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Decision

Matter of: ACI Technologies, Inc.

File: B-417011

Date: January 17, 2019

H. Todd Whay, Esq., The Whay Law Firm, for the protester.
D. Randall Kemplin, Esq., Christopher A. Monsey, Esq., and Eric VanWiltburg, Esq., Department of the Navy, for the agency.
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the issuance of a solicitation that anticipates selection of a consortium to enter into an other transaction agreement (OTA) for prototype projects is denied in part and dismissed in part where the anticipated work is within the agency's statutory authority to enter into OTAs, and where the protester fails to provide adequate factual support for its contention that the work is duplicative of existing research.

DECISION

ACI Technologies, Inc., of Philadelphia, Pennsylvania, a small business, protests the issuance of solicitation No. N00164-18-9-0001 by the Department of the Navy, Naval Surface Warfare Center, with the intent of entering into an other transaction agreement (OTA) for prototype projects. The protester argues that the solicitation anticipates performance of work that is not related to prototype projects and is therefore outside the agency's statutory authority for OTAs, and that the solicitation improperly provides for work that duplicates existing research.

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

BACKGROUND

The Navy issued the solicitation on September 12, 2018, seeking proposals for the establishment of an OTA with a consortium of contractors who will support the agency's Strategic & Spectrum Missions Advanced Resilient Trusted Systems (S²MARTS)

initiative. Agency Report (AR), Tab 1, Special Announcement, at 2, 5; Tab 2, Combined Solicitation and Synopsis, at 2.¹ The solicitation was issued under the authority of 10 U.S.C. § 2371b, which, as discussed below, authorizes the secretary of a military department to enter into OTAs for prototype projects. The S²MARTS initiative seeks to obtain “innovative technological solutions to address current and future security threats in the electromagnetic spectrum (EMS), trusted microelectronics, and strategic missions hardware environments.” AR, Tab 2, Special Announcement, at 2. The agency states that the objectives of the OTA include: “developing a relationship with industry and academia to establish streamlined processes for obtaining innovative, State-of-the-Art (SOTA) technologies,” and “establishing an agile and collaborative working relationship amongst the Government and academia/industry.” Id.

The solicitation states that the agency will select a firm to act as the manager of a consortium of “entities possessing significant technical capabilities to meet Government needs” with regard to prototype projects. Id. The consortium manager will “run the day-to-day operations of the Consortium, solicit and sustain Consortium members, assist Consortium members with proposal preparation, and facilitate financial transactions between the Government and the Consortium or individual Consortium members.” Id. The agency advises that “[f]or proposal purposes only, an Offeror should assume 13 - 20 projects per year with a total estimate of \$350 [million] for the first five years of operation.” AR, Tab 3, Solicitation Revision, at 2. As discussed below, the solicitation identifies 21 technology areas that are “of current, specific interest” under the S²MARTS program. AR, Tab 4, Technology Areas Attachment, at 2.

As relevant to this protest, ACI was awarded an indefinite-delivery, indefinite-quantity contract by the Navy on April 27, 2016, for support of the Navy Electronics Manufacturing Center of Excellence (NEMCOE). Protest at 4. The contract was awarded under the Department of Defense (DoD) Manufacturing Technology (ManTech) program, which is authorized by 10 U.S.C. § 2521(a). See Contracting Officer’s Statement/Memorandum of Law (COS/MOL) at 5. As set forth in the statement of work for ACI’s ManTech contract, the “primary mission” of the NEMCOE is to develop “advanced manufacturing technologies and deploy them in the U.S. advanced electronics industrial base with the goal of facilitating industry improvements and ultimately reducing the cost and time required to transition advanced electronics technology into Navy and DoD system applications as defined in the [Office of Naval Research] ManTech Investment Strategy.” AR, Tab 13, ACI’s ManTech Contract, Statement of Work, at 2. ACI’s ManTech contract was awarded to “improve the manufacturing quality, productivity, technology, and practices of business and workers providing goods and services to the Department of Defense[.]” Id. at 1.

ACI filed this protest prior to the October 14 date for receipt of proposals.

¹ Citations to pages are to the PDF documents provided in the agency report.

