



# Decision

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**Matter of:** Air Tractor, Inc.

**File:** B-418244; B-418244.2

**Date:** February 10, 2020

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Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., and Todd M. Garland, Esq., Smith Pachter McWhorter PLC, for the protester.

James J. McCullough, Esq., Michael J. Anstett, Esq., and Katherine L. St. Romain, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP, for Textron Aviation Defense, LLC, the intervenor.

Heather M. Mandelkehr, Esq., Thomas M. Powers, Esq., and John F. Spurlin, Esq., Department of the Air Force, 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.

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## DIGEST

1. Protest arguing that agency's use of a statute permitting the procurement of items for experimental purposes was impermissible due to limitations set forth in a different statute pertaining to prototype projects is dismissed as untimely where the protester waited until its comments on the agency report to raise this argument.

2. Protest arguing that agency's use of a statute permitting the procurement of items for experimental purposes was impermissible under the requirements of that statute is denied where the agency did not abuse its discretion in deciding that the award met applicable statutory requirements.

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## DECISION

Air Tractor, Inc., a small business located in Olney, Texas, protests the issuance of request for proposal (RFP) No. FA8637-20-2-0001 by the Department of the Air Force to Textron Aviation Defense, LLC, located in Wichita, Kansas, seeking light attack aircraft for use in the agency's light attack experimentation (LAE) III program. The protester asserts that the agency improperly used its authority under 10 U.S.C. § 2373, Procurement for Experimental Purposes, to issue the RFP to Textron without complying with applicable statutory and regulatory requirements.

We dismiss the protest in part and deny the protest in part.

## BACKGROUND

The challenged solicitation represents the most recent purchase of light attack aircraft by the Air Force to address the agency's need for weapon systems to meet counter violent extremist operations (c-VEO) requirements. Contracting Officer's Statement (COS) at 2. In the prior two phases of the program (LAE I and LAE II), the agency used its "other transaction authority" under 10 U.S.C. § 2371b, Authority of the Department of Defense to Carry-Out Certain Prototype Projects, to conduct market research and experimentation with the aim of developing a light attack capability.<sup>1</sup> See id. at 3.

For LAE I, the Air Force's Office of Strategic Development Planning and Experimentation issued an invitation to vendors, in May of 2017, to participate in the agency's market research into the industry's capability, capacity, and interest in providing cost-effective light attack aircraft platforms for the Air Force's future force structure. Id. at 2. The Air Force used the results of this process to develop an acquisition strategy for the next phase of the experimentation, LAE II. Id. at 3. In the summer of 2018, the Air Force chose two vendors' aircraft, Textron's AT-6C and Sierra Nevada Corporation's A-29, to participate in the LAE II effort. Id. LAE II was cut short, however, when, on June 22, the A-29 participating in the experiment crashed. Id. at 4.

In February 2019, the Air Force announced it would not pursue a competitive fleet procurement but would instead continue to pursue experimentation through the use of a smaller fleet buy. Id. In the summer of 2019, the Air Force began developing its LAE III strategy, with the primary goal of developing a light attack capability via an "optimum mix of technology and [tactics, techniques, and procedures] . . . to enable seamless operations between the [Air Force] and partner nations executing c-VEO operations to maximize the speed, safety, and confidence of those operations." Agency Report (AR), Tab 7, Light Attack Capability Concept of Operations (CONOPS), at 10.

On May 31, the Air Force executed a determination and findings (D&F) document, explaining its decision to purchase one to three Textron AT-6 aircraft via what the Air

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<sup>1</sup> "Other transactions" are legally-binding instruments that by statutory definition are other than contracts, grants, or cooperative agreements, and generally are not subject to federal laws and regulations applicable to procurement contracts. Oracle Am., Inc., B-416061, May 31, 2018, 2018 CPD ¶ 180 at 1 n.1. These instruments are used for various purposes by federal agencies that have been granted statutory authority permitting their use. Id. Section 2371b of title 10 of the United States Code authorizes certain Department of Defense (DOD) officials to enter into transactions for prototype projects, as well as follow-on production contracts or transactions, provided the requirements of the statute are met. Such prototypes can be used by agencies to help evaluate the technical or manufacturing feasibility, or the military utility, of a particular technology or process, concept, or system. See Federal Acquisitions: Use of 'Other Transaction' Agreements Limited and Mostly for Research and Development Activities, GAO-16-209 at 5 (Jan. 2016).

