

# Part 4: Other Types of Protests: Protesting OTAs, BAAs, CRADAs, SBIRs and State & Local Procurements



Jeffery M. Chiow  
[jeff.chiow@gtlaw.com](mailto:jeff.chiow@gtlaw.com) | 202.331.3149

# What is the purpose of bid protests?

- The ability to challenge a procurement process or outcome is essential to the integrity of the procurement system.
  - It gives the appearance, and sometimes the reality, of fairness
  - It provides a process whereby invested vendors can seek recourse
  - It shines a light on the expenditure of taxpayer funds
  - It provides a mechanism to vent frustration or send a message
  - The threat of protest has some chilling effect on vice
- Competitions, if properly designed and fairly run, lead to better procurement outcomes
  - Better products, technology or solutions
  - With offerors lowering their prices to make their offers more enticing
  - The priorities of the buyer can/should be reflected in the competitive rules
  - By broadcasting their needs, buyers can attract motivated sellers
  - Ideally, buyers say what they want and their budget goals

# Bid Protest Axioms

- There are some “axiomatic” rules essential to a healthy procurement process
  - Buyers should announce their (usually minimum) actual needs so offerors can compete fairly against a common set of requirements
  - All offerors should be treated fairly, both in understanding the buyer’s needs and in the evaluation of offers; no buyer should take an action that favors one offeror over another
  - Evaluations should be based upon the criteria announced in the solicitation and not some other unstated considerations
  - Price to the government should always be a consideration (and sometimes lifecycle cost)
  - The ability to actually deliver the goods or perform the service (technical acceptability) should always be a consideration
  - Past performance of relevant work should generally be a consideration
  - Bias or conflicted interests should be avoided in order to avoid even the appearance of impropriety

# Procurements start by selecting the right procurement approach

- The Government's needs should guide the selection of the procurement method or "contract" vehicle used to meet those needs
  - Sealed bids
    - often used in construction – a crazy process –
    - FAR Part 14
  - Negotiated procurements
    - FAR Part 15 – full and open
    - FAR Part 12 – commercial items
    - FAR Part 16.5 – Task or Delivery Orders under IDIQs/GWACs/MATOCs
  - Simplified acquisitions
    - FAR Part 13
    - BPAs/BOAs
- Schedule procurements
  - FAR Part 8.4
  - BPAs
- OTAs, BAAs, Grants & Cooperative Agreements, SBIRs

# Fundamental Bid Protest Concerns

- Jurisdiction
- Standing
- Timeliness
- Prejudice
- Stay of Performance

# OTA Protests – What is an OTA?

- “Other Transaction Authority”
  - OTA authority falls under FY2016 and FY2018 NDAA’s
    - Codified at 10 U.S.C. § 2371b
    - Extends from basic applied and advanced research to prototyping
- Broad authority to use OTAs for prototype projects “directly relevant to enhancing effectiveness of military personnel” or to “improv[e] platforms, systems [etc.] in use by the armed forces.”
- Provides for follow-on production contracts or transactions
  - This can be either an OTA under the statute (“production other transaction”) or a traditional FAR-based procurement contract
- Four conditions: 1) at least 1 nontraditional defense contractor participating; 2) all significant participants are small business or nontraditional contractors; 3) parties pay at least one third of cost; and 4) “exceptional circumstances justify” use of OTA

# OTAs – Can You Protest at GAO?

- “GAO generally does not review protests of awards, or solicitations for award, of agreement other than procurement contracts, with the exception of awards or agreements as described in § 21.13[,] GAO does, however, review protests alleging that an agency is improperly using a non-procurement instrument to procure goods or services.” 4 C.F.R. § 21.5(m); *Rocketplane Kistler*, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22.
- GAO will review only whether the agency’s use of its discretionary authority was proper, i.e., knowing and authorized. *MorphoTrust USA, LLC*, B-412711, May 16, 2016, 2016 CPD ¶ 133 at 7-8.
- Knowing: Production OT must be provided for in Prototype OT (10 USC 2371b(f)(1))
- Authorized: Sole source Production OT may be awarded if Prototype OT was
  - Competitively awarded (10 USC 2371b(f)(2)(A)); and
  - Successfully completed (10 USC 2371b(f)(2)(B))