DISCUSSION

ACI challenges the issuance of the solicitation based on two primary arguments: (1) the solicitation is not authorized under the OTA prototype provisions of 10 U.S.C. § 2371b because two of the technology areas listed in the solicitation are not for prototype work, and (2) the multiple areas of research anticipated under the solicitation are prohibited because they are duplicative of research that has been or could be performed by ACI. For the reasons discussed below, we deny the protester's first argument, and dismiss the second argument.²

As a preliminary matter, we conclude that this protest is within our jurisdiction to consider. Under the Competition in Contracting Act of 1984 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, as well as solicitations leading to such awards. 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. Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22 at 3; see also MorphoTrust USA, LLC, B-412711, May 16, 2016, 2016 CPD ¶ 133 at 7-8. Where, as here, a protester argues that an agency is improperly using its other transaction authority to procure goods or services, we will review the matter. 4 C.F.R. § 21.5(m); see also Oracle America, Inc., B-416061, May 31, 2018, 2018 CPD ¶ 180 at 10-11; Rocketplane Kistler, supra; MorphoTrust USA, supra.

This protest concerns two statutory provisions regarding OTAs. First, 10 U.S.C. § 2371 provides that the Secretary of Defense and secretary of each military department may enter into "transactions (other than contracts, cooperative agreements, and grants) under the authority of this subsection in carrying out basic, applied, and advanced research projects." 10 U.S.C. § 2371(a). This authority is subject to the following conditions including, as relevant here, the avoidance of duplication of effort:

(1) The Secretary of Defense shall ensure that--

(A) to the maximum extent practicable, no cooperative agreement containing a clause under subsection (d) and no transaction entered into under subsection (a) provides for research that duplicates research being conducted under existing programs carried out by the Department of Defense; and

² ACI also raises other collateral issues. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest.

(B) to the extent that the Secretary determines practicable, the funds provided by the Government under a cooperative agreement containing a clause under subsection (d) or a transaction authorized by subsection (a) do not exceed the total amount provided by other parties to the cooperative agreement or other transaction.

(2) A cooperative agreement containing a clause under subsection (d) or a transaction authorized by subsection (a) may be used for a research project when the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate.

Id. § 2371(e).

Second, 10 U.S.C. § 2371b provides that the Secretary of Defense and secretary of each military department may enter into OTAs for prototype projects, pursuant to the authority granted under 10 U.S.C. § 2371, as follows:

(a) Authority

(1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of this title, carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

10 U.S.C. § 2371b(a).

Scope of Prototype Work

The solicitation was issued under the authority of 10 U.S.C. § 2371b for OTA prototype projects. ACI argues that the agency is not authorized to issue the solicitation because two of the 21 technology areas listed in the solicitation involve work that is outside the scope of a prototype project. For the reasons discussed below, we find no basis to sustain the protest.

As our Office noted in Oracle America, Inc., the term prototype is not defined in 10 U.S.C. § 2371b. Oracle America, Inc., supra, at 14. ACI's and the Navy's arguments refer instead to the definition of prototype contained in the 2017 DoD Other Transactions Guide for Prototype Projects (2017 DoD OT Guide). DoD OT Guide, Jan. 2017, at 4, [www.darpa.mil/attachments/OTGuidePrototype Projects.pdf](http://www.darpa.mil/attachments/OTGuidePrototype%20Projects.pdf) (last visited Jan. 10, 2019). This guide, however, is not a procurement regulation promulgated by

DoD. Under the Competition in Contracting Act of 1984, our Office is authorized to decide bid protests “concerning an alleged violation of a procurement statute or regulation.” 31 U.S.C. §§3552, 3553(a). We have consistently concluded, therefore, that protests that assert a violation of internal agency policy or guidance, rather than statute or regulation, do not establish a valid basis for protest. See, e.g., Triad Logistics Servs. Corp., B-403726, Nov. 24, 2010, 2010 CPD ¶279 at 2–3.

Nonetheless, both the protester and the agency cite this guidance and the definition of a prototype project as support for their respective positions. Protester’s Comments, Nov. 26, 2018, at 2; COS/MOL at 9-11. Because the Navy cites the 2017 DoD OT Guide as a basis for finding the solicitation consistent with the agency’s statutory authority, we will look to this internal agency guidance to determine whether the agency’s reliance was reasonable. See Oracle America, Inc., supra, at 14.

The 2017 DoD OT Guide defines the term prototype as follows:

A prototype project can generally be described as a preliminary pilot, test, evaluation, demonstration, or agile development activity used to evaluate the technical or manufacturing feasibility or military utility of a particular technology, process, concept, end item, effect, or other discrete feature. Prototype projects may include systems, subsystems, components, materials, methodology, technology, or processes. By way of illustration, a prototype project may involve: a proof of concept; a pilot; a novel application of commercial technologies for defense purposes; a creation, design, development, demonstration of technical or operational utility; or combinations of the foregoing, related to a prototype. The quantity should generally be limited to that needed to prove technical or manufacturing feasibility or evaluate military utility.

DoD OT Guide, Jan. 2017, at 4, www.darpa.mil/attachments/OTGuidePrototypeProjects.pdf (last visited Jan. 10, 2019).

ACI argues that technology areas Nos. 8 and 18 are not prototype projects and are therefore outside the scope of the Navy’s authority to enter into OTAs under 10 U.S.C. § 2371b. These two technology areas are as follows:

8. Outreach and Standards - Develop standards and practices to foster commercial development of secure, trusted and assured parts. Document and promulgate security-enhancing design practices across government, industry, and academia in the areas of standard program outreach material; standard training material; Government and industry standards and best practices; and self-service libraries of standards and best practices.

* * * * *

18. Microelectronics and Electronic Warfare focused Workforce Development[] - Develop access to training and skill development for university, DoD, and small businesses. This includes SOTA processes for test articles and training; promoting design challenges and hacks around hardware [intellectual property (IP)] development/assurance.

AR, Tab 4, Technology Areas Summary, at 3, 5.

ACI notes that the 2017 DoD OT Guide states that a prototype project “can generally be described as a preliminary pilot, test, evaluation, demonstration, or agile development activity used to evaluate the technical or manufacturing feasibility or military utility of a particular technology, process, concept, end item, effect, or other discrete feature.” 2017 DoD OT Guide at 4 (emphasis added). With regard to technology area Nos. 8 and 18, the protester argues that developing standards and practices, developing of training materials, and training of military personnel are not “preliminary steps” in the “evaluation” of a technology, and therefore do not qualify as prototype projects. Protester’s Comments, Nov. 26, 2018, at 2.

The Navy argues that both technology areas are within the scope of the definition of prototypes set forth in the 2017 DoD OT Guide because they will “establish a beginning and not an end state” in assessment of rapidly-developing technologies. COS/MOL at 11. In this regard, the agency notes that the 2017 DoD OT Guide states that “[p]rototype projects may include . . . processes,” and may include a “preliminary pilot, test, evaluation, demonstration, or agile development activity used to evaluate the technical or manufacturing feasibility or military utility of a particular . . . process.” Id. at 9, 11 (quoting 2017 DoD OT Guide at 4).

With regard to technology area No. 8, the Navy also contends that the development of “standards and practices to foster commercial development of secure, trusted and assured parts” is within the scope of prototype projects because those actions will “develop methodologies and processes that will promote development of microelectronics that are compatible with DoD systems.” COS/MOL at 9. For example, the agency states that processes created as part of a prototype project could be used to “verify [the] integrity of components” used in DoD systems. Id. Similarly, with regard to technology area No. 18, the Navy contends that the development of “SOTA processes for test articles and training” and “promoting design challenges and hacks around hardware IP development/assurance” is within the scope of the 2017 DoD OT Guide’s definition of prototypes. Id. at 10. Specifically, the agency states that these activities will “develop systems, methodologies, and processes that will allow workers to learn relevant skills and knowledge for using and developing DoD systems.” Id.

We agree with the protester and agency that, in the absence of a statutory definition of the term prototype, the 2017 DoD OT Guide, which was in effect at the time the

solicitation was issued, provides a reasonable definition of that term.³ See Oracle America, Inc., supra, at 12-15. The protester, however, does not demonstrate that the relevant statutes or the 2017 DoD Guide expressly define developing standards and practices, developing of training materials, or training of military personnel as activities outside the scope of a prototype project. Moreover, the protester's general assertions do not explain why the solicitation anticipates work that goes beyond a "preliminary" stage. See Protester's Comments, Nov. 26, 2018, at 2. Based on this record, we find that the agency reasonably explains that the work anticipated under technical areas Nos. 8 and 18 are within the scope of prototype projects.

In sum, we find no basis to conclude that any of the protester's arguments establish that the solicitation is outside the scope of the agency's authority to enter into OTAs for prototype projects under 10 U.S.C. § 2371b. We therefore find no basis to sustain the protest.