Force termed an “Other Transaction type contract” for use in LAE III “under the authority of 10 U.S.C. § 2373, ‘Procurement for Experimental Purposes.’” AR, Tab 4, D&F. Section 2373 provides as follows:

(a) Authority.--The Secretary of Defense and the Secretaries of the military departments may each buy ordnance, signal, chemical activity, transportation, energy, medical, space-flight, telecommunications, and aeronautical supplies, including parts and accessories, and designs thereof, that the Secretary of Defense or the Secretary concerned considers necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense.

(b) Procedures.--Purchases under this section may be made inside or outside the United States and by contract or otherwise. Chapter 137 of this title applies only when such purchases are made in quantities greater than necessary for experimentation, technical evaluation, assessment of operational utility, or safety or to provide a residual operational capability.

10 U.S.C. § 2373.

The D&F stated that the purchase met the requirements of 10 U.S.C. § 2373 because the AT-6 aircraft constituted an “aeronautical supply,” whose purchase was “necessary to continue [light attack aircraft] experimentation,” and because the Air Force was purchasing only the quantity needed for the experimentation (“one to three AT-6s”). AR, Tab 4, D&F, at 1.

On October 24, the RFP was issued to Textron to initiate the purchase of the AT-6 aircraft, along with related contractor support, to assist the government-led experimentation effort. AR, Tab 8, RFP, at 9.

This protest followed.

## DISCUSSION

The protester argues that the Air Force’s decision to acquire aircraft from Textron pursuant to the agency’s authority under 10 U.S.C. § 2373 does not comply with applicable statutory and regulatory requirements. As an initial matter, Air Tractor argues that the agency’s proposed award improperly evades the follow-on requirements of the other transaction agreement (OTA) statute found at 10 U.S.C. § 2371b, under which the earlier LAE efforts were undertaken. The protester also contends that the agency’s reliance on 10 U.S.C. § 2373 as authority for this acquisition is not appropriate because the contract is for production, and because the agency has failed to demonstrate that the aircraft at issue meet that statute’s requirements. Finally, the protester argues that the agency failed to comply with statutory and regulatory requirements requiring the agency to conduct market research and provide appropriate notification to interested parties before awarding a sole-source contract.

For the reasons discussed below, we find no basis to sustain the protest.

## Jurisdiction

As a preliminary matter, we review our jurisdiction to consider the Air Force's use of its authority under 10 U.S.C. § 2373. Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3552, our Office has jurisdiction to consider protests concerning an alleged violation of a procurement statute or regulation. The statute further defines a protest as a written objection by an interested party to any of the following:

- (A) A solicitation or other request by a [f]ederal agency for offers for a contract for the procurement of property or services.
- (B) The cancellation of such a solicitation or other request.
- (C) An award or proposed award of such a contract.
- (D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.
- (E) Conversion of a function that is being performed by [f]ederal employees to private sector performance.

## 31 U.S.C. § 3552.

The statute at issue here, 10 U.S.C. § 2373, permits a DOD agency to procure certain items, including aeronautical supplies, via "contract or otherwise." 10 U.S.C. § 2373(b). The record clearly establishes that, in this instance, the Air Force is seeking to procure the aircraft via the award of a contract. First, the agency's D&F states that it seeks to acquire the aircraft via an "Other Transaction type contract under the authority of 10 U.S.C. § 2373." AR, Tab 4, D&F, at 1. Second, the agency issued an RFP seeking a proposal from Textron to provide aircraft as well as contractor support services. RFP at 1. Since the agency is using a contract to obtain goods and services, we conclude that our Office has jurisdiction under CICA to review the agency's compliance with the applicable statute, 10 U.S.C. § 2373. We note that, had the agency used its authority under 10 U.S.C. § 2373 to acquire items via a non-contractual instrument, such a transaction may have fallen outside of our jurisdiction.<sup>2</sup>