# OTAs – What are rules that can be gleaned from GAO protests

- Cannot have a follow-on production contract unless prototype OT provides for production OT, and prototype OT was competitively awarded and successfully completed. *Oracle America, Inc.*, B-416061, May 31, 2018, 2018 CPD ¶ 180.
  - Prototype has very broad definition – can be a “pilot”, “test” or a “demonstration”.
    - May also be a federal application of a product or service that is fielded commercially.
- **BUT** - a FAR based sole source production contract can follow a non-competitive OTA. *DRS Sustainment Systems, Inc.*, B-417628 *et al.*, Sept. 9, 2019, 2019 CPD ¶ 316.
  - In such instances, question is whether FAR based sole source authority is properly invoked.
- Don't forget timeliness!
  - “Where a protester is aware that the agency has issued a competitive solicitation seeking to enter into an OTA pursuant to its statutory authority, any protest regarding the use of that authority must be filed prior to the time for receipt of initial proposals.” *Blade Strategies, LLC*, B-416752, Sept. 24, 2018, 2018 CPD ¶ 327.



# Where Can We Protest OTAs?

- We cannot go to the GAO, the usual protest forum.
- Can we go to Court to protest OTAs?
  - Plaintiff: want to argue that a court **can** hear an OTA protest, i.e., has jurisdiction.
  - Intervenor: want to argue that a court **cannot** hear an OTA protest, i.e., has no jurisdiction.
- There are two choices . . .
  - The Court of Federal Claims (COFC), or
  - A United States District Court

# Three Jurisdictional Statutory Provisions

- (1) The Tucker Act, 28 U.S.C. § 1491(b), Exclusive Jurisdiction for Procurement Bid Protest  
**The Court of Federal Claims** “shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.” 28 U.S.C. § 1491(b).
- (2) The Tucker Act, 28 U.S.C. § 1491(a), Jurisdiction for Non-Procurement Bid Protest  
**The Court of Federal Claims** “shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States.” 28 U.S.C. § 1491(a).
- (3) The Administrative Procedures Act (APA) Jurisdiction for Non-Procurement Bid Protest  
“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.  
But the court does not have jurisdiction “if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.” 5 U.S.C. § 702.

# COFC or District Court

Two questions:

- (1) Was the OTA “in connection with” a procurement?
- (2) Do we want an injunction or money damages?

# “in connection with”

The Federal Circuit: “The operative phrase ‘in connection with’ is very sweeping in scope.” *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d at 1286, 1289 (Fed. Cir. 1999).

An OTA **is not** in connection with a procurement if

*Space Exploration Technologies Corp. v. United States*: the OTA and procurement solicitations are “separate and distinct,” “involved different acquisition strategies,” with different “goals,” the OTA “did not involve the procurement of any goods or services,” or the “[OTA Phase] will not dictate the outcome of the . . . Procurement.” 144 Fed. Cl. 433, 443–45 (2019) (*SpaceX I*).

An OTA **is** in connection with a procurement if

*MD Helicopters v. United States*: “any phase of the FARA CP program [(an OTA)] would be outcome-determinative because only entities that are selected for the phase of the FARA CP shall be eligible for . . . any eventual procurement.” 435 F. Supp. 3d 1003, 1013 (D. Ariz. 2020).

*Kinematics, Inc. v. United States*: “this solicitation [(an OTA)] had a direct effect on the award of a contract.” “[R]ejection in the evaluation phase did disqualify plaintiff from consideration for the follow-on production contract.” 155 Fed. Cl. 777, 785 (2021).

*Hydraulics Int’l Inc. v. United States*: “[W]here an OTA can result in the exclusion of a bidder for consideration of a follow-on production contract, the OTA is in connection with a procurement or a proposed procurement.” 161 Fed. Cl. 167 (2022).

# The Answer (?)

(1) If the OTA is in connection with a procurement, go to COFC seeking money damages and / or injunction under § 1491(b).

(2) If the OTA is not in connection with a procurement, go to a District Court for an injunction under the APA.

But make sure to allege violations of federal laws, and not make the claim purely contractual.

“The principle of party presentation” or “trash in, trash out.”