Duplicative Research

Next, ACI argues that the scope of work anticipated by the solicitation is duplicative of the scope of research performed under the protester's ManTech contract. For the reasons discussed below, we conclude that the protester fails to provide an adequate factual basis for this argument.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency

³ For the record, we note that the 2017 DoD OT Guide was superseded in November 2018, after the issuance of the solicitation, by a revised guide. DoD Other Transaction Guide, Nov. 2018 (2018 DoD OT Guide), [www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20\(OT\)%20Guide.pdf](http://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf) (last visited Jan. 7, 2019). The 2018 DoD OT Guide, however, does not support ACI's arguments. As relevant to the protester's arguments, the revised guide provides a new definition of prototype project that does not use the term "preliminary," and defines a prototype project as follows: "[A] proof of concept, model, reverse engineering to address obsolescence, pilot, novel application of commercial technologies for defense purposes, agile development activity, creation, design, development, demonstration of technical or operational utility, or combinations of the foregoing. A process, including a business process, may be the subject of a prototype project." Id. at 31. Additionally, the current guide states that "ancillary work efforts that are necessary for completion of the prototype project, such as test site training or limited logistics support, may be included in prototype projects." Id. We find, therefore, that nothing in the 2018 DoD OT Guide provides a basis to sustain the protest.

action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

As discussed above, the solicitation was issued under 10 U.S.C. § 2371b, which authorizes OTAs for prototype projects “under the authority of section 2371 of this title.” 10 U.S.C. § 2371b(a)(1). The provisions of 10 U.S.C. § 2371 state that the agency shall ensure that, “to the maximum extent practicable . . . no [OTA] . . . provides for research that duplicates research being conducted under existing programs carried out by the Department of Defense. . . .” 10 U.S.C. § 2371(e)(1)(A).

ACI states that it has performed work that falls within 14 of the 21 technology areas listed in the S²MARTS solicitation. Protest at 7 (ACI has “performed work under its ManTech Contract that falls within Area Nos. 1, 3, 4, 5, 6, 8, 10, 11, 12, 14, 15, 16, 18, and 20.”). The protester argues that “[t]hrough the ManTech Contract, the Agency has an existing contract vehicle under which it can conduct the research required by many of the areas listed in the Solicitation.” Id. The protester further argues that, to avoid what it contends is a prohibition against duplication of research in 10 U.S.C. § 2371(e)(1)(A), “a significant portion of the work being procured by the Solicitation . . . must be procured under ACI’s ManTech Contract.” Id.

Aside from ACI’s citation of 14 areas of the solicitation, and the protester’s general representation that it has “performed work” that “falls within” the scope of the OTA solicitation, the protester provides no basis to conclude that the solicitation here will result in duplicative research prohibited under 10 U.S.C. § 2371(e)(1)(A). In this regard, the protester does not identify any specific research it has performed under its ManTech contract, nor does it explain why research it has performed is duplicative of the 14 areas identified in its protest. We therefore dismiss this argument for failing to set forth adequate factual bases.⁴ See 4 C.F.R. § 21.5(f).

Alternatively, ACI argues that the solicitation is improper because it anticipates research that could be performed under the protester’s ManTech contract. We conclude that this argument also fails to state a valid basis of protest. To the extent the protester’s argument concerns research anticipated under the solicitation that has not been performed, but could be performed in the future under its ManTech contract, this is not a matter addressed by section 2371 because the relevant statutory provision pertains to duplication of “research being conducted under existing programs carried out by the Department of Defense. . . .” 10 U.S.C. § 2371(e)(1)(A) (emphasis added).

Additionally, to the extent ACI argues that work should be directed to its ManTech contract or that the agency is in breach of obligations to procure its requirements

⁴ The Navy argues that ACI’s ManTech contract does not involve research, and therefore there could not be any duplication of research. COS/MOL at 12-15. Because we conclude that the protester does not set forth facts adequate to support its argument, we need not address this matter further.

through its ManTech contract, this is a matter of contract administration that is not for our Office's review as part of our bid protest jurisdiction. In this regard, our Office considers bid protest challenges to the award or proposed award of contracts. 31 U.S.C. § 3552. Therefore, we generally do not review matters of contract administration, which are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the U.S. Court of Federal Claims, absent exceptions not present here. 4 C.F.R. § 21.5(a).

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel