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Decision

Matter of: MorphoTrust USA, LLC

File: B-412711

Date: May 16, 2016

Kevin P. Mullen, Esq., Damien C. Specht, Esq., and R. Locke Bell, Esq., Morrison & Foerster LLP, and Charles L. Capito, Esq., Jenner & Block LLP, for the protester. Virginia G. Farrier, Esq., Christopher J. Reames, Esq., and Angela M. Varner, Esq., Department of Homeland Security, Transportation Security Agency, for the agency. Louis A. Chiarella, Esq., and Noah B. Bleicher, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester’s contention that the Transportation Security Agency (TSA) is improperly using its “other transactions” authority--rather than a procurement contract--to enter into agreements with entities to develop innovations for the TSA Pre✓® Application Expansion Initiative is denied where TSA has statutory authority to enter into “other transactions” and the protester has not shown that TSA’s use of this authority is inconsistent with TSA’s statute.

DECISION

MorphoTrust USA, LLC, of Washington, District of Columbia, protests the terms of request for proposals (RFP) No. HSTS02-16-R-OIA011, issued by the Department of Homeland Security (DHS), Transportation Security Agency (TSA), for the award of “other transaction” agreements in support of the TSA Pre✓® Application Expansion Initiative.¹ MorphoTrust argues the solicited services must be acquired using a procurement contract; the protester also alleges that the solicitation is ambiguous and defective in certain regards.

We deny the protest.

¹ As detailed below, an “other transaction” agreement is a special type of legal instrument used by federal agencies that possess such authority.

BACKGROUND

In the aftermath of the terrorist hijackings and crashes of passenger aircraft on September 11, 2001, the Congress passed, and the President signed, the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 et seq. (2001), codified at 49 U.S.C. § 114. The ATSA established TSA as a new agency, originally within the Department of Transportation (DOT) and then subsequently within DHS, and tasked it with security responsibilities for all modes of transportation overseen by DOT and other related activities. As part of its mission to ensure aviation security, TSA was made responsible for passenger security, including security screening at various security checkpoints throughout commercial airports. To fulfill this mission, TSA thereafter hired and deployed security screeners, security managers, law enforcement officers, and intelligence and support personnel to screen all passengers and property at the nation's domestic airports (see Resource Consultants, Inc., B-290163, B-290163.2, June 7, 2002, 2002 CPD ¶ 94 for additional details).

Relevant to the protest here, the ATSA also specified TSA's authority to conduct aviation passenger security prescreening as follows:

In general. The Under Secretary of Transportation for Security may take the following actions:

* * * * *

(3) Establish requirements to implement trusted passenger programs and use available technologies to expedite the security screening of passengers who participate in such programs, thereby allowing security screening personnel to focus on those passengers who should be subject to more extensive screening.

49 U.S.C. § 114 note.

On October 22, 2015, TSA issued the current RFP, competitively seeking proposals for the TSA Pre✓® Application Expansion Initiative. In general terms, the TSA Pre✓® Program is "an expedited security screening program connecting travelers departing from airports within the United States with smarter security and a better air travel experience. Passengers considered low-risk who qualify for the program can receive expedited screening either as a member of the program or another specific trusted traveler group." See <https://www.tsa.gov/tsa-precheck> (last visited on May 10, 2016). As a result of the voluntary TSA Pre✓® screening, pre-approved airline travelers are then permitted to leave on their shoes, light outerwear and belt,

keep their laptop in its case, and leave their “3-1-1” compliant liquid/gels bag in a carry-on in select screening lanes.² Statement of Work (SOW) at 1.

The RFP described the purpose and scope of the TSA Pre✓® Application Expansion Initiative as follows:

The purpose of this Statement of Work (SOW) is to identify the tasks necessary to develop, deliver, and deploy private sector application capabilities expanding the public’s enrollment opportunities for TSA Pre✓®

TSA requests ready-to-market solutions to add private sector application capabilities for the TSA Pre✓® Application Program to increase the public’s enrollment access to the TSA Pre✓® program. As a secondary benefit, increasing enrollment access may lead to increasing scale for TSA Pre✓® and providing the ability for TSA to identify known travelers.^[3]

Id.

