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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Rocketplane Kistler

File: B-310741

Date: January 28, 2008

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DIGEST

The National Aeronautics and Space Administration could use a Space Act agreement under that agency's "other transactions" authority, and was not required to use a procurement contract, for the development and demonstration of a space transportation system, where the principal purpose of the announcement was not to acquire goods or services for the direct benefit of the agency, but to stimulate a public purpose authorized by law.

DECISION

Rocketplane Kistler protests the terms of announcement No. JSC-COTS-2, issued by the National Aeronautics and Space Administration (NASA) for the award of a funded Space Act agreement for the development and demonstration of various space transportation capabilities to and from low-Earth orbit. Rocketplane contends that the solicited services must be acquired using a procurement contract.

We deny the protest.

NASA has established the Commercial Crew and Cargo program to:

- implement U.S. Space Exploration policy with investments to stimulate the commercial space industry,
- facilitate U.S. private industry demonstration of cargo and crew space transportation capabilities with the goal of

achieving safe, 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.” Id. at 2. Phase 2 was described as a “planned competitive procurement of orbital transportation services to resupply the [International Space Station] with cargo and crew.” Id.

The announcement here was issued as a continuation of the phase 1 development of the COTS project and stated that:¹

As a continuation of the project initiated in 2006, NASA intends to enter into a second round of agreements with private industry to develop and demonstrate the vehicles, systems, and operations needed to resupply, return cargo from, and transport crew to and from a human space facility, with the International Space Station providing the representative requirements for such a facility.

Id. at 1. The announcement solicited proposals for demonstrations involving an end-to-end space transportation system of services including ground operations and integration, launch, rendezvous, proximity operations, docking or berthing, orbital operations, reentry, and safe disposal or return. Id. at 2.

Instructions for the preparation of technical proposals and business plans were provided, and participants were informed that, based upon the evaluation of these proposals and plans, a firm, or firms, would be selected for the negotiation of funded Space Act agreement(s).² Id. at 16-24. The participants were informed that they were expected to secure the funding necessary to complete the proposed capability

¹ Previously, Rocketplane and Space Exploration Technologies Corporation received Space Act agreements supporting phase 1 of the COTS project. See Exploration Partners, LLC, B-298804, Dec. 19, 2006, 2006 CPD ¶ 201 at 3.

² 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. NASA Policy Directive, NPD 1050.1H, Nov. 29, 2006, at 2.

demonstration, although funding from NASA could be considered one of the sources of funding. In this regard, the announcement provided that NASA anticipated providing up to \$174 million for funding spread over fiscal years 2008 through 2010 among the firm, or firms, selected for Space Act agreements. Id. at 12. The announcement also stated

[p]ayments will be made upon the successful completion of performance milestones 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. A startup milestone payment will be considered.

Id. at 3.

Rocketplane protests that the principal purpose of the announcement is to obtain research and development (R&D) services for the direct benefit of NASA,³ and that therefore NASA was required to obtain these services under a procurement contract and not a Space Act agreement. Protest at 2-3.

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 procurement of goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551(1), 3552 (2000); 4 C.F.R. § 21.1(a) (2007). We have found that Space Act agreements, which 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), 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. Exploration Partners, LLC, supra, at 4-5. We will review, however, a timely protest that an agency is improperly using a non-procurement instrument, such as a Space Act agreement, 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 5; Energy Conversion Devices, Inc., B-260514, June 16, 1995, 95-2 CPD ¶ 121 at 2.

The Federal Grant and Cooperative Agreement Act establishes the general criteria that agencies must follow in deciding which legal instrument to use when entering into a funding relationship with a state, locality or other recipient for an authorized

³ That is, the protester argues, the announcement seeks "research and development efforts of a commercial space sector contractor to develop and produce transport vehicles that can take equipment and ultimately crew to and from the International Space Station." Protest at 2.

purpose. 31 U.S.C. §§ 6301-6308 (2000). Under these criteria, an 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; see also Federal Acquisition Regulation (FAR) § 35.003(a) (“Contracts shall be used only when the principal purpose is the acquisition of supplies and services for the direct benefit of the Federal Government”). On the other hand, a procurement contract would not be required to carry out a public purpose of support or stimulation authorized by law, where the principal purpose of the agreement is not to acquire property or services for the direct benefit or use of the agency. See, e.g., 31 U.S.C. § 6305 (cooperative agreements); see also Rick’s Mushroom Serv., Inc. v. United States, 76 Fed.Cl. 250, 258 (2007) (agreement was not a procurement contract, where it did not contemplate the transfer of goods or services directly to the government; there was no evidence of a buyer-seller relationship; and no direct benefit accrued to the government.)

