



Comptroller General
of the United States

518206

Washington, D.C. 20548

Decision

Matter of: Energy Conversion Devices, Inc.

File: B-260514

Date: June 16, 1995

Robert S. Gardner, Esq., for the protester.
Thomas J. Madden, Esq., James F. Worrall, Esq., and
Fernand A. Lavallee, Esq., for Materials Research Group, an
interested party.
Jewel L. Miller, Esq., Advanced Research Projects Agency,
for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest against selection of offeror with which to enter into an agreement for research and development with respect to manufacturing technology is denied where there is no showing that a "procurement contract" was required--that is, that the principal purpose of the contemplated transaction was the acquisition of supplies and services for the direct benefit of the federal government; under the Competition in Contracting Act of 1984 and General Accounting Office's (GAO) Bid Protest Regulations, GAO will generally not review protests regarding the award of cooperative agreements or other nonprocurement instruments unless an agency is using a cooperative agreement or other nonprocurement instrument where a procurement contract is required.

DECISION

Energy Conversion Devices, Inc. (ECD) protests the Advanced Research Projects Agency's (ARPA) selection of the ITN Consortium with which to enter into an agreement, under broad agency announcement (BAA) No. 94-42, for the development and demonstration of vapor phase manufacturing technology in the area of thin-film photovoltaics.

We deny the protest.

¹The ITN Consortium includes the Materials Research Group and eight other organizations.

The BAA sought proposals "to develop and demonstrate cost-effective, large-area, vapor phase manufacturing technology based on emerging methods of intelligent processing (closed-loop, model & sensor-based control) of thin films" in three areas: (1) thin-film photovoltaics; (2) multi-layer turbine engine coatings; and (3) thin-film, high temperature superconducting devices. The solicitation provided proposal preparation instructions and evaluation factors that would be used in selecting proposals for award. Offerors were informed that ARPA "anticipated substantial industrial cost sharing and program funding via contract or agreements authority as applicable."

ARPA received proposals in the area of thin-film photovoltaics from six offerors, including the ITN Consortium and a consortium led by ECD. Based upon its evaluation of initial proposals, the agency determined the ITN Consortium's proposal to be the most advantageous proposal in the area of thin-film photovoltaics and selected it for funding. Upon learning of the selection, ECD filed this protest.

ECD challenges the evaluation of technical and cost proposals and contends that ARPA should have conducted discussions with offerors. In addition, ECD generally challenges the award to ITN on the basis that a procurement contract should have been awarded.

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, and solicitations leading to such awards. 31 U.S.C. §§ 3551(1), 3552 (1988); 4 C.F.R. § 21.2(a) (1995). We generally do not review protests of the award, or solicitations for the award, of cooperative agreements or other nonprocurement instruments because they do not involve the award of a "contract." See Federal Grant and Cooperative Agreement Act (FGCA), 31 U.S.C. §§ 6303, 6305; Sprint Communications Co., L.P., B-256586; B-256586.2, May 9, 1994, 94-1 CPD ¶ 300; Resource Dev. Program & Servs., Inc., B-235331, May 16, 1989, 89-1 CPD ¶ 471; see generally SBMA, Inc., B-255780, Nov. 23, 1993, 93-2 CPD ¶ 292. We will review, however, a timely protest that an agency improperly is using a cooperative agreement or other nonprocurement instrument, where under the FGCA a "procurement contract" is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. See id.; Renewable Energy, Inc., B-203149, June 5, 1981, 81-1 CPD ¶ 451.

The FGCA established the general criteria which agencies must follow in deciding which legal instrument to use when

entering into a funding relationship with a state, locality or other recipient for an authorized purpose. 31 U.S.C. §§ 6301-6308. Under these criteria, a contract is the proper funding vehicle when "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government." 31 U.S.C. § 6303. Grants and cooperative agreements, on the other hand, reflect:

"a relationship between the United States Government and a State, a local government, or other recipient when--

(1) a principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government."

31 U.S.C. §§ 6304 and 6305; see 65 Comp. Gen. 605 (1986); B-257430, Sept. 12, 1994. Likewise, the Federal Acquisition Regulation (FAR) provides that:

"Contracts shall be used only when the principal purpose is the acquisition of supplies and services for the direct benefit of the Federal Government. Grants or cooperative agreements should be used when the principal purpose of the transaction is to stimulate or support research and development for another public purpose."

FAR § 35.003(a).

ARPA maintains that the principal purpose of the BAA and the instrument contemplated here was not to acquire goods and services for the direct benefit and use of ARPA. Rather, the agency reports:

"ARPA's interest is in enhancing the state of the art, demonstrating technology, establishing industrial capabilities, and otherwise advancing national capabilities so that the United States technological base will be capable of supporting the most advanced military systems in the future."

Thus, according to the agency:

"BAA 94-42 called for a cost-shared, dual-use, multi-party 'partnership' arrangement to support technology developments, advance the state of the art, demonstrate technology, transfer technology, and otherwise support and stimulate research and development. . . ."

Although ECD generally claims that ARPA was required to use a procurement contract, it has not refuted ARPA's position that the primary purpose of the BAA was not to acquire property or services for the direct benefit or use of the government, but to advance the state-of-the-art by supporting and stimulating research and development. Rather, ECD focuses on the specific authority cited by ARPA as the basis for the contemplated instrument. Specifically, ARPA relied on the authorization in 10 U.S.C. § 2371, as amended, to "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), as amended by the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, § 1301, 108 Stat. 3243, 3285 (1994).² ECD, however, notes that the authority of 10 U.S.C. § 2371 is available "only when the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate"; ECD argues that ARPA has not shown that it could not accomplish its goals by use of "a standard contract, grant, or cooperative agreement." 10 U.S.C. § 2371(e)(3).

We need not resolve whether ARPA has satisfied the statutory prerequisites to entering into an "other" instrument under section 2371 since the agency's choice of which nonprocurement instrument or authority to rely on is irrelevant to the question of whether we will consider ECD's protest. Again, our Office will review only protests

²Section 2358 of Title 10 generally authorizes the Secretary of Defense and the Secretary of a military department to "engage in basic research, applied research, advanced research, and development projects" by means of "contract, cooperative agreement, or grant. . . ." 10 U.S.C. § 2358 (1994), as amended by FASA, § 1301, 108 Stat. 3243, 3284. According to ARPA, however, use of an "other" instrument as authorized under section 2371 instead was necessary because the cost-shared, dual-use, multi-party 'partnership' arrangement for the support of technology development and advancing the state-of-the-art which it contemplates entering into, while not a procurement contract, also is not a traditional cooperative agreement.

concerning the award or proposed award of procurement contracts, or protests that an agency improperly is using a nonprocurement instrument where a "procurement contract" is required. ECD has not shown, nor is it otherwise apparent from the record, that under the FGCA a "procurement contract" is required here--that is, that the principal purpose of the transaction contemplated under BAA No. 94-42 is the acquisition of supplies and services for the direct benefit of the federal government. We find no basis to question ARPA's position that the principal purpose of the transaction instead is to stimulate or support research and development with respect to vapor phase manufacturing technology in the area of thin-film photovoltaics.

The protest is denied.

\s\ Michael R. Golden
for Robert P. Murphy
General Counsel