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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Exploration Partners, LLC

File: B-298804

Date: December 19, 2006

Royce Jones for the protester.

James H. Roberts, III, Esq., Van Scoyoc Kelly PLLC, for Rocketplane Kistler, the intervenor.

Vincent A. Salgado, Esq., Eve Lyon, Esq., Amy Voigt, Esq., and Jonathan A. Arena, Esq., National Aeronautics and Space Administration, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under the Competition in Contracting Act of 1984 and GAO's Bid Protest Regulations, GAO will not review the issuance of Space Act agreements pursuant to agency's "other transactions" authority, because the issuance of the Space Act agreements pursuant to that authority was not tantamount to the award of contracts for the procurement of goods and services and was, therefore, outside GAO's bid protest jurisdiction; GAO will review, however, a timely protest that an agency improperly used a non-procurement instrument, such as an "other transactions" instrument, where a procurement contract was required.

DECISION

Exploration Partners, LLC protests the issuance of funded Space Act agreements to Space Exploration Technologies Corporation (SpaceX) and Rocketplane Kistler Limited Incorporated by the National Aeronautics and Space Administration (NASA) under announcement No. COTS-01-05, which solicited research and development proposals in support of the agency's Commercial Crew/Cargo Project Office.

We dismiss the protest.

"Space Act" agreements are issued by NASA under its "other transactions" authority pursuant to the National Aeronautics and Space Act of 1958 (the "Space Act"). 42 U.S.C. § 2473(c)(5) (2000). A "Funded Space Act Agreement" is "an agreement under which appropriated funds will be transferred to a domestic agreement partner to

accomplish an Agency mission, but whose objective cannot be accomplished by the use of a contract, grant, or Chiles Act cooperative agreement.” NASA Policy Directive, NPD 1050.1G, Nov. 13, 1998, at 1-2.

NASA established the Commercial Crew/Cargo project to:

- implement U.S. Space Exploration policy with an investment to stimulate commercial enterprises in space,
- facilitate U.S. private industry demonstration of cargo and crew space transportation capabilities with the goal of achieving reliable, cost effective access to low-Earth orbit, and
- create a market environment in which commercial space transportation services are available to Government and private sector customers.

Announcement at 1. In support of these objectives, NASA informed interested firms that the agency envisioned a two-phased approach to be known as the commercial orbital transportation (COTS) project. Phase 1 was described as a “period of development and demonstration by private industry, in coordination with NASA, of various space transportation capabilities . . . determined to be most desirable for the Government and other customers.” Phase 2 was described as a “potential competitive procurement of orbital transportation services to resupply the [International Space Station] with cargo and crew, if a capability is successfully demonstrated and the Government determines it is in its best interest.” NASA issued the announcement, which is the subject of this protest, to implement phase 1 of the COTS project and stated that the agency intended to enter into “at least one and preferably multiple” funded Space Act agreement(s). Id. at 2.

Firms were also informed that NASA anticipated providing funding of up to \$500 million over a 4-year period; firms were also informed that “[i]n order to maximize capability coverage, participants are expected to secure additional funds to supplement the NASA funding.” Id. at 12. In this regard, the announcement stated

Payments will be made upon the successful completion of performance milestones as proposed by the participants and negotiated with NASA. NASA’s contribution will be a fixed amount and will not be increased based on the participant’s ability to obtain private funding.

Id. at 3.

The announcement requested proposals from interested firms and provided instructions for the preparation of proposals. Proposals were to describe the firms’

business plans and technical approaches, and to provide the firms' anticipated costs, estimated operational prices, and business financial information. See id. at 16-22, app. C. The announcement also stated that selection of proposals for issuance of Funded Space Act agreements would not be governed by the Federal Acquisition Regulation (FAR) or the agency's FAR supplement because the announcement did not provide for the award "of a contract, grant, or cooperative agreement." Id. at 23.

NASA received proposals from a number of firms, including Exploration Partners, SpaceX, and Rocketplane. Six firms, including SpaceX and Rocketplane, were invited to proceed to "negotiations"; the protester was not. Subsequently, NASA issued Space Act agreements to SpaceX and Rocketplane.

Exploration Partners protests that, as "the only company that offered a fully funded end-to-end transportation system," it should have received a Space Act agreement. In the alternative, the protester requested that the "COTS program . . . be re-bid under the original terms and conditions without interference in obtaining Shuttle hardware, cost data or interference in commercial business relationships." Protest at 7.

NASA and the intervenor argue that the Space Act agreements protested here are not procurement contracts subject to our bid protest review under the Competition in Contracting Act of 1984 (CICA). Instead, they assert that these agreements were issued pursuant to the agency's "other transactions" authority under the Space Act. Accordingly, the agency and intervenor request that we dismiss this protest.

Under CICA 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 procurement of goods and services, and solicitations leading to such awards. See 31 U.S.C. §§ 3551(1), 3552 (2000); 4 C.F.R. § 21.1(a) (2006). We generally do not review, however, protests of the award or solicitations for the award of cooperative agreements or other non-procurement instruments because they do not involve the award of a procurement contract. See, e.g., Sprint Communications, L.P., B-256586, B-256586.2, May 9, 1994, 94-1 CPD ¶ 300 at 3 (GAO does not have jurisdiction to consider the award of a cooperative agreement).

The jurisdiction of our Office to review the issuance of these Space Act agreements turns upon whether NASA's exercise of its "other transactions" authority is actually the award of contracts for the procurement of goods and services. NASA's authority to enter into "other transactions" was provided by the Space Act, which provides, in pertinent part, that the agency may

enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or

possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution.

42 U.S.C. § 2473(c)(5). The Space Act does not define “other transactions,” but Congress recognized at the time of its promulgation that this was a grant of “broad authority.”¹ See H.R. No. 1770, at 19 (1958), reprinted in 1958 USCCAN 3160, 3178; see also H.R. No. 1758, at 50 (1958).

The starting point for our analysis is the statutory language used by Congress. See Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.”). Here, the Space Act in its grant of authority to NASA plainly distinguished between contracts and “other transactions.”² It is a cardinal principle of statutory construction that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001), citing United States v. Menasche, 348 U.S. 528, 538-39 (1955). Applying this principle to the language of the Space Act, we find that entering and performing “other transactions” cannot be the same as entering and performing procurement contracts. Therefore, we conclude that NASA’s issuance of these Space Act agreements pursuant to its “other transactions authority” is not tantamount to the award of contracts for the procurement of goods and services, which would be subject to our bid protest jurisdiction.³ This conclusion is consistent with our earlier decisions,

¹ Since 1958, Congress has extended the authority to use “other transactions” to a number of other federal agencies, including the Department of Defense (DoD) (10 U.S.C. § 2371 (2000)), the Department of Homeland Security (Homeland Security Act of 2002, Pub. L. No. 107-296, § 831(a), 116 Stat. 2224), the Department of Energy (Energy Policy Act of 2005, Pub. L. No. 109-58, § 1007, 119 Stat. 932), and the Department of Transportation (Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 5102, 112 Stat. 423).

² We note in this regard that DoD’s grant of “other transaction” authority also clearly distinguishes that authority from the authority provided DOD to enter into contracts. See 10 U.S.C. § 2371(a).

³ This conclusion is consistent with the long-held views of those agencies that have been granted “other transactions” authority and within the federal procurement community generally. See, e.g., NASA’s Space Act Agreements Manual, NPR 1050.1, Nov. 21, 2003, at 3 (“As discussed in this document, these ‘other transaction’ agreements (referred to as Space Act agreements) also do not include procurement contracts. Therefore, procurement laws and regulations are not applicable.”); Memorandum of DoD Under Secretary of Defense (Acquisition, Technology & Logistics) Paul Kaminiski to Secretaries of the Military Departments, Dec. 14, 1996 (“other transactions” are “alternatives to contracts,” which are not subject to

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cited above, in which we concluded that our Office’s bid protest review authority did not generally extend to cooperative agreements and other non-procurement instruments.

Notwithstanding our conclusion, we will review, however, a timely protest that an agency is improperly using a cooperative agreement or other non-procurement instrument, such as NASA’s Space Act agreements, where a procurement contract is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. *Id.* at 3; Energy Conversion Devices, Inc., B-260514, June 16, 1995, 95-2 CPD ¶ 121 at 2. For example, the Federal Grants and Cooperative Agreement Act provides, in pertinent part, that an executive agency must use a procurement contract when:

- (1) 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; or
- (2) the agency decides in a specific instance that the use of a procurement contract is appropriate.

31 U.S.C. § 6303.

(...continued)

procurement statutes and regulations such as CICA and the FAR and are not subject to GAO’s bid protest review); see also Department of Defense “Other Transactions”: An Analysis of Applicable Laws, American Bar Association Monograph, Jan. 5, 2000. GAO’s reports to Congress have also reported that “other transactions” are “other than contracts, grants, or cooperative agreements that generally are not subject to federal laws and regulations applicable to procurement contracts.” GAO-03-150, “Defense Acquisitions: DOD Has Implemented Section 845 Recommendations but Reporting Can Be Enhanced,” Oct. 2002, at 1; see also GAO-05-136, “Homeland Security: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority,” Dec. 2004, at 1 (“Other transactions are agreements other than government contracts, grants, and cooperative agreements . . . [and] are exempt from the Federal Acquisition Regulation (FAR), the government’s Cost Accounting Standards, and various federal statutes. . . .”) (footnote omitted); GAO/NSIAD-00-33, “Acquisition Reform: DOD’s Guidance on Using Section 845 Agreements Could Be Improved,” Apr. 2000, at 3 (“[o]ther transactions are generally not subject to the federal laws and regulations governing standard procurement contracts”); GAO/NSIAD-96-11, “DOD Research: Acquiring Research by Nontraditional Means,” Mar. 1996, at 2-3.

Here, Exploration Partners did not timely challenge NASA's issuance of Space Act agreements where the protester believed that procurement contracts were required.⁴ The protester's contention that NASA allegedly misused its "other transaction" authority by issuing Space Act agreements to firms that had not offered completely funded end-to-end transportation solutions does not, as the protester apparently believes, provide us with an independent basis to review NASA's issuance of Space Act agreements here. To the contrary, the protester's arguments actually concern NASA's selection of Space Act agreement recipients under the announcement, rather than the propriety of its use of its "other transactions" authority.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

⁴ Such a challenge here was required to be filed before the closing date set for receipt of proposals, given NASA's announcement that it would be issuing Space Act agreements. 4 C.F.R. § 21.2(a)(1).