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<sup>2</sup> Throughout this protest, the protester, the Air Force, and the intervenor referred to 10 U.S.C. § 2373 as an OTA statute. While the parties do not dispute this characterization--and hence the question need not be resolved here--the characterization does not appear to be accurate. OTA statutes, e.g., 10 U.S.C. § 2371b, permit an agency to acquire qualifying items via a transaction that by statutory definition is other than a contract, grant, or cooperative agreement, whereas 10 U.S.C. § 2373 permits a DOD agency to procure qualifying items via "contract or otherwise." Since section 2373 anticipates the use of a contract (at least in some instances) to

While our Office has jurisdiction to review the agency's compliance with section 2373, we note that the statute provides that any contract used need not adhere to the procurement requirements set forth in chapter 137 of title 10, unless the purchase is for quantities "greater than necessary for experimentation, technical evaluation, assessment of operational utility, or safety or to provide a residual operational capability." 10 U.S.C. § 2373(b). This exemption from the competitive requirements of chapter 137 was intended by Congress to "offer an alternative acquisition path for the Department of Defense to pursue technologies and solutions from non-traditional contractors to maintain technological superiority in the future." Senate Committee on Armed Services Report, S. Rep. No. 114-49, at 176 (2015). Since a qualifying procurement conducted under this statute is not required to comply with the requirements governing competitive acquisitions, our review of such a procurement is generally limited to determining whether the purchase complies with the requirements of the statute.<sup>3</sup>

Because Air Tractor argues that it is not proper for the Air Force to use its authority under 10 U.S.C. § 2373 to award a contract to Textron, we conclude that our Office has jurisdiction to review this limited protest issue.

#### Applicability of 10 USC § 2371b

The protester first argues that the proposed award is an improper attempt to evade the requirements governing follow-on production contracts or transactions found at 10 U.S.C. § 2371b. That statute permits defense agencies to reach agreements for "prototype projects" and follow-on production contracts or transactions provided for in the prototype project transaction. See 10 U.S.C. § 2371b(f). The protester notes that

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procure an item, as here, most commentators have concluded that section 2373 is not properly characterized as an OTA statute. See, e.g., Moshe Schwartz and Heidi M. Peters, Cong. Research Serv., R45521, Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress at 3 (2019) ("10 U.S.C. § 2373, while generally not considered an *other transaction authority*, allows DOD to buy certain items and designs for experimental or test purposes without having to adhere to the procurement laws set forth in Chapter 137 of Title 10.") (emphasis in original); see also Contracting Cone, Def. Acquisition Univ., <https://aaf.dau.edu/aaf/contracting-cone/> (last visited Feb. 10, 2020).

<sup>3</sup> Specifically, use of the statute is limited in three primary ways. The authority is limited by domain (ordnance, signal, chemical activity, transportation, energy, medical, space-flight, telecommunications, and aeronautical supplies, including parts and accessories, and designs thereof); limited by purpose (necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense); and limited by quantity (the quantities needed for experimentation, technical evaluation, assessment of operational utility, or safety or to provide a residual operational capability). 10 U.S.C. § 2373.

LAE I and LAE II were authorized as prototype OTA projects under 10 U.S.C. § 2371b and argues that LAE III is a follow-on effort, and therefore is subject to the limitations of 10 U.S.C. § 2371b(f). The protester further contends that the solicitation includes extensive production requirements, and, in fact, is classified under North American Industry Classification System code 336411, which is reserved for aircraft manufacturing. In the protester's view, given these production requirements, "permitting the Air Force to award an OTA to Textron using a separate statute--10 U.S.C. § 2373--will nullify [the] follow-on provisions in 10 U.S.C § 2371b(f)(2)(A)-(B)." Protester's Comments at 12.

As a preliminary matter, we find this protest argument to be untimely because it was raised, for the first time, in Air Tractor's comments on the agency report. Under our Bid Protest Regulations, protests generally must be filed no later than 10 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). Moreover, where a protester initially files a timely protest, and later supplements it with independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. Synergy Solutions, Inc., B-413974.3, June 15, 2017, 2017 CPD ¶ 332 at 7.

Here, the initial protest contained a general argument that the Air Force had violated statutes applicable to DOD's other transaction authority. Protest at 11-13. On November 13, the agency sought dismissal of this argument, asserting that the protester was trying to apply the rules governing 10 U.S.C. § 2371b to the instant procurement, despite the fact that the agency had not relied on this statute as authority for its intended award and had, instead, relied on its authority under 10 U.S.C. § 2373.

