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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Spire Corporation

File: B-258267

Date: December 21, 1994

Jon W. van Horne, Esq., McDermott, Will & Emery, for the protester.
Harriet J. Halper, Esq., Department of the Navy, for the agency.
Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against the award of a cooperative agreement under the authority of the Federal Technology Transfer Act (FTTA), 15 U.S.C. § 3710a (1988), is dismissed as untimely where, after filing general protest against use of cooperative agreement instead of competitive procurement, protester was specifically advised by agency that it had acted pursuant to authority under FTTA, and did not protest on this specific basis until more than 10 working days after being so advised.

DECISION

Spire Corporation protests the award of a cooperative research and development agreement (CRADA) to Implant Sciences Corporation by the Department of the Navy, Naval Research Laboratory. The CRADA involves the right to use of an ion implanter owned by the Navy. Spire contends that the agency improperly entered into a CRADA rather than conducting a competitive procurement and awarding a contract.

We dismiss the protest.

Under a cooperative agreement entered into between the Navy and Spire in 1988, Spire was given control over the ion implanter in issue. Spire's cooperative agreement, unlike

[1]An ion implanter is a device used to implant electrically active elements into the surface of various articles (such as aircraft components) to enhance the durability and anti-corrosive properties of the implanted material.

the current CRADA, was executed under the authority of the Federal Grant and Cooperative Agreement Act (FGCA), 31 U.S.C. § 6301 et seq. (1988). Pursuant to that agreement, Spire was provided with the ion implanter and, among other things, was required to provide the Navy with 1,750 hours of facility operation time over the course of 5 years.

By letter dated August 12, 1994, the Navy's contracting officer directed Spire to shut down the ion implanter and prepare it for shipment. This letter stated that the Navy had executed a cooperative agreement with Implant Sciences, and that the ion implanter would be necessary for the parties to proceed under that agreement. By letter dated August 23, Spire protested the Navy's award of the cooperative agreement to our Office; Spire alleged that the Navy had improperly awarded the cooperative agreement to Implant Sciences in violation of the FGCA. Thereafter, in a letter to Spire dated August 29, the Navy stated that:

> "[t]he agreement entered into with Implant Sciences Corporation is not a cooperative agreement similar to the one with Spire. Rather, it was executed under the authority of the [Federal Technology Transfer Act (FTTA), 15 U.S.C. § 3710a (1988)]."

In a September 22 letter to Spire, the Navy reiterated the fact that a CRADA under the authority of the FTTA had been entered into with Implant Sciences. Spire took no action based on the August 29 or September 22 letters. The Navy filed its administrative report in our Office on September 29. The report discussed at length the fact that the CRADA entered into between the Navy and Implant Sciences had been executed pursuant to the FTTA rather than the FGCA. In its comments on the report, Spire maintained for the first time that the award of the CRADA violated the requirements of the FTTA.

Under our Bid Protest Regulations, protests such as this must be filed no later than 10 working days after the basis for protest was or should have been known. 4 C.F.R. § 21.2(a)(2) (1994). Although Spire initially timely protested the propriety of the Navy's entering into a cooperative agreement, it did not raise any arguments concerning the agency's use of a CRADA--under the specific authority of the FTTA--until it filed its October 14 report comments. This was substantially more than 10 working days after Spire was first apprised of the basis for the agency's actions in the August 29 letter. The argument therefore is

untimely. See TAAS-Israel Indus., Inc., B-251789.3, Jan. 14, 1994, 94-1 CPD ¶ 197; Sprint Communications Co., L.P., B-256586; B-256586.2, May 9, 1994, 94-1 CPD ¶ 300.[2]

Spire maintains that there is no relevant distinction between a cooperative agreement executed under the authority of the FGCA and one executed under the authority of the FTTA, and concludes that its initial generalized protest sufficiently raised the pivotal issue here.

We disagree. The FGCA sets forth general parameters for using a cooperative agreement or grant instead of a competitive procurement. In those limited circumstances where we review an agency's use of a cooperative agreement entered into under the authority of the FGCA, we consider whether the agency's actions are proper in light of the act's parameters; a protester must show that the agency improperly used a cooperative agreement where a competitive procurement should have been used. See Council on Envtl. Quality and Office of Envtl. Quality--Coop. Agreement with Nat'l Academy of Sciences, 65 Comp. Gen. 605 (1986); see also Civic Action Inst., 61 Comp. Gen. 637 (1982), 82-2 CPD ¶ 270.

The FTTA sets forth specific requirements for using a CRADA which are different from the more general requirements for using a cooperative agreement specified in the FGCA. As a general matter, CRADAs under the FTTA may only be used where the purpose of the agreement is to transfer technology from a federal laboratory to a nonfederal entity for the purpose of conducting specified scientific research or development work in collaboration with the nonfederal entity. 15 U.S.C. §§ 3702, 3710a(c)(2) (1988). Given the more specific requirements under the FTTA, the terms of that statute would be the basis for determining whether a CRADA was appropriate here. It follows that the agency's actions would have to be shown to be impermissible under the terms of the FTTA in order for our Office to object to the agency's use of a CRADA. Since Spire did not challenge the agency's actions in terms of the FTTA in its original protest, that protest

[2]We also note that, while not dispositive of this matter, Spire has been fully aware since 1988, when Spire was awarded its cooperative agreement, that the agency was making the ion implanter available by cooperative agreement.

was inadequate to raise what ultimately became the determinative issue. Again, while Spire did argue in terms of the FTTA in its comments, those arguments were untimely.

The protest is dismissed.

John M. Melody
Assistant General Counsel