



## Decision

**Matter of:** R B Toth Associates, LLC

**File:** B-418441; B-418441.2

**Date:** March 13, 2020

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Michael Toth, R B Toth Associates, LLC, for the protester.  
Lisette Voyatzis, Esq., National Endowment for the Humanities, for the agency.  
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### DIGEST

Protest that agency improperly awarded a grant instead of a procurement contract is dismissed because the agreement at issue does not contemplate the acquisition of property or services for the direct benefit or use of the United States Government.

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### DECISION

R.B. Toth Associates, LLC, of Oakton, Virginia, protests the award of a grant to the University of Rochester by the National Endowment for the Humanities for the development of a low-cost spectral imaging system and accompanying software. The protester alleges that the agency is improperly using the grant to acquire goods and services, which must be acquired by procurement contract.

We dismiss the protest for lack of jurisdiction.

### BACKGROUND

The agency proposed to award a grant in the amount of \$350,000 to the University of Rochester to fund continued development of a prototype spectral imaging system (comprising imaging equipment, a microcontroller, and associated software). Agency Request to Dismiss at 12-13, 15.<sup>1</sup> The university's grant application contemplates that the grant would result in the construction of more robust spectral imaging prototype

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<sup>1</sup> Because the attachments to the agency's request to dismiss the protest are not consistently paginated, cited page numbers refer to the pdf document pagination of the agency's request.

systems, as well as a set of instructions for building and operating such a system at a lower cost than current commercially available systems. Id. at 15-16. Of note, the grant application indicates that all specifications, instructions, and software source code will be published to permit interested persons or organizations to construct and operate their own versions of the resulting systems. Id. at 62-63. Significantly, the grant application also states that the university would retain the resulting prototype systems rather than furnishing them to the National Endowment for the Humanities. Id.

On January 14, 2020, the agency announced the award of the grant at issue. Protest at 1. On January 22, the protester filed an agency-level protest of the award, and later on the same day, the agency informed the protester that grant awards are not subject to protests or appeals. Id. This protest followed.

## DISCUSSION

The protester principally argues that this grant should have been issued as a procurement contract because the grant will result in the direct acquisition of goods (the prototype systems to be developed) and services (research and development) for the federal government's use. See Protest at 4-15; Supp. Protest at 3-7. Paradoxically, the protester also argues that the government failed to make any provision for the government's receipt and subsequent public use of the prototype system. See, e.g., Supp. Protest at 6-7. In response, the agency argues that it is not acquiring (nor does it need) a low-cost spectral imaging system to carry out its statutory responsibilities. Agency Request to Dismiss at 5. The agency therefore contends that this transaction is appropriately characterized as a grant and is outside of our bid protest jurisdiction. Id. The record supports the agency's view.

Under the Competition in Contracting Act and our Bid Protest Regulations, our Office reviews protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). We generally do not review protests of the issuance of grants, cooperate agreements, or other non-procurement instruments, because they do not involve the award of a procurement contract, and are thus beyond our jurisdiction. 4 C.F.R. § 21.5(m); see also, e.g., Energy Conversion Devices, Inc., B-260514, June 16, 1995, 95-2 CPD ¶ 121 at 2. However, we will review a timely protest asserting that an agency is improperly using a non-procurement instrument, where a procurement contract is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. Id. As a general matter, executive agencies are required to use procurement contracts when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the United States Government. 31 U.S.C. § 6303.

Contrary to the protester's repeated conclusory assertions that the grant contemplates "deliverables" for the government, the grant application is explicit that the prototype systems will be retained by the grantee or other participating universities, not delivered

to the agency. Agency Request to Dismiss at 23, 62-63. Furthermore, the grant application includes a dissemination plan that outlines how the specifications, instructions, and source code for the resulting system will be made publicly available, but likewise includes no discussion of any intangible deliverables to the agency. Id. Put simply, the grant application explains in detail how the work product resulting from the grant will be allocated and disseminated to universities and the public, but does not contemplate, in any way, the provision of goods or services to or for the direct benefit of the United States Government. Such an agreement is not a procurement contract.

The protester raises numerous collateral arguments, which collectively fall into two categories. First, the protester raises various arguments concerning ways in which the grant award failed to conform to laws and regulations governing the award of procurement contracts.<sup>2</sup> See Protest at 4-15. However, because we have concluded the award is not a procurement contract, laws and regulations governing procurement contracts do not apply to it. Second, the protester also raises arguments concerning ways in which the grant award failed to conform to laws and regulations governing the award of grants.<sup>3</sup> See, e.g., Supp. Protest at 12-15. As noted above, the review of the propriety of grant awards is beyond our jurisdiction, therefore we cannot consider these arguments.

The protest is dismissed.

Thomas H. Armstrong  
General Counsel

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<sup>2</sup> For example, the protester argues that the agency erred by failing to seek full and open competition in awarding the grant. See, e.g., Protest at 8.

<sup>3</sup> For example, the protester argues that, because a commercial entity has expressed an interest in selling a prefabricated version of the future system built from the published plans, the agency is, in effect, making a grant for the benefit of a commercial entity, which would be inconsistent with the agency's statutory grant authority. Supp. Protest at 12-15 (citing 20 U.S.C. § 956 generally).