In response, the protester argued that it was not relying on the authority of 10 U.S.C. § 2371b; rather, Air Tractor maintained, that its citations to 10 U.S.C. § 2371b were meant to illustrate that GAO should apply the same reasoning used for cases involving section 2371b to decide our Office's jurisdiction in the instant matter. See Response to Dismissal Req. at 5. Notably, the protester did not argue in its response to the agency's dismissal request that the requirements of section 2371b limit the Air Force's ability to rely on its authority under 10 U.S.C. § 2373 to award a contract to Textron. Instead, the protester waited a month, until it filed comments on the agency report, to make this argument. We find that this argument was not timely raised.

At any rate, we find no merit to this protest ground. The starting point of any analysis of the meaning of a statutory provision is the statutory language used by Congress. International Program Grp., Inc., B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172 at 5 (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Nothing in the language of 10 USC § 2371b limits an agency from using another statute to purchase an item if the purchase is consistent with that separate statutory authority. In addition, nothing in the language of 10 U.S.C. § 2373 limits the agency's use of that statute based on its prior usage of 10 U.S.C. § 2371b in a previous

procurement.<sup>4</sup> And, while 10 U.S.C. § 2371b contains requirements that must be met before a follow-on production contract can be awarded pursuant to 10 U.S.C. § 2371b, it does not proscribe agencies from using different statutory bases to enter into contracts for other purposes, such as the agency's intended experimentation here. Nor will we read such a limitation into the statute by adopting an overly broad interpretation of the statute, e.g., by construing the term "follow-on production contract" to apply even when the agency relies on a statutory authority other than 10 U.S.C. § 2371b. Such an interpretation goes far beyond the language appearing within the statutory provision.

### Compliance with Requirements of 10 U.S.C. § 2373

The protester further argues that the acquisition record does not support the agency's contention that it needs the aircraft for an experimental purpose, as required by 10 U.S.C. § 2373. In this respect, Air Tractor asserts that the AT-6 aircraft being purchased are not experimental aircraft, and that the solicitation does not support the agency's contention that the Textron aircraft will be used for experimentation. The protester notes that the solicitation's statement of work includes a single, general reference to experimentation and that other portions of the solicitation include only "general references to 'experimentation' that fail to establish how the intended award involves 'experimental' services." Protester's Comments at 13. The protester further asserts that the solicitation involves extensive production and acceptance testing tasks, all of which belie the agency's position that the procurement was experimental in nature.

Based on our review of the acquisition record, we find the protester's argument to be without merit. While the solicitation contains production task items, and does not contain a detailed exposition of the experimentation to be conducted, we are not persuaded that this means the aircraft being purchased will not be used for experimentation. As the agency notes, it is the Air Force (not Textron) that will be conducting the experimentation, so there is no need for the solicitation to contain such detail, "much like a contract for test tubes would not impose on the test tube manufacturer the task of conducting the experiments or include all of the details of the experiment to be conducted." Supp. Memorandum of Law (MOL) at 3. In addition, we note that the experimentation involves more than just the aircraft; it also involves techniques and tactics (i.e., operational paradigms) that can be employed with the aircraft. MOL at 13.

Further, the contemporaneous acquisition record supports the agency's position that the aircraft will be used for experimentation. In support of its determination in this regard, the Air Force executed a D&F that sets forth the agency's intention to purchase "one to three AT-6 . . . to continue [light attack aircraft] experimentation that will lead to development of the best [c-VEO] weapons system options in order to meet priorities of

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<sup>4</sup> We note also that our Office generally treats each procurement as a separate action, with an agency's actions under one procurement not affecting the propriety of its actions under a different procurement. Holiday Inn; Baymont Inn & Suites, B-288099.3, B-288099.4, Sept. 20, 2001, 2001 CPD ¶ 166 at 2 n.1.

the national defense.” AR, Tab 4, D&F, at 1. The D&F noted that the experimentation would focus on:

- (1) Discovering and developing effective Joint Tactical Air Control (JTAC) tactics tools and procedures, the key component in c-VEO engagements
- (2) The operational effectiveness of networked battlefield intelligence and communications systems
- (3) The effectiveness of engagements operationally integrated with coalition partner nations. This will include experimentation alongside coalition and international partners, to assess the feasibility and effectiveness that operations can be synchronized between the US and foreign partners to meet shared national objectives.

Id. The agency’s contemporaneous acquisition planning documents provide further evidence of its experimentation plan, including the agency’s concept of operations document and an acquisition strategy panel presentation.<sup>5</sup> See AR, Tab 7, CONOPS, at 10; AR, Tab 6, Acquisition Strategy Panel Presentation, at 8.

While the protester argues that these documents are inadequate since they are not binding solicitation documents, we disagree.<sup>6</sup> Instead, we find that these documents expound on the agency’s experimentation plans, which are also referenced in the solicitation documents. Together, these documents set forth the agency’s experimentation plan and its plan for the purchase of the AT-6 aircraft and related contractor support. Accordingly, we find that the record adequately supports the agency’s use of its discretion under 10 U.S.C. § 2373 to acquire the AT-6 aircraft at issue.<sup>7</sup>

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<sup>5</sup> With respect to the Textron aircraft (the AT-6), in particular, the contracting officer has noted that the aircraft’s technological and production maturity would enable the program to meet fielding timelines required in the fiscal year 2020 to conduct LAE III in fiscal year 2021. COS at 7.

<sup>6</sup> The protester’s reliance on Oracle Am., Inc., supra, at 17, in support of this argument, is inapt. In that decision, we found that an agency could not meet a requirement that a prototype OTA provide for a follow-on production contract, using a document other than the prototype OTA. Id. Here, the procurement statute in question does not require that the solicitation contain the entirety of the agency’s experimentation plan, nor would it make sense for it to do so, especially where the agency, rather than the contractor, is conducting the experimentation.

<sup>7</sup> While the protester argues that the solicitation does not limit the number of AT-6 aircraft to three, and could always be modified to include additional aircraft, we find this argument to be premature and speculative at this stage. Should the agency modify the RFP to provide for additional aircraft, beyond the quantity necessary for experimentation, the protester may challenge such an action at that time.



The protester also argues the D&F is inadequate because it (1) “lacks any reference to competition, contrary to [the] congressional preference for competition,” (2) fails to show that the AT-6 aircraft, as compared to Air Tractor’s aircraft, are necessary for the proposed experimentation, and (3) “cites a non-existent program (LAE III) in an improper attempt to justify the intended sole-source OTA.” Protester’s Comments at 15. As an initial matter, we find nothing in the statutory language requiring an agency to conduct a competition, or consider competitive acquisition methods, before using 10 U.S.C. § 2373. In fact, the statute specifically exempts the agency from the competitive requirements found at chapter 137 of title 10 when the quantities purchased are limited as here.<sup>8</sup>

Similarly, we decline to impose a requirement that to qualify as “necessary” the item being purchased for experimentation be purchased from the only available source. In our view, had the statute intended such a restrictive interpretation of the word “necessary,” it would have expressly said so, e.g., by adopting requirements such as those found in Federal Acquisition Regulation § 6.302-1. Last, we find no support in the record for the protester’s contention that LAE III is a non-existent program; indeed, the record demonstrates otherwise. See, e.g., AR, Tab 7, CONOPS, at 5; AR, Tab 6, Acquisition Strategy Panel Presentation, at 8; COS at 5-6.

The protest is dismissed in part and denied in part.

Thomas H. Armstrong  
General Counsel

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<sup>8</sup> The protester also argues that the Air Force was obligated, by various regulatory and statutory requirements, to conduct market research and provide notice of its intent to award a contract to Textron. We find, however, that the purpose of these requirements is to increase competition, e.g., by requiring agencies to determine whether acquisitions require the use of competitive procedures. Since 10 U.S.C. § 2373 does not require the Air Force to use, or even to consider using, such competitive acquisition methods, we see no purpose to be served by requiring the agency to conduct market research or provide notice prior to awarding a contract under this statute. In addition, since no competition is required, the protester cannot credibly claim to be prejudiced by any of these failures. See generally Azimuth, Inc., B-409711, B-409711.2, July 21, 2014, 2014 CPD ¶ 218 at 3 n.2. Accordingly, we find that these arguments do not provide a basis to sustain the protest.