(3) If the OTA is not in connection with a procurement, go to COFC for money damages under § 1491(a).

# BAA Protests – What is a BAA?

- A BAA is a contracting method by which agencies can acquire basic and applied research to fulfill requirements for scientific study and experimentation directed toward advancing the state of the art or increasing knowledge and understanding, rather than focusing on a specific system or hardware solution.
  - Federal Acquisition Regulation (FAR) § 35.016.
- Unlike other competitive procurement methods, a BAA does not contain a specific statement of work, proposals need not be evaluated against each other since they are not submitted in accordance with a common work statement, and offers are to demonstrate that proposed research meets agency requirements.
  - Tamper Proof Container Sys. Corp., B-402191, Jan. 27, 2010, 2010 CPD ¶ 46 at 2 n.1.

# BAA Protests – What can you protest?

- There is great discretion afforded to an agency regarding offeror selection under FAR § 35.016, which sets forth that comparative evaluation of proposals need not be conducted.
- If a BAA fails to define “overall best value” to mean more than the selection of the most advantageous offers based on the evaluation, funding, and programmatic interests as set out in FAR § 35.016 a protest that the Agency failed to conduct a cost/technical tradeoff will fail.
  - Tetracore, Inc., B-412535, Jan. 29, 2016, 2016 CPD P \_\_\_ at 2-3.
- Debriefings provided pursuant to procurements such as this, conducted under the authority of FAR § 35.016, do not trigger the debriefing exception to our timeliness rules.
  - Millennium Space Sys., Inc., B-406771, Aug. 17, 2012, 2012 CPD ¶ 237 at 3-6.

# BAA and OTA Research may lead to other procurements

- Pursuant to the 2008 BAA, DARPA has invested substantially in the research and development of the LRASM technologies proposed by Lockheed in its response to the 2008 BAA. Related to this effort, DARPA has now identified a need to devote additional resources in order to complete the maturation of Lockheed's specific LRASM technologies. We view this need, as identified in DARPA's sole-source notice and J&A, as reasonable and within DARPA's broad discretion as the DOD agency tasked with developing new technologies, without regard to whether the Navy, or DOD, has an operational requirement for similar capabilities in this area.
  - [Raytheon Company and Kongsberg Defence & Aerospace AS](#), B-409615, B-409615.2: Jun 24, 2014
- DRS asserted that the prototype OTA awarded noncompetitively to General Dynamics was an illegal follow-on production contract prohibited by OTA authority. GAO held the Army was expressly relying on the separate authority of Title 10 USC 2304, which permits follow-on contracting, rather than its OTA authority.
  - DRS Sustainment Systems, Inc., B-41766728 *et al.*, Sept. 9, 2019, 2019 CPD P \_\_\_at \_\_\_.



# What is a grant or cooperative agreement, e.g. a CRADA?

- The Federal Grant and Cooperative Agreement Act distinguishes between procurement contracts, on the one hand, and grants and cooperative agreements on the other (FGCAA 31 U.S.C. 6301)
- “An executive shall use a **procurement contract** as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient 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 ... .”**

# Grants, CRADAs, - What can you protest?

- GAO and COFC only have jurisdiction over agency actions in connection with procurements
- The fora do not have bid protest jurisdiction over the solicitation or award of grants or cooperative agreements
- But they do have jurisdiction over protests that contend that the solicitation is misidentified as a grant or cooperative agreement, when really the agency seeks to enter a procurement contract

# The FGCAA “Principal Purpose” Test for Cooperative Agreements

- An executive agency shall use a **cooperative agreement** as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when — (1) the **principal purpose of the relationship is to transfer a thing of value** to the State, local government, or other recipient **to carry out a public purpose** of support or stimulation authorized by a law of the United States **instead of acquiring** (by purchase, lease, or barter) property or **services for the direct benefit or use of the United States Government** ... .
- Only difference between grants and cooperative agreements is that the federal agency remains “substantially involved” in carrying out the work under cooperative agreements, but is hands off with respect to grants

