

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** David Frankel

**File:** B-408319

**Date:** June 7, 2013

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David Frankel for the protester.

David C. Shonka, Esq., Alex Tang, Esq., and Olga Vaytsman, Esq., Federal Trade Commission, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging agency's selection of winners of a contest is dismissed because the transaction does not involve the award or proposed award of a contract; in the context of the protest, Government Accountability Office bid protest jurisdiction is confined to situations where an agency awards or proposes to award a contract.

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### DECISION

David Frankel, of Los Gatos, California, protests the results of a prize contest conducted by the Federal Trade Commission (FTC) for a technological solution to the problem of automated "robocalls." The protester argues that the agency failed to evaluate his entry in accordance with the rules established for the contest.

We dismiss the protest.

The prize contest at issue, "Robocall Challenge," was conducted by the FTC pursuant to the authority of the America COMPETES Reauthorization Act of 2010, 15 U.S.C. § 3719 (Supp. IV 2010). Under the terms of that statute, federal agencies are authorized to carry out a program to award prizes competitively to stimulate innovation that has the potential to advance the mission of the agency. 15 U.S.C. § 3719(b). This competition was conducted for purposes of "challenging the public to create innovative solutions that will block illegal robocalls on landlines and mobile phones." 77 Fed. Reg. 64,802 (Oct. 23, 2012).

The rules of the competition were posted on the internet at <http://robocall.challenge.gov/rules>. Those rules specify all aspects of the contest

including, for example, the schedule, participant eligibility requirements, registration and solution submission requirements, the rights of the participants, winner selection and judging/prize award criteria,<sup>1</sup> entry conditions and releases required of the participants, limitations of liability on the part of the agency, and rules governing the handling of any disputes arising out of the prize competition.

The protester submitted a solution in response to the contest. After learning of the FTC's decision not to select his solution, the protester filed in our Office.

Mr. Frankel contends that, because Contest Rule No. 18 specifies that any disputes arising in connection with the contest are to be resolved under federal law, our Office is an appropriate forum to resolve his dispute with the agency. Essentially, the protester takes issue with the outcome of the contest and argues that his submitted solution was better than those selected by the agency as winning solutions. Mr. Frankel requests that the entries be rescored in a manner that is consistent with the contest rules.

We dismiss the protest because we do not have jurisdiction to consider the matter. The Competition in Contracting Act (CICA) establishes the jurisdiction of this Office to consider bid protests. Pursuant to that statute, the Comptroller General is directed to decide "protests" when they are filed in accordance with the other provisions of CICA relating to bid protests. 31 U.S.C. § 3552(a). A "protest" is defined by CICA as follows:

- (1) The term "protest" means a written objection by an interested party to any of the following:
  - (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
  - (B) The cancellation of such a solicitation or other request.
  - (C) An award or proposed award of such a contract.
  - (D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or

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<sup>1</sup> The contest contemplated the award of two types of prizes, the "best overall solution" prize, which had a monetary value of up to \$50,000, and the "Federal Trade Commission technology achievement award" prize, which had no monetary value. The contest rules further specified that, for the best overall solution prize, if the agency determined that two or more submitted solutions were tied, the prize money would be equally divided among the winners. Contest Rule No. 13.

cancellation is based in whole or in part on improprieties concerning the award of the contract.

(E) Conversion of a function that is being performed by Federal employees to private sector performance.

31 U.S.C. § 3551(1).

CICA directs the Comptroller General as follows:

With respect to a solicitation for a contract, or a proposed award or the award of a contract, protested under this subchapter, the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation.

31 U.S.C. § 3554(b)(1).

Mr. Frankel's protest is confined to the question of whether the winners were selected appropriately, and does not take issue with the underlying rules of the contest (that is, the "solicitation" for contest entries). Accordingly, the question whether our Office has jurisdiction turns on the question of whether the FTC awarded or proposes to award a contract and, if so, whether or not such an award complies with statute and regulation. 31 U.S.C. §§ 3551(1)(C), 3554(b)(1). We therefore consider whether the actions of the parties here created a contract.

Section 2.101(a)(2) of the Federal Acquisition Regulation broadly defines a contract as follows: "Contract" means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them." At the heart of this definition is the requirement for there to be a "sale" and a "purchase" that is enforceable under the terms of a "mutually binding legal relationship."

We conclude from a reading of the contest rules that the actions of the parties here did not create a contract. First, the only supply or service being furnished to the FTC by the competitors is their respective contest submissions--solutions to the robocall problem. The contest rules deal with the legal effect of the competitors' submitting their contest entries. Specifically, Rule 7 A provides that any applicable intellectual property rights to a submission remain with the contestant, except for the granting of a license to the agency as described in Rule 7 B. Rule 7 B provides as follows:

By entering the Submission to this Competition, Contestant grants to the Sponsor and the Administrator . . . a non-exclusive, irrevocable, royalty-free and worldwide license to use the Submission, any information and content submitted by the Contestant, and any portion

thereof, and to display the Solution name, text description, video, and images (but not the Proposal), on the Competition Website, during the Competition and for 36 months after its conclusion. Sponsor and the Administrator . . . will also have the right to publicize Contestant's name . . . on the Competition Website, and in any media whatsoever, for advertising and publicity purposes relating to the Competition, during the Competition and for three (3) years thereafter.

Thus, under the contest rules, the contestant, solely through tendering a contest entry, grants the agency--without any expectation of remuneration--an irrevocable, royalty-free worldwide license to use the contestant's submission for the reasons and period of time described in the rules. The rules of the contest do not create a legally enforceable right on the part of the contestant to receive any payment for their submission. Nor do the rules create a legally enforceable right on the part of the agency to obtain anything of value from the contestant beyond the license granted. Rather, the contestant agrees--as a condition of participating in the contest--to grant the FTC the license described in the rules. Accordingly, there is no "sale" element of the transaction.

Correspondingly, other than the freely-given license described above, the FTC does not receive anything in exchange for disbursing a prize. As the rules expressly establish, all intellectual property remains the possession of the contestant. The rules therefore do not create a legally enforceable right on the part of the agency to obtain anything from the contestants. Nor do the rules create a legally enforceable right on the part of the contestants to receive payment for their submissions (as noted, at least one of the prizes to be awarded--the Federal Trade Commission technology achievement award--has no monetary value.) Accordingly, there is no "purchase" element of the transaction.

In conclusion, the rules of the contest themselves establish that the essential elements of a contractual transaction--a "sale" and a "purchase" pursuant to the terms of a mutually binding legal relationship--are absent in the nature of the transaction. Because the transaction at issue is not a contract, we decline to consider the propriety of the FTC's actions in selecting the winners of the contest. As discussed above, for the purposes of this matter, our jurisdiction is confined to determining whether the award of a contract or proposed award of a contract complies with statute and regulation. Since there has not been the award or proposed award of a contract here, we lack jurisdiction to consider Mr. Frankel's protest.

The protest is dismissed.

Susan A. Poling  
General Counsel