



Decision

Matter of: Jay Hymas

File: B-414546

Date: May 23, 2017

Jay Hymas, for the protester.
Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.
Peter D. Verchinski, Esq., Nora K. Adkins, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's issuance of multiple cooperative farming agreements is dismissed where the protester has already sought and received an adjudication of the matter at the U.S. Court of Appeals for the Federal Circuit.
 2. Protest challenging the agency compliance with the Federal Grant and Cooperative Agreement Act is dismissed where our Office does not review protests of the award, or protests of solicitations for the award, of cooperative agreements because they do not involve the award of a procurement contract, and are thus beyond our jurisdiction.
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DECISION

Jay Hymas, of Richland, Washington, protests the Department of the Interior, U.S. Fish and Wildlife Service's (FWS) use of cooperative farming agreements (CFA) in U.S. Fish and Wildlife refuges for 2017. Jay Hymas argues that the CFAs should be issued as procurement contracts because the agency is not following the proper procedures under the Federal Grant and Cooperative Agreement Act (FGCAA), 31 U.S.C. §§ 6301-6308. The protester also alleges that the CFAs are "unlawful" because the agency is not providing proper notice of the "procurements."

We dismiss the protest.

Jay Hymas' challenges to the agency's CFA program began in 2013 before the U.S. Court of Federal Claims (COFC) and ultimately reached the Court of Appeals for the Federal Circuit. See Hymas v. United States, 117 Fed. Cl. 466 (2014); Hymas v. United States, 810 F.3d 1312 (2016). On January 14, 2016, the Court of Appeals for the Federal Circuit issued a decision resolving the government's appeal of the 2014

COFC decision. As relevant to the current protest, the Federal Circuit concluded that the CFAs at issue were not procurements under the Competition in Contracting Act (CICA), but instead were properly issued as cooperative agreements. In concluding that the CFAs were not procurements, the Federal Circuit found that the COFC had improperly taken jurisdiction to hear Jay Hymas' protest of the agency's use of CFAs. The Federal Circuit vacated the COFC's decision--which had found that the CFAs constituted procurements under CICA--and remanded with instructions to dismiss the case.

On remand, the COFC transferred the case to the United States District Court for the Eastern District of Washington. On December 14, 2016, Mr. Hymas filed an amended complaint with the District Court, and on March 3, 2017, filed a motion for a temporary restraining order to enjoin the operation of existing CFAs and enjoin the FWS from entering into new CFAs. On March 20, the District Court dismissed six of the seven counts in the amended complaint, and denied Hymas' request for a temporary restraining order. See Agency Motion to Dismiss, exh. 2. The District Court concluded that the Federal Circuit's decision had conclusively established that CICA does not apply to the CFAs, and that the FWS had properly construed the CFAs as cooperative agreements.

After receiving the Court's decision, Jay Hymas filed a protest with our Office on April 4. The protester alleges that the agency's actions with regard to the CFAs are improper because the agency is failing to post notice of the CFAs, including posting notifications to www.grants.gov, www.cfda.gov, or www.fbo.gov. The protester explains that

[n]o postings occur for these hundreds of CFAs (whether FGCAA grants or merely regular procurements) issued annually for most of the refuges located throughout the 48 states. No competition or public notice or even execution on valid government forms occurs for these undisclosed, completely noncompetitive and hand-picked procurements for farming services.

Protest at 1. The protester argues that the agency should be required to solicit these requirements as procurement contracts due to the agency's repeated failure to post notification of the cooperative agreements and FWS' failure to follow the requirements of FGCAA. Jay Hymas requests that our Office require the agency to post notice of the CFAs, and requests that GAO require the agency to permit Jay Hymas "to participate in any CFAs issued within the entire United States for 2017 and future years." Id.

On April 26, the agency filed a motion to dismiss with our Office. The agency argues that the protester's challenge to the agency's use of cooperative agreements should be dismissed because the Federal Circuit has already decided the matter--that the CFAs were properly issued as cooperative agreements, not procurements. Agency's Motion to Dismiss, at 1. The agency also asserts that GAO has no bid protest jurisdiction to hear Jay Hymas' protest challenging the FWS' use of cooperative agreements. Id.

Our regulations provide for the dismissal of any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction. Bid Protest Regulations 4 C.F.R. § 21.11(b). Here, it is beyond cavil that the Court of Appeals for the Federal Circuit is a court of competent jurisdiction to render a decision on Jay Hymas' complaints challenging the CFAs. In this regard, our Office has explained that where, as here, the court's decision constitutes a final adjudication on the merits with respect to the procurement, it is conclusive, and bars further reconsideration of the merits by our Office. See Adams and Assocs., Inc., B-409680, B-409681, Apr. 22, 2014, 2014 CPD ¶ 131 at 3 (dismissing issues that were decided by, as well as those that could have been brought before, the Court of Appeals for the Federal Circuit); see also Warvel Prods. Inc., B-281051.5, July 7, 1999, 99-2 CPD ¶ 13 at 8 (dismissing issues that were, or could have been, decided by the Court of Federal Claims).

As it relates to the protester's allegation that the CFAs should be issued as procurements, the Court of Appeals for the Federal Circuit concluded that the FWS was permitted by statute to enter into such cooperative agreements and that such agreements did not constitute procurements. Given that the Court of Appeals for the Federal Circuit has already decided the matter, and the protester has failed to provide any explanation as to why the Court of Appeals for the Federal Circuit's determination should not apply to the facts here, we find that Jay Hymas' protest provides no basis to challenge the CFAs.

With respect to Jay Hymas' allegations regarding the agency's failure to post notification of multiple CFAs¹ and the agency improperly awarding the cooperative agreements under FGCAA, our Office has no jurisdiction to hear these complaints.

Under CICA and our Bid Protest Regulations, our Office reviews protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). We generally do not review protests of the award, or protests of solicitations for the award, of cooperative agreements or other non-procurement instruments, because they do not involve the award of a procurement contract, and are thus beyond our jurisdiction. Energy Conversion Devices, Inc., B-260514, June 16, 1995, 95-2 CPD ¶ 121 at 2. However, we will review a timely protest asserting that an agency is improperly using a cooperative agreement or other non-procurement instrument, where a procurement

¹ On May 10, 2017, Jay Hymas forwarded to GAO the FWS's Region 5 response to Jay Hymas' April 6, 2017 Freedom of Information Act request. Specifically, the FWS' response provided "copies of all Cooperative Farming Agreements executed in calendar years 2016 and 2017 within Region 5." Jay Hymas Email to GAO, attach. 1. In his email to GAO, Jay Hymas states that these CFAs have not been posted to www.grants.gov, www.cfda.gov, or www.fbo.gov, nor do they comply with "a host of other requirements" Jay Hymas Email to GAO, May 10, 2017.

contract is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. Id.

As stated above, the Court of Appeals for the Federal Circuit determined that the FWS was permitted by statute to enter into such cooperative agreements and that such agreements did not constitute procurements. Thus, we have no jurisdiction to review Jay Hymas' protest of the cooperative agreements.

The protest is dismissed.

Susan A. Poling
General Counsel