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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC20548

Decision

Matter of: Eastern Medical Equipment, Inc.; Omnicare, Inc.; Dania Medical Equipment & Supplies, Inc.; Chronic Care Pharmaceutical Services, LLC; Wound Management Technologies, Inc.

File: B-311423; B-311423.2; B-311423.3; B-311423.4; B-311423.5

Date: May 1, 2008

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Jamie B. Insley, Esq., Department of Health and Human Services, for the agency.
Peter D. Verchinski, Esq., and John M. Melody, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Pursuant to title 18 of the Social Security Act (42 U.S.C. §§ 1395-1395hhh), Government Accountability Office lacks jurisdiction over protests of awards made by Centers for Medicare & Medicaid Services, Department of Health and Human Services under the agency's Competitive Acquisition Program.

DECISION

Eastern Medical Equipment, Inc.; Omnicare, Inc.; Dania Medical Equipment & Supplies, Inc.; Chronic Care Pharmaceutical Services, LLC; and Wound Management Technologies, Inc. protest the rejection of their bids submitted in response to the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS), competitive bidding program for certain Medicare Part B covered items. The protesters assert that CMS improperly determined that the firms failed to submit all required financial documentation with their bids.

We dismiss the protest.

The national Medicare program is administered by CMS, an agency within HHS, and governed by title 18 of the Social Security Act (codified at 42 U.S.C. §§ 1395-1395hhh). Section 1847 of title 18 (42 U.S.C. § 1395w-3) establishes the Competitive Acquisition Programs (CAP) for the procurement of certain items and

services, including durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS).

In the procurements at issue here, CMS solicited bids under the DMEPOS CAP for a number of categories of items to be provided to Medicare beneficiaries. These bids were submitted under the first round of procurements conducted under CAP, covering 10 metropolitan areas. After submitting their bids, the protesters were subsequently notified that the bids had been rejected for failing to include certain financial information. The protesters then filed these protests with our Office, asserting that the rejections were improper because the firms had in fact submitted the information.

The agency argues that our Office is precluded by title 18 of the Social Security Act from reviewing the protests. We agree.

In addition to establishing the CAP, section 1847 of title 18 includes a provision addressing administrative or judicial review of the agency's actions. In this regard, section 1847(b)(10) states as follows:

> There shall be no administrative or judicial review under section 1869, section 1878, or otherwise, of…(B) the awarding of contracts under this section.

See 42 U.S.C. § 1395w-3(b)(10).

The starting point of any analysis of the meaning of a statutory provision is the statutory language used by Congress. See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.") Where the language is clear on its face, its plain meaning will be given effect; that is, if the intent of Congress is clear, "that is the end of the matter." SmithKline Beecham Pharm., B-271845, Aug. 23, 1996, 96-2 CPD ¶ 82 at 3, citing Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 842, (1984).

Here, we find that the language in question is unambiguous. As stated, the language prohibits any judicial or administrative review of the awarding of contracts under section 1847. Based on this plain language, since the procurements here were conducted under section 1847, our Office is precluded from considering the protests of the awards.[1]

[1] We note that CMS's regulations implementing the statute fully support our reading of the plain language. In this regard, the regulations implementing section 1847 of the Social Security Act repeat that "[t]here is no administrative or judicial review under this subpart of the following…(2) awarding of contracts." 42 C.F.R. § 414.424.

(continued...)

Omnicare argues that section 1847(b)(10) does not preclude GAO's review of its protest because the firm is not seeking review of the "awarding of contracts," but rather is challenging the disqualification of its bid. We do not view this distinction as meaningful. The agency's decision to reject the protester's bid is a necessary aspect of determining which bidders are eligible for award under the solicitation. More specifically, in requesting that we find that its bid should not have been rejected, Omnicare necessarily is requesting that we find that it should have received an award. As such, we view the agency rejection of Omnicare's bid as part of the process of the "awarding of contracts"; our review of its protest therefore is precluded by the statute.[2]

Omnicare also argues that the jurisdictional exemption in section 1847(b)(10) applies only to actions within the scope of the agency's authority; since the agency's allegedly improper actions here fall outside its statutory authority and required duties in administering a competitive bidding program as Congress intended, they are reviewable under this provision. Omnicare's Comments, Mar. 31, 2008, at 3. We

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During the comment and review period when this regulation was pending, the agency responded to a suggestion that, given the number of protests sustained by GAO and the United States Court of Federal Claims, CMS should allow administrative or judicial review to prevent fraud or arbitrary and erroneous awards. The agency responded:

> We disagree with these comments. The Medicare DMEPOS Competitive Bidding Program is a unique program that differs in many ways from traditional government procurement. We are bound to implement this program in accordance with the statute, which as noted earlier in this section, provides that there will be no administrative or judicial review of certain functions.

72 Fed. Reg. 18056 (Apr. 10, 2007). We will give deference to an agency's reasonable interpretation of its own regulations, and we find nothing unreasonable in the agency's interpretation of the statute as reflected in the cited regulation. Israel Aircraft Indus., Ltd.--Recon., B-258229.2, July 26, 1995, 95-2 CPD ¶ 46 at 5.

[2] Omnicare asserts that, in rejecting its bid, the agency has deprived the firm of its property rights without due process of law as required by the Fifth Amendment of the United States Constitution. However, the jurisdiction of our Office is limited to deciding protests concerning alleged violation of procurement statutes or regulations. See 31 U.S.C. § 3552. Because this allegation does not implicate violations of procurement statutes or regulations, it is not for resolution by our Office but is a matter for the courts ultimately to decide. DeTekion Sec. Sys., Inc., B-298235, B-298235.2, July 31, 2006, 2006 CPD ¶ 130 at 17 n.6.

disagree. In prohibiting the reviewing of contract awards, section 1847(b)(10) makes no distinction based on whether the actions in question are "within the scope of the agency's authority." Again, therefore, we find that review by our Office is precluded.

Finally, Dania, Chronic Care, and Wound Management argue that GAO is not precluded from reviewing their protests, since section 1847(b)(10) only pertains to administrative or judicial review. The protesters suggest that the term "administrative review" refers only to review by an executive branch entity; GAO, as a legislative branch agency, has a "legislative" not an administrative review role. Protesters' Comments, Apr. 1, 2008, at 2. However, the protesters have provided no legal support for their narrow reading of the term "administrative" in the context of the statute here, and there is nothing in the statute itself or the legislative history that indicates Congress intended to exclude GAO review from the exempting language. See H.R. Conf. Rep. No. 108-391 (2003).[3] This being the case, and because GAO is the principal federal agency with statutory authority to review bid protests, we think it is sufficiently clear that the exempting language was intended to preclude GAO review.[4] Accordingly, we reject the protesters' interpretation here.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

[3] See also H.R. Rep. 108-181 (2003).

[4] We note that our Office previously has indicated that we view our bid protest jurisdiction as administrative in nature. See Staber Indus., Inc., B-276077, May 9, 1997, 97-1 CPD ¶ 174 at 2 (failure to follow an executive order, which specifically states that the order is not intended to create "any right to administrative or judicial review," provides no basis for protest to our Office by the order's own terms). The United States Court of Appeals for the Federal Circuit has indicated likewise. See NHK Eng'g v. United States, 805 F.2d 372, 378 (Fed. Cir. 1986) (noting that the Competition in Contracting Act, 32 U.S.C. §§ 3551-3556, provides for an "administrative review" of a protest upon filing with GAO).