# The *HUD CASES*

- The facts were muddy enough that HUD had a facially plausible case for evading procurement requirements, but at the end of the 5 years we prevailed in convincing the Federal Circuit that the “principal purpose” of the contract administrators’ fees was to obtain services from the contractors
  - Indicates a procurement contract is sought, thus the FAR applies
- The “principal purpose” of the fees was not to transfer money to the contractors/local housing authorities to enable them to carry out the public purpose of their good works
  - 2011: 66 post-award GAO protests (then a record number) by disappointed contract administrators lead to corrective action
  - 2012: HUD issues a Notice of Funding Availability (a cooperative agreement vehicle)
  - 2012: GAO protest sustained
    - HUD announces rejection of GAO recommendation (this never happens)
  - 2013: Protesters challenge HUD’s rejection of GAO recommendation to Court of Federal Claims
    - COFC sides with HUD and denies protest
  - 2014: Protesters appeal to Federal Circuit
    - Win stay of contract awards and reversal of COFC decisions
  - 2015: HUD petitions SCOTUS for certiorari; is denied



# National Park Service – Concession Contracts Jurisdiction.

- The essence of [Park Service concession] contracts is not the acquisition of goods or services by the government, but the grant, for a fee, of certain rights to private contractors.
- The jurisdictional basis for bid protests involving pure concession contracts is Section 1491(a)(1) of the Tucker Act, which permits suits alleging breach of the government's implied duty to fairly and honestly consider proposals, and not Section 1491(b)(1), which is the source of the court's jurisdiction over challenges to traditional procurement contract competitions.
- *Resource Conservation Group LLC v. United States*, 597 F.3d 1238 (Fed. Cir. 2010), has been interpreted to mean implied-in-fact contract jurisdiction over pure concession contracts exists under Section 1491(a), because Section 1491(b) does not provide a remedy.
- As Section 1491(a)(1) of the Tucker Act, and not Section 1491(b)(1) is the basis for jurisdiction, potential remedies available to concession-contract protesters are very limited as compared to those remedies available to protestors challenging traditional procurement contract awards.

# What is an SBIR Contract?

- SBIR program was established under the Small Business Innovation Development Act of 1982. *See* 15 U.S.C. § 638.
- Agencies reserve a portion of R&D budget for awards to small businesses.
- Goal is to help small businesses obtain and perform R&D work that has the potential for commercialization.
- “Contracting agencies” vs. “granting agencies”
- Special protection period for rights in technical data and computer software.
- SBA oversees the SBIR program pursuant to SBIR Policy Directive.
- Three phases
  - Phase I – Small businesses are invited to submit proposals to conduct research on one or more topics. Agency is looking to determine the scientific and technical merit and feasibility of ideas that appear to have commercial potential.
  - Phase II – Firms that received Phase I awards may submit proposals for further development work on the topic.
  - Phase III – Agency awards work that “***derives from, extends, or completes***” efforts under a prior SBIR contract. The work is funded with non-SBIR sources (e.g. program budget).

# SBIR Protest Timing and Standing

- Timing
  - Pre-award. Any impropriety in the SBIR solicitation must be challenged prior to the deadline set for receipt of proposals. *See, e.g., nanoPrecision Products, Inc.*, B-404297, Jan. 14, 2011, 2011 CPD ¶ 22
    - Pre-award protests are unlikely because agencies have flexibility to define topics and procedures for selecting proposals.
  - Post-award. Any other challenge must be raised within 10 days of when you knew or should have known the basis of protest. 4 C.F.R. § 21.2(a)(2).
    - Debriefing exception under 4 C.F.R. § 21.2(a)(2) does not apply because SBIR procurements are not conducted on the basis of “competitive proposals.” *See Global Aerospace Corp.*, B-414514, July 3, 2017, 2017 CPD ¶ 198.
- Standing
  - Protester lacks standing to challenge Phase II award where the protester did not receive a Phase I award. *Made in Space, Inc.*, B-414490, June 22, 2017, 2017 CPD ¶ 195.

