



Decision

Matter of: Lunar Resources, Inc.

File: B-421936

Date: November 14, 2023

Elliot Carol for the protester.

Scott E. Pickens, Esq., Barnes & Thornburg LLP, for Blue Origin, LLC, an intervenor.
Meredith K. Blasingame, Esq., and Young H. Cho, Esq., National Aeronautics and
Space Administration, for the agency.

Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's award of a Funded Space Act Agreement, issued pursuant to the agency's other transaction authority, is dismissed as challenging an action outside of GAO's bid protest jurisdiction.

DECISION

Lunar Resources, Inc. (LRI), of Houston, Texas, protests the award of a Funded Space Act Agreement (FSAA) to Blue Origin, LLC, of Kent, Washington, by the National Aeronautics and Space Administration (NASA) under announcement for partnership proposals (AFPP) No. 80HQTR22SOA02, which solicited proposals to advance commercial space technologies that are at a "tipping point" in their development. LRI argues that Blue Origin is not entitled to award because Blue Origin made fraudulent representations in its proposal.

We dismiss the protest.

The AFPP sought proposals under two topic areas: (1) cislunar/lunar surface infrastructure and capabilities and (2) in-space infrastructure and capabilities. Protest, exh. A, AFPP at 2-3. The AFPP contemplated the award of FSAs with milestone payments tied to major technical achievements. *Id.* at 4. The AFPP stated that NASA was looking for a broad portfolio of technologies that would be funded, but that the agency reserved the right to select "none, one, or multiple proposals deemed the most competitive." *Id.* at iii. The AFPP anticipated funding up to a total of approximately

\$150-200 million for all selections, and the award durations for each FSAA could range from one to four years. *Id.* at 5.

The AFPP also advised offerors that the evaluation process NASA intended to use for the selection of FSAA(s) was “especially tailored for this Announcement.” *Id.* at 24. The AFPP further advised that the process “does not involve the procedures set forth in the Federal Acquisition Regulation (FAR) nor the NASA FAR Supplement (NFS) since this Announcement will not result in the award of a contract.” *Id.*

LRI and Blue Origin were among the firms that submitted final proposals. Req. for Dismissal at 4. NASA selected 11 firms, including Blue Origin, for award of a Tipping Point FSAA. *Id.* The same day that it announced those awards, NASA notified LRI that its proposal was not selected for award of a Tipping Point FSAA. *Id.*

LRI filed an agency-level challenge to the award to Blue Origin, asserting that Blue Origin’s proposal included fraudulent representations and was not entitled to contract award.¹ See Protest, exh. B, Agency-Level Protest at 2-3. LRI did not challenge the agency’s decision not to award the protester a Tipping Point FSAA. See *id.* LRI requested that NASA rescind the award to Blue Origin or, in the alternative, rescind the funding of the award until the agency had investigated LRI’s allegations. *Id.* at 3.

In response, the agency agreements officer advised LRI that Funded Space Act Agreements are awarded pursuant to NASA’s other transaction authority (OTA)², not a competition subject to protest under the FAR. Protest, exh. C, Email from NASA to LRI. The agreements officer noted that the Tipping Point FSAA provides “for the informal resolution of concerns from interested parties,” and that, in the agreement officer’s view, LRI’s allegations provided “no basis for further action.” *Id.*

LRI’s protest to GAO--which is identical to the agency-level protest--followed.

NASA argues that it awarded an FSAA to Blue Origin under the AFPP pursuant to the agency’s OTA under the Space Act and that, accordingly, LRI’s protest should be dismissed because GAO lacks jurisdiction to consider the protest. Req. for Dismissal at 1. In response, LRI stated that “[p]oints of NASA’s argument for Protest dismissal are valid.” Protester’s Resp. to Req. for Dismissal. LRI argued, however, that based on its knowledge of alleged fraud and misrepresentation by Blue Origin, the protester felt a legal and moral obligation to protest NASA’s award of a Tipping Point FSAA to Blue

¹ The agency argues that the protester incorrectly identified “the award instrument as a contract,” when it was, in fact, an FSAA. Req. for Dismissal at 4 n.8.

² See National Aeronautics and Space Act of 1958, 51 U.S.C. § 20113(e) (authorizing NASA “to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate”).

Origin. *Id.* LRI did not challenge the agency's assertion that GAO lacked jurisdiction to consider this protest. *See id.*

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 OTA "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. *Spartan Medical, Inc.*, B-419503, Feb. 26, 2021, 2021 CPD ¶ 109 at 2; *System Architecture Info. Tech.*, B-418721, June 2, 2020, 2020 CPD ¶ 184 at 2. The exception to this general rule is a timely, pre-award protest alleging that the agency is improperly exercising its OTA to avoid using a procurement contract. *Spartan Medical, Inc.*, *supra*.

LRI has not alleged that NASA was using its OTA improperly to acquire goods or services that should be acquired using a procurement contract. Rather, LRI's challenge is confined to the evaluation of Blue Origin's proposal and the award of a Tipping Point FSAA to that firm. Consequently, our Office does not have jurisdiction to consider this allegation. *Spartan Medical, Inc.*, *supra*.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel