is improperly using an OTA to acquire goods or services in lieu of acquiring the goods or services using a procurement contract. See, e.g., 4 C.F.R. § 21.5(m) ("GAO does, however, review protests alleging that an agency is improperly

using a non-procurement instrument to procure goods or services.”); ACI Techs., Inc., B-417011, Jan. 17, 2019, 2019 CPD ¶ 24 at 3; Oracle America, Inc., B-416061, May 31, 2018, 2018 CPD ¶ 180 at 11; MorphoTrust USA, LLC, B-412711, May 16, 2016, 2016 CPD ¶ 133 at 7. Absent any allegation by MD Helicopters that the Army is improperly using its statutory OTA authority to acquire goods or services that should be acquired via a procurement contract, we have no jurisdiction over its protest.

The protest is dismissed.

Thomas H. Armstrong
General Counsel