# SBIR Protest Jurisdictional Issues

- GAO and COFC do not have jurisdiction to review an agency's decision **not** to enter into a **noncompetitive** Phase III funding agreement. *See Complere, Inc.*, B-406553, June 25, 2012, 2012 CPD ¶ 18; *Night Vision Corp. v. United States*, 68 Fed. Cl. 368 (2005); *aff'd*, 469 F.3d 1369 (2006).
- But, GAO has jurisdiction to review whether the agency complied with the SBIR statute and Policy Directive in connection with an agency's decision to make a Phase III award. *See ASRC Fed. Data Network Techs., LLC*, B-418028, Dec. 26, 2019, 2019 WL 7370424.
- GAO also has jurisdiction to review an agency's failure to give statutory Phase III preference to a SBIR awardee in a **competitive** procurement. *See Toyon Research Corp.*, B-409765, Aug. 5, 2014, 2014 CPD ¶ 235.
- GAO does not have jurisdiction to review disputes relating to agency's use of the contractor's IP. *See Complere, Inc.*, B-406553, June 25, 2012, 2012 CPD ¶ 18.





# Standard of Review for SBIR Procurements

- Agencies have “substantial discretion” to determine which proposals they will fund under an SBIR procurement.
- GAO’s review the record to determine whether the agency acted in bad faith or violated any applications regulations or solicitation provisions.
- GAO’s usual deference to the Agency’s technical judgment is particularly strong in “a SBIR procurement, which is not based on design or performance specifications for existing equipment, but rather emphasizes scientific and technological innovation and has as its objective the development of new technology. It is precisely because of the scientific and innovative nature of this type of procurement that the contracting agency is given substantial discretion in determining which proposals it will fund.” *Wang Electro-Opto Corp.*, B-418523, June 4, 2020, 2020 CPD ¶ \_\_\_\_.
- “Agency discretion, though broad, is not unfettered, and continues to be subject to the test of reasonableness.” *Intellectual Properties, Inc.*, B-280803.2, May 10, 1999, 99-1 CPD ¶ 83 at 5.
- Agencies must prepare a contemporaneous record that is adequate to explain the basis for the source selection decision. *See Global Aerospace Corp.*, B-414514, July 3, 2017, 2017 CPD ¶ 198.

# SBIR Phase III Preference Protests

- Agencies are required by statute to award Phase III work to “***the greatest extent practicable***” to the firm that initially developed the technology under a prior SBIR funding agreement, including ***sole source awards***. 15 U.S.C. § 638(r)(4).
- This is a very valuable statutory preference for SBIR awardees, but it is often overlooked by agencies.
- SBIR awardees can enforce the preference, but only through a bid protest and not a CDA claim. *See Lite Machines Corp. v. United States*, 143 Fed. Cl. 267 (2019).
- What are your options to enforce the preference?
  - Encourage SBA to appeal the decision pursuant to SBIR Policy Directive § 4(c)(7)(v); and/or
  - File a GAO/COFC protest.
- What does it mean to “derive from, extend or complete” a prior SBIR effort?
  - According to GAO, the RFP under protest must incorporate “original concepts, findings, ideas, or research results that a contractor generated” under prior SBIR contract. *See Toyon Research Corp.*, B-409765, Aug. 5, 2014, 2014 CPD ¶235.
  - GAO rejected SBA’s interpretation that the Phase III preference applied because the agency’s requirements were the same as the requirements under the prior SBIR contract..

# Phase III eligibility protests

- *ASRC Fed. Data Network Techs., LLC*, B-418028, Dec. 26, 2019, 2019 WL 7370424.
- SBIR Policy Directive § 6(a)(5) states, “in order to receive a Phase III award, the [a]wardee must have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award.”
- DDL Omni performed Phase I and Phase II awards for the agency.
- DDL Omni receives a Phase III blanket ordering agreement (BOA) for development work on medical information systems.
- The Phase III BOA is novated to American Systems upon its acquisition of DDL Omni. The novation agreement doesn’t include the Phase I or Phase II awards.
- The agency issued an order to American Systems under the Phase III BOA and AFDNT protested.
- GAO held that American Systems was ineligible for a Phase III award because American Systems did not perform the Phase I and II awards and those contracts were not novated to American Systems.
- GAO disagreed with the SBA’s interpretation of the SBIR Policy Directive and narrowly construed the eligibility requirements for Phase III awards.



# State & Local

- There are hundreds (even thousands) of procurement schemes
- The same procurement axioms apply
- Each protest begins for us in the same way
  - Records Request to Agency
    - State records laws vary, generally responses are slow
    - Protest context can provide spