



Decision

Matter of: Tactical Solutions International, Inc.

File: B-418748

Date: June 4, 2020

Brian Bewley for the protester.
Dennis J. Gallagher, Esq., Department of State, for the agency.
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participated in the preparation of the decision.

DIGEST

Protest challenging the agency's adherence to stated evaluation criteria and documentation in its award selection process is dismissed where our Office does not review protests of the award of cooperative agreements because they do not involve the award of a procurement contract, and are thus beyond our jurisdiction.

DECISION

Tactical Solutions International, Inc. (TSI), a service-disabled veteran-owned, Historically Underutilized Business Zone small business of Crowheart, Wyoming, protests its nonselection for the award of a cooperative agreement under notice of funding opportunity (NOFO) No. SFOP0006282, issued by the Department of State for programs to improve community security and access to justice in Syria. TSI alleges that the agency failed to adhere to the stated evaluation criteria in the NOFO, failed to provide an adequate document of record in the award selection process, and treated applicants unequally.

We dismiss the protest because we do not review the award of cooperative agreements.

The agency issued the NOFO on November 19, 2019. Req. for Dismissal, attach. A, NOFO, at 1. The deadline for applications was January 24, 2020. *Id.* TSI submitted its application on January 24. Protest at 1. On April 13, the agency notified TSI of its nonselection for the cooperative agreement. *Id.* TSI requested a debriefing, which took place on May 4. *Id.* TSI filed this protest with our Office on May 15. *Id.*

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; 4 C.F.R. § 21.1(a). We do not review protests of the award or solicitations for the award of grants, cooperative agreements, or other non-procurement instruments because they do not involve the award of a procurement contract. 4 C.F.R. § 21.5(m) (GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts); *Jay Hymas*, B-414546, May 23, 2017, 2017 CPD ¶ 155 at 3; *Sprint Commc'ns Co., L.P.*, B-256586, B-256586.2, May 9, 1994, 94-1 CPD ¶ 300 at 3 (GAO will not review protests of an award, or solicitation for the award, of a cooperative agreement because they do not involve the award of a “contract.”). However, our Office will review a timely protest asserting that an agency is improperly using a cooperative agreement where a procurement contract is required to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. 4 C.F.R. § 21.5(m); see also *Assisted Housing Servs. Corp. et al.*, B-406738 *et al.*, Aug. 15, 2012, 2012 CPD ¶ 236 at 9.

Here, the record reflects that the protest concerns the award of a cooperative agreement. The NOFO contemplated that all awards would be funded as cooperative agreements, not procurement contracts. NOFO at 4, 9, 10, 22. The NOFO contained multiple references to the “Grants Officer”, and required “grant applicants” to create an account at the website called “mygrants.service-now.com”. *Id.* at 10, 13, 17. Notably, the NOFO did not contain any Federal Acquisition Regulation (FAR) provisions applicable for the award of a procurement contract.¹ As the protest does not concern a procurement contract, we lack jurisdiction to consider the merits of the protest.² 4 C.F.R. § 21.5(m).

¹ The NOFO only mentioned the FAR once in conjunction with the prohibition on the allowance of profit to commercial organizations under assistance awards, noting that the provisions of FAR part 31 would be used to determine the allowability of costs incurred. NOFO at 18.

² TSI also contends that our Office has jurisdiction to hear its challenge because GAO “may also evaluate competition in grant awards from an audit perspective”. Protester Resp. to Req. for Summary Dismissal at 1-2 (*quoting* GAO, *Principles of Federal Appropriations Law*, Vol. II, ch. 10, at 10-26 (3d ed. 2006)). However, our Office is not responsible for concerns raised in this regard. GAO’s audit function evaluates “and makes policy and legislative recommendations to improve the responsiveness, efficacy, and affordability of federal programs,” and is “broader in scope than GAO’s bid protest function, which is limited to deciding challenges to whether an agency’s actions with respect to a specific procurement are reasonable and in accordance with applicable procurement laws and regulations.” *Blue Origin Florida, LLC*, B-417839, Nov. 18, 2019, 2019 CPD ¶ 338 at 12-13 n.8. For this reason, our Office, which carries out GAO’s bid protest function, lacks jurisdiction to evaluate these claims from an audit perspective.

TSI argues that our Office has jurisdiction to hear its challenge on the merits because the purpose of the NOFO was to acquire applicant services “for the direct benefit or use” of the government and that this type of arrangement requires a procurement contract. Resp. to Req. for Dismissal at 2. This argument, however, constitutes an untimely challenge to the solicitation. Where a protester is aware that the agency has issued a competitive solicitation seeking to enter into a non-procurement instrument, such as a cooperative agreement, any protest regarding the use of that non-procurement instrument must be filed prior to the time for receipt of applications. See 4 C.F.R. § 21.2(a)(1); see also *Sprint Commc’ns Co., L.P., supra*. As noted, the NOFO clearly indicated that the resulting awards would be cooperative agreements. NOFO at 4. As TSI did not file a protest prior to the January 24 time for receipt of applications, its challenge to the terms of the NOFO is untimely. See 4 C.F.R. § 21.2(a)(1); see also *Sprint Commc’ns Co., L.P., supra*.

The protest is dismissed.

Thomas H. Armstrong
General Counsel