

Decision

Matter of: Spartan Medical, Inc.

File: B-419503

Date: February 26, 2021

Keith J. Feigenbaum, Esq., and Luke McLoughlin, Esq., Duane Morris LLP, for the protester.

Colonel Patricia S. Wiegman-Lenz, Lawrence M. Anderson, Esq., and Sariah Adams, Esq., Department of the Air Force, for the agency.

Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Post-closing-date protest challenging the agency's use of its other transaction agreement (OTA) authority, pursuant to 10 U.S.C. § 2371b, is dismissed as untimely.
 2. Protest challenging the agency's evaluation of protester's response to a solicitation that was issued pursuant to the agency's OTA authority is dismissed as challenging an action outside of GAO's bid protest jurisdiction.
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DECISION

Spartan Medical, Inc., of Rockville, Maryland, protests the Department of the Air Force's "improper use" of the agency's prototype other transaction agreement (OTA) authority for the procurement of COVID-19 testing supplies through the issuance of solicitation No. FA811921SC001, Area of Interest 0001. Spartan also protests the agency's "flawed evaluation" of Spartan's response to that solicitation. Protest at 1-2.

We dismiss the protest.

On November 12, 2020, the agency issued the solicitation seeking "white papers or solution briefs" responding to the need for rapid point-of-care and point-of-use COVID testing products. Protest ex. A, Solicitation at 1. Among other things, the solicitation stated that it sought responses from "vendors who have developed or are developing products that . . . [h]ave potential to achieve manufacturing production rates of 100K – 1M tests/day within 3-4 months of contract award." *Id.* The solicitation further notified vendors that the agency contemplated that award would be made pursuant to

the agency's OTA authority contained in 10 U.S.C. § 2371b. *Id.* at 4. Finally, the solicitation established a closing date of December 7, 2020.

On or before the December 7 closing date Spartan submitted its response to the solicitation; that response identified Spartan as the distributor of a product manufactured by another business entity. Protest, exh. C, Spartan Response to Solicitation at 1. On December 18, the agency notified Spartan that its solution would not be further considered. Protest at 6. On January 4, 2021, Spartan filed this protest challenging the agency's use of its OTA authority as well as the agency's bases for eliminating Spartan from further consideration. Thereafter, the agency requested dismissal of Spartan's protest, asserting that Spartan's complaints were untimely filed and/or beyond GAO's protest jurisdiction. We agree.

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. *System Architecture Info. Tech.*, B-418721, June 2, 2020, 2020 CPD ¶ 184 at 2; *MD Helicopters, Inc.*, B-417379, Apr. 4, 2019, 2019 CPD ¶ 120 at 2; *Blade Strategies, LLC*, B-416752, Sept. 24, 2018, 2018 CPD ¶ 327 at 2.

The only exception to this general rule pertains to situations where an agency is exercising its OTA authority, and the protester files a timely, pre-closing date protest alleging that the agency is improperly exercising that authority. 4 C.F.R. § 21.5(m); *Blade Strategies, LLC*, *supra* at 2. Where a protester is aware that the agency has issued a competitive solicitation seeking to enter into an OTA pursuant to its statutory authority, any protest regarding the use of that authority must be filed prior to the time for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); *Exploration Partners, LLC*, B-298804, Dec. 19, 2006, 2006 CPD ¶ 201 at 6 n.4.

Here, the solicitation expressly placed Spartan on notice that the agency intended to make award pursuant to its OTA authority. Protest, exh. A, Solicitation at 4. Nonetheless, Spartan opted to submit a response to the solicitation--and, only after receiving notification that its response had been eliminated from consideration, filed a protest challenging the agency's use of its OTA authority and the agency's bases for eliminating Spartan from further consideration. On this record, Spartan's assertion that the agency's use of its OTA authority in conducting this procurement was not timely

filed, and its challenges to the agency's evaluation of Spartan's response to the solicitation are outside of our bid protest jurisdiction.

The protest is dismissed.

Thomas H. Armstrong
General Counsel