The RFP contemplated the award of multiple “other transaction” agreements--rather than procurement contracts--for a 3-year base period with seven 1-year options.⁴ RFP at 2. The RFP established that awards would be based upon a detailed, multi-step evaluation approach. Id. at 2-3. First, TSA would evaluate offerors’ written proposals and oral presentations using four criteria, or elements: technology and technical capabilities; operational approach and capabilities; marketing approach and capabilities; and past performance. Id. at 6-9. In subsequent phases, TSA would conduct: independent verification and validation of the offeror’s information technology systems; assessment testing by the DHS Science and Technology

² Travelers who choose not to enroll or for some reason are not eligible for the TSA Pre✓® Program are not subject to any limitations on their travel, and will instead be processed through standard TSA screening before entering the controlled areas of airports. SOW at 1. TSA also retains the authority to perform random screening on travelers who are authorized to receive TSA Pre✓® or other forms of physical screening. Id.

³ While private firms would market, enroll, and pre-screen individuals for TSA Pre✓® eligibility, the agency itself would make the final eligibility determination for actual TSA Pre✓® enrollment upon completion of a security threat assessment. RFP at 1.

⁴ The RFP stated that the agency may limit the number of awards initially to three offerors, but that the agency could also seek and consider additional proposals, and make additional awards, during the 10-year performance period. RFP at 2.

Directorate; and an operational systems demonstration. Id. at 2-3. Thereafter, those offerors whose proposed solutions were found to be most advantageous to the government would be awarded “other transaction” agreements. Id. at 3, 14.

Also, while the solicitation set forth various technical capability factors upon which award would be based, cost to the government was not an evaluation criterion. In this regard, the RFP stated that:

Cost Reimbursement

Successful offerors will provide these enrollment services, throughout the life of the resultant agreement, at no cost to the Government. Offerors must provide TSA a nominal fee per applicant to reimburse expenses related to the conduct of Government security threat assessments and make final enrollment determinations. Beyond this fee, Offerors are free to establish novel business models and pricing mechanisms to recover the costs of their efforts and continue to expand enrollments.^[5]

Id. at 2.

Prior to the issuance of the RFP, the head of the TSA contracting activity prepared a determination and findings (D&F) regarding the agency’s decision to use “other transaction” agreements for the TSA Pre✓® Application Expansion Initiative. In its memorandum the agency official found that:

- TSA had statutory authority to enter into “other transaction” agreements.
- The agency had determined it necessary to use “other transaction” agreements with private entities to develop and deploy innovative solutions that would increase the number of individuals determined to pose a low risk to the transportation system, and who would be authorized to use expedited physical screening processes under the TSA Pre✓® initiative.
- The “other transaction” agreements would authorize selected entities to offer pre-screening services to the public, and to charge users fees for the services provided.
- The use of a procurement contract was not suitable for this requirement based on the anticipated relationships between the parties, and that the principal purpose of the “other transaction” agreement was not to acquire services for the direct benefit or use of the government (rather, the travelling public that may be

⁵ Additionally, “TSA will not provide any Government reimbursement of any cost incurred in making necessary studies or designs for the preparation of the systems or incurred in obtaining services or supplies.” Id. at 2.

authorized to use expedited screening processes was the beneficiary of the services).⁶

- The method of soliciting and selecting “other transaction” agreement recipients would be through the use of full and open competition.

AR, Tab 2, TSA D&F, Dec. 12, 2014, at 1-2.

The head of the TSA contracting activity then determined that “other transaction” agreements were appropriate for this project and approved their use. Id. at 2.

On January 25, MorphoTrust sent an email to TSA, asserting that the use of a procurement contract was required and that the terms of the solicitation were defective in certain regards.⁷ Protest, attach. B, MorphoTrust Email to TSA, Jan. 25, 2016, at 1-4. On January 27, the day proposals were due, TSA informed MorphoTrust that notwithstanding the firm’s concerns, “the agency is moving forward with the RFP.” Id., attach. C, TSA Email to MorphoTrust, Jan. 27, 2016, at 1. MorphoTrust thereafter [DELETED], and filed its protest with our Office on February 5.⁸

DISCUSSION

MorphoTrust argues that TSA must use a procurement contract, rather than an “other transaction” agreement, to acquire the desired TSA Pre✓® enrollment and pre-screening services. In support of its position the protester asserts that: (1) awardees under the solicitation will relieve TSA of statutorily-required duties that would otherwise be provided by agency personnel; (2) the prior use of a procurement contract to obtain these services is evidence that an “other transaction” agreement is inappropriate;⁹ and (3) the RFP includes services, such

⁶ The agency found that TSA would receive a secondary benefit, however, insofar as the number of pre-screened passengers would increase, thereby allowing more attention to be paid to travelers about whom nothing was known. Agency Report (AR), Tab 2, TSA D&F, Dec. 12, 2014, at 1.

⁷ Although not labeled as such, we find that MorphoTrust’s submission here met the requirements of an agency-level protest, *i.e.*, a specific expression of dissatisfaction with the agency’s actions and a request for relief. See Coulson Aviation (USA), Inc., B-411525, B-411525.2, Aug. 14, 2015, 2015 CPD ¶ 272 at 5.

⁸ As MorphoTrust filed an agency-level protest challenging the terms of the RFP before closing, we also find that MorphoTrust filed a timely protest with our Office within 10 days of initial adverse agency action. See 4 C.F.R. § 21.2(a)(3).

⁹ MorphoTrust had previously performed work under contract with TSA in support of the TSA Pre✓® Program (*e.g.*, providing enrollment sites, collecting biographic and
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as adjudication services, that have been previously performed by TSA personnel.¹⁰ MorphoTrust also argues that TSA's use of its "other transaction" authority "exempts TSA from adhering to important procurement statutes and regulations, and allows the Agency to avoid precisely the type of oversight and regulation that Congress intended for federal procurements." Protest at 1.

The agency maintains that the use of its "other transaction" authority is proper, as the TSA Pre✓® Application Expansion Initiative falls within the scope of the agency's "other transaction" authority. TSA also argues that, as intended by the Congress, the use of its "other transaction" authority to carry out the functions of the agency is discretionary. The agency further maintains that MorphoTrust has failed to allege a violation of applicable procurement statute or regulation. As detailed below, we find no basis on which to sustain the protest.

An "other transaction" agreement is a special type of legal instrument used for various purposes by federal agencies that have been granted statutory authority to use "other transactions." GAO's audit reports to the Congress have repeatedly 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." Defense Acquisitions: DOD Has Implemented Section 845 Recommendations but Reporting Can Be Enhanced, GAO-03-150, Oct. 9, 2002, at 1.¹¹

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biometric information from an applicant, and collecting the application fee). Contracting Officer's Statement, Mar. 4, 2016, at 11.

¹⁰ MorphoTrust does not allege that the RFP requires the awardee to perform inherently-governmental functions that can only be done by agency personnel. Rather, the protester essentially argues that although the RFP requirements can be performed by a private entity such as itself, it must be done pursuant to a procurement contract rather than an "other transaction" agreement.

¹¹ See also Federal Acquisitions: Use of 'Other Transaction' Agreements Limited and Mostly for Research and Development Activities, GAO-16-209, Jan. 7, 2016, at 1-6; Homeland Security: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority, GAO-05-136, Dec. 15, 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. . . ."); Acquisition Reform: DOD's Guidance on Using Section 845 Agreements Could Be Improved, GAO/NSIAD-00-33, Apr. 7, 2000, at 3. The Congressional Research Service has expressed similar views. Library of Congress, Congressional Research Service, "Other Transaction (OT) Authority," No. 7-5700, July 15, 2011, at 1 ("There is no statutory or regulatory definition of 'other

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TSA's authority to enter into "other transactions" was provided to it by the ATSA, which provides in pertinent part that,

The Administrator is authorized to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the functions of the Administrator and the Administration. The Administrator may enter into such contracts, leases, cooperative agreements, and other transactions with any Federal agency . . . or any instrumentality of the United States, any State, territory, or possession, or political subdivision thereof, any other government entity, or any person, firm, association, corporation, or educational institution, on such terms and conditions as the Administrator may consider appropriate.

