

COOPERATIVE AGREEMENT PROVIDING FUNDS DOES NOT MAKE AN ENTITY A FEDERAL AGENCY

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Does a non-profit organization qualify as a “federal agency” for purposes of Government Accounting Office (“GAO”) protest jurisdiction? The GAO says that even though the organization receives federal funding for a procurement, it is not a federal agency. *Acclaim Systems, Inc.*, B-421379, Feb. 10, 2023.

The Association of Food and Drug Officials (“AFDO”) holds a cooperative agreement with the U.S. Food and Drug Administration (“FDA”) that provided funds to AFDO for a procurement for information technology services to design, develop and manage a national regulatory platform for agriculture and public health. Acclaim asserted that AFDO made a flawed selection decision based on unreasonable technical evaluations.

AFDO is a well-recognized non-profit organization. It used funding from a cooperative agreement between it and the Department of Health and Human Services, FDA to issue a solicitation whereby AFDO would contract with the successful offeror to implement and manage the proposed solution.

GAO noted that its statutory authority to decide bid protests is set forth in the Competition in Contracting Act of 1984 (“CICA”). 31 USC §§ 3551-3557. CICA defines a protest as a written objection by an interested party to a solicitation or other request by a federal agency for offers for a contract for the procurement of property or services, or the award of such a contract. CICA adopted the definition of a federal agency set forth in the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 102(5). This section of law defines a federal agency as “an executive agency or an establishment in the legislative or judicial branch of the Government (except the Senate, House of Representatives and the Architect of the Capital).”

The threshold jurisdictional question for GAO is whether the procurement being protested is being conducted by a federal agency. GAO noted that AFDO is not a federal agency as defined by CICA. Further, nothing demonstrated that FDA involvement in the procurement was anything more than providing funding via the cooperative agreement.

Accordingly, since the procuring entity was not a federal agency, GAO was without jurisdiction to consider the protest and GAO dismissed the protest.

Takeaway. Protesters must be sure that any GAO protest is based on procurement by a federal agency. Money that passes through from a federal agency to a non-federal agency does not bring a protest within the scope of GAO protest jurisdiction.

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