



G A O

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**Comptroller General
of the United States**

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

Decision

Matter of: John Gage--Designated Employee Agent

File: B-400379

Date: August 4, 2008

John Gage, Designated Employee Agent, for the protester.
Tony Washington, Esq., and Adeel Ahmed, Esq., Transportation Security Administration, for the agency.
Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Pursuant to statutory and regulatory limitations on this Office's jurisdiction to hear protests challenging Transportation Security Administration (TSA) procurements, this Office will not consider a protest challenging a TSA procurement conducted in connection with a solicitation issued prior to June 23, 2008.

DECISION

John Gage-Designated Employee Agent, National President of the American Federation of Government Employees, protests the Transportation Security Administration's (TSA) award of a contract to Lockheed Martin Integrated Systems, Inc. The contract was awarded to Lockheed on July 3, 2008, pursuant to solicitation No. HSTS01-08-HRM010 which was issued by TSA on October 18, 2007; the solicitation sought proposals to provide various human resources services. Gage asserts that the contract constitutes a direct conversion of activities performed by federal employees under Office of Management and Budget Circular No. A-76.

We dismiss the protest.

In 2001 Congress enacted the Aviation Transportation Security Act, relevant portions of which are set forth at 49 U.S.C. § 114 (2004 Supp.), establishing the TSA as a new agency within the Department of Transportation and tasking it with broad transportation security responsibilities. Pursuant to 49 U.S.C. § 40110(d) (2005 Supp.), TSA procurements were subject to the Federal Aviation Administration's (FAA) acquisition management system and, because the statute also stipulated that procurements under that system are exempt from our bid protest

jurisdiction, TSA procurements were not subject to protests filed at our Office pursuant to TSA's organic legislation.¹

Recent legislation effectively revised this Office's jurisdiction over protests challenging TSA procurements. Specifically, the Consolidated Appropriations Act, 2008 (CAA), Pub. L. No. 110-161, 121 Stat. 1844, was enacted on December 26, 2007. That law repealed TSA's authority to use the FAA's acquisition management system, made TSA subject to the Federal Acquisition Regulation (FAR), and effectively provided jurisdiction for our Office to consider protests challenging TSA procurements. The CAA further provided that the changes flowing from that legislation "shall take effect 180 days after the date of enactment of this Act." 121 Stat. 2092. There is no dispute that June 23, 2008 was the 180th day following enactment of the CAA.

In implementing the CAA's legislative changes, the DHS published a rule providing that TSA acquisitions initiated after June 22, 2008 would be subject to the FAR. 73 Fed. Reg. 30,317 (2008). Similarly, and consistent with the DHS rule, this Office published proposed changes to our Bid Protest Regulations in March 2008 and, on June 9, 2008, issued the final rule changes, stating: "In light of the revised DHS regulations pertaining to the applicability of the FAR to TSA procurements, and in the interest of an orderly transition by TSA to FAR-based procurements, GAO will hear protests of TSA procurements covered by TSA solicitations issued on or after June 23." 73 Fed. Reg. 32,429.

Here, Gage's protest challenges the award of a contract to Lockheed pursuant to a solicitation that was issued by TSA on October 18, 2007--that is, more than 2 months prior to enactment of the CAA and more than 8 months prior to the effective date of that legislation. In pursuing this matter, Gage complains that, in addition to engaging in a direct conversion of activities performed by federal employees, TSA intends to improperly increase the scope of services Lockheed will perform beyond the services contemplated by the solicitation, specifically to include performance of human resource services at DHS headquarters.

We view the protest, including the argument regarding the scope of the services to be performed, as challenging TSA's actions pursuant to the October 18 solicitation and, as such, outside of our jurisdiction. In short, consistent with the legislative provisions of TSA's organic legislation, as subsequently amended by the CAA, along with this Office's announcement that we would begin hearing protests challenging

¹ In 2002, TSA was transferred to the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, 2173 (2002); however, that Act did not alter TSA's authority to conduct procurements pursuant to the FAA's acquisition management system or TSA's exemption from our bid protest jurisdiction.

TSA procurements covered by TSA solicitations issued on or after June 23, our protest jurisdiction does not extend to Gage's protest which challenges TSA's contract award pursuant to a solicitation issued prior to June 23.

The protest is dismissed.

Gary L. Kepplinger
General Counsel