49 U.S.C. § 106(l)(6).¹²

The ATSA, does not define "other transactions" or otherwise provide guidance on its use by TSA. Congress has, however, previously recognized the expansiveness of this provision: when providing "other transaction" authority to the National Aeronautics and Space Administration (NASA), Congress characterized this to be a grant of "broad authority." See H.R. Rep. No. 1770, at 19 (1958), reprinted in 1958 U.S.C.C.A.N. 3160, 3178; see also H.R. Rep. No. 1758, at 50 (1958).

Under the Competition in Contracting Act of 1984 (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 the procurement of goods and services, and solicitations leading to such awards. See 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). We have also found that agreements issued by an agency under its "other transaction" authority "are not procurement contracts, and therefore we generally do not review protests of the award, or solicitations for the award, of these agreements under our bid protest jurisdiction."¹³ Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD

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transaction,' though, in practice, it is defined in the negative: an ['other transaction'] is not a [procurement] contract, grant, or cooperative agreement."). See also "The Government Contracts Reference Book" (2nd ed. 1998) at 380.

¹² Specifically, the ATSA states that in carrying out its functions, TSA "shall have the authority as is provided to the Administrator of the Federal Aviation Administration under subsections (l) and (m) of section 106 [49 USCS § 106]." 49 U.S.C. § 114(m)(1).

¹³ In Exploration Partners, LLC, B-298804, Dec. 19, 2006, 2006 CPD ¶ 201 at 4, we set forth in detail our determination why "other transaction" agreements were not
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¶ 22 at 3; see also Exploration Partners, LLC, B-298804, Dec. 19, 2006, 2006 CPD ¶ 201 at 3 (finding that “other transaction” agreements, cooperative agreements, and other non-procurement instruments are not procurement contracts); Strong Env'tl., Inc., B-311005, Mar. 10, 2008, 2008 CPD ¶ 57 at 4 (GAO does not have jurisdiction to consider the award of a cooperative agreement); Sprint Commc'ns Co. L.P., B-256586, B-256586.2, May 9, 1994, 94-1 CPD ¶ 300 at 3. We will review, however, a timely protest that an agency is improperly using its “other transaction” authority. See Rocketplane Kistler, supra.

We find that TSA has statutory authority to enter into “other transaction” agreements, and the protester has not shown that TSA’s use of this authority for the Pre✓® Application Expansion Initiative is inconsistent with TSA’s statute.

Congress granted “other transaction” authority to TSA. Specifically, TSA “is authorized to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the functions of the Administrator and the Administration.” 49 U.S.C. § 106(l)(6) (emphasis added). Further, it is clear that the solicitation here for the TSA Pre✓® Application Expansion Initiative falls within the scope of TSA’s “other transaction” authority. Unlike the limited “other transaction” authority provided to certain other federal agencies, TSA’s “other transaction” authority may be used for any purpose “necessary to carry out” the agency’s functions.¹⁴ There is no express statutory

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procurement contracts subject to our bid protest review (the protest involved the use of “other transaction” agreements by NASA, with authorizing language almost identical to that provided to TSA). The starting point for our analysis was the statutory language used by Congress. Id. There, as here, the underlying statute in its grant of authority plainly distinguished between contracts and “other transactions.” Id. “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.” Id., citing TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001). Applying this principle to the language of the statute at hand, we found that entering and performing “other transactions” could not be the same as entering and performing procurement contracts. Id. We therefore concluded that NASA’s use of “other transaction” agreements was not tantamount to the award of contracts for the procurement of goods and services, which would be subject to our bid protest jurisdiction. Id. Additionally, for the same reason, i.e., so as to prevent any statutory clause, sentence, or word from becoming superfluous, void, or insignificant, we find that “other transaction” agreements are also distinct and separate from cooperative agreements.

¹⁴ For example, the “other transaction” authority provided to the Department of Defense is generally limited to basic, applied, and advanced research projects. 10 U.S.C. § 2371(a).

prohibition on TSA using its “other transaction” authority for the Pre✓® Application Expansion Initiative, nor any statutory requirement that this particular program be done by means of a procurement contract.

Where, as here, a decision--such as whether to use “other transaction” authority--is authorized by statute or regulation, our Office will not make an independent determination of the matter. MCR Fed., LLC, B-401954.2, Aug. 17, 2010, 2010 CPD ¶ 196 at 5; Knights’ Piping, Inc.; World Wide Marine & Indus. Servs., B-280398.2, B-280398.3, Oct. 9, 1998, 98-2 CPD ¶ 91 at 6. Instead, our review of a discretionary agency action is limited to whether the action undertaken was a knowing and authorized one. See, e.g., CIGNA Gov’t Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 14 (holding that our review of an agency’s discretion to waive an organizational conflict of interest was confined to whether the waiver outlined the extent of the conflict and was executed by a duly-authorized agency official).

Here we find TSA’s decision to use its “other transaction” authority unobjectionable. In this regard, the record reflects that the head of the TSA contracting activity prepared and duly executed a written determination that outlined the rationale for the agency’s use of its “other transaction” authority for the TSA Pre✓® Application Expansion Initiative. The determination first recognized the “other transaction” authority possessed by the agency. The determination also included a detailed discussion of the bases for his conclusion that an “other transaction” agreement would provide flexibilities necessary to the successful accomplishment of the program, and would be in the best interests of the government. See AR, Tab 2, TSA D&F, Dec. 12, 2014, at 1-2. Additionally, there is no dispute that the head of the TSA contracting activity was authorized to make such a determination, or that the resulting solicitation was consistent in scope with the approved use of the agency’s “other transaction” authority. We therefore have no basis to question the reasonableness of the agency’s actions.¹⁵ See CIGNA Gov’t Servs., LLC, supra.

MorphoTrust does not dispute that TSA possesses “other transaction” authority. Rather, MorphoTrust maintains that the agency is required by the Federal Grant and Cooperative Agreement Act (FGCAA) to conduct the TSA Pre✓® Application Expansion Initiative as a procurement contract.¹⁶ We disagree.

¹⁵ To the extent MorphoTrust believes that TSA may have abused its discretion to use “other transaction” authority, MorphoTrust can pursue avenues other than our bid protest review that it deems appropriate.

¹⁶ MorphoTrust also alleges that the agency’s internal policy guidance on the use of “other transactions” requires TSA to use a procurement contract here. However, internal agency policy guidance does not establish legal rights and responsibilities such that actions taken contrary to it are subject to objection. NANA Servs., LLC, B-401951.5, B-401951.6, Sept. 27, 2012, 2013 CPD ¶ 50 at 5.

The FGCAA establishes the general criteria that agencies must follow in making the decision about whether to use a procurement contract, grant, or cooperative agreement when entering into a funding relationship with a state, locality, or other entity for an authorized purpose.¹⁷ 31 U.S.C. §§ 6301-6308. The FGCAA, however, makes no mention of “other transaction” authority which various federal agencies such as TSA possess. Thus, although the FGCAA provides applicable guidance to all federal agencies when the choices are limited to (1) procurement contracts, (2) grants, or (3) cooperative agreements, it provides no guidance when determining when an agency may properly use its other transaction authority. We find our decision in Assisted Housing Servs. Corp., et al., B-406738 et al., Aug. 15, 2012, 2012 CPD ¶ 236, which reviewed an agency’s intended use of a cooperative agreement under the FGCAA and upon which MorphoTrust repeatedly relies, to be inapposite to the present situation, since “other transaction” authority was not at issue.

Lastly, MorphoTrust protests that the terms of the solicitation are defective in certain regards. The protester alleges that the RFP contains a number of privacy and data security issues that are ambiguous and which deprive offerors of an ability to compete on an equal basis. MorphoTrust also argues that the attendant risks and uncertainties will result in proposals that cannot be evaluated on a common basis. Protest at 8-9. As we have determined that TSA can properly use “other transaction” agreements for its Pre✓® Application Expansion Initiative, and the protester has in no way shown that the terms of TSA’s request for proposals are inconsistent with its statute, we see no basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel

¹⁷ In this regard, the FGCAA provides that an agency must use a procurement contract when “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 the agency otherwise “decides in a specific instance that the use of a procurement contract is appropriate,” 31 U.S.C. § 6303, and a grant agreement or cooperative agreement when the “principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States.” Id., §§ 6304-6305. Under the FGCAA, the distinction between the two agreement types--grants and cooperative agreements--is whether or not “substantial involvement” is expected between the agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement. Id.