NASA contends that the principal purpose of the announcement is not to acquire goods and services for the direct benefit and use of NASA. Specifically, the agency notes that:

NASA obtains no vehicles, supply service, prototype, hardware, or other property, no systems or vehicle designs, and only the minimum Government-purpose data rights legally required by the Space Act. The Announcement does not provide NASA any right to future use of systems and vehicles developed and demonstrated under COTS Phase 1, for [International Space Station] supply missions or for any other purpose. The participant, not NASA, proposes the capabilities it will demonstrate and establishes the technical and schedule milestones for those demonstrations.

Agency Report (AR) at 2. Instead, NASA states that the purpose of the announcement is to “encourage the growth of a future U.S. commercial market in which space transportation services will be available for commercial and Government customers.” Id. This purpose differs from that of an R&D contract, the agency argues, because an R&D contract is used to obtain research, and the results of that research for an agency’s use, see FAR §§ 35.010, 35.011, whereas here the announcement seeks to “incentivize the private sector to develop and demonstrate their own commercial

technologies” and allows those firms to retain the maximum intellectual property rights allowed by the Space Act.⁴ Supp. AR at 2.

We find that the announcement did not principally provide for the acquisition of goods and services for the direct benefit and use of NASA. The record supports the agency’s arguments that the principal purpose of the announcement is to encourage, support and stimulate the development of a commercial market for space transportation, from which NASA could potentially acquire orbital transportation services. Although we agree with Rocketplane that such services in support of the growth of a commercial space transportation industry also support the government’s space exploration policy, which NASA is directed to foster, we do not find that supporting and stimulating efforts in support of a lawfully mandated public policy establishes that an agency is acquiring services for its own direct benefit and use. See Rick’s Mushroom Serv., Inc. v. United States, 76 Fed.Cl. at 258 (agreement was not a procurement contract, even though it was entered into to carry out a public purpose of support or stimulation authorized by law). Instead, we agree with NASA that the agreement’s purpose should control whether the services are “principally” for the agency’s direct benefit or use, or, as is the case here, to support or stimulate a public purpose authorized by law.

Rocketplane also argues that NASA’s own policy directive states that funded Space Act agreements, such as that to be entered here, “may be used only when the Agency objective cannot be accomplished through the use of a procurement contract, grant, or cooperative agreement.” See NASA Policy Directive, NPD 1050.1H, Nov. 29, 2006, at 2. Rocketplane contends that the agency “failed to make any required baseline determination” as to whether the objectives contained in [the announcement] could not be accomplished through the use of an R&D contract. Protester’s Comments at 2.

However, the record shows that NASA “considered the objectives and purposes of the COTS Demonstrations, and whether they were appropriate for and could be accomplished under a contract, grant, cooperative agreement, or ‘other transaction,’ when planning the project strategy prior to the original COTS announcement in 2006.” See Supp. AR at 3; AR, Tab H, Commercial Crew/Cargo Project Strategy Briefing, Nov. 15, 2005, at 15-16. NASA concluded, as noted above, that its primary purpose was to stimulate the commercial space industry to provide creative, innovative, cost effective solutions for space transportation and that the announcement would not seek the acquisition of goods and services for the agency. AR, Tab H, Commercial Crew/Cargo Project Strategy Briefing, Nov. 15, 2005, at 16. In any event, we generally will not review an alleged violation of an internal agency

⁴ The announcement states that NASA will not obtain rights to a participant’s background intellectual property and “that title to all property acquired for the COTS demonstrations will remain with the Participant(s).” Announcement at 10.

policy, such as NASA's policy directive here. See Hughes Space and Commc'ns Co.; Lockheed Missiles & Space Co., Inc., B-266225.6 et al., Apr. 15, 1996, 96-1 CPD ¶ 199 at 17.

The protest is denied.

Gary L. Kepplinger
General Counsel