

GAO clarifies the scope of its jurisdiction over OTA protests

(March 8, 2021) - Bradley Arant Boult Cummings LLP attorneys Aron Beezley and Patrick Quigley discuss a recent Government Accountability Office decision that outlines the limits of its bid protest jurisdiction amid agencies' "increasingly popular" use of its other transaction agreement authority.


The Government Accountability Office (GAO), in *Spartan Medical, Inc.*, B-419503,¹ recently clarified the scope of its jurisdiction over bid protests involving an agency's use of its other transaction agreement (OTA) authority.

The GAO's decision in this case is noteworthy because agencies are increasingly relying on OTAs to meet their procurement needs.

The facts

On November 12, 2020, the Air Force issued a solicitation seeking "white papers or solution briefs" responding to the need for rapid point-of-care and point-of-use COVID-19 testing products.

Among other things, the solicitation stated that it sought responses from "vendors who have developed or are developing products that ... [h]ave potential to achieve manufacturing production rates of 100K – 1M tests/day within 3-4 months of contract award."

The solicitation also notified vendors that the Air Force contemplated that award would be made pursuant to the agency's OTA authority contained in  [10 U.S.C. § 2371b](#). The solicitation established a closing date of December 7, 2020.

The contractor at issue never protested the agency's use of the OTA vehicle before proposals were due.

Instead, on or before the December 7 closing date, the contractor submitted its response to the solicitation, identifying therein that it is the distributor of a product manufactured by another business entity.

On December 18, the Air Force notified the contractor that its solution would not be further considered.

On January 4, 2021, the contractor filed a bid protest with the GAO, challenging the Air Force's use of its OTA authority as well as the Air Force's bases for eliminating the contractor from further consideration.

The Air Force requested dismissal of the protest, asserting that the complaints were untimely filed and/or beyond the GAO's protest jurisdiction.

The holding

At the outset of its decision on the protest, the GAO noted that, under the Competition in Contracting Act of 1984 (CICA) and the GAO Bid Protest Regulations, the GAO reviews 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 an award (*see* 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a)).

However, the GAO noted that, in circumstances where an agency has statutory authorization to enter into "contracts ... [or] other transactions," the GAO has concluded that agreements issued by the agency under its "other transaction" authority "are not procurement contracts."

Accordingly, the GAO noted that it generally does not review protests of the award or solicitations for the award of these agreements under its bid protest jurisdiction.

The GAO then stated that, "The only exception to this general rule pertains to situations where an agency is exercising its OTA authority, and the protester files a timely, pre-closing date protest alleging that the agency is improperly exercising that authority."

The GAO further stated that, "Where a protester is aware that the agency has issued a competitive solicitation seeking to enter into an OTA pursuant to its statutory authority, any protest regarding the use of that authority must be filed prior to the time for receipt of initial proposals."

The GAO went on to find that the solicitation expressly placed the protester on notice that the Air Force intended to make the award pursuant to its OTA authority.

The GAO found that, on this record, the protester's assertion that the Air Force's use of its OTA authority in conducting this procurement was not timely filed, and the contractor's challenges to the Air Force's evaluation of the response to the solicitation are outside of the GAO's bid protest jurisdiction.

The takeaway

The GAO's *Spartan Medical* decision merits discussion because it is yet another example of an agency using its increasingly popular OTA authority for what otherwise looks like a standard procurement for products and the GAO stepping back from having much of a role in reviewing the reasonableness of the agency's decision.

The case also serves as a reminder to contractors that, if they want relief from the GAO regarding an OTA, it is necessary to challenge the decision to use the OTA in the first place, rather than the selection decision after the fact.

Notes

1 <https://bit.ly/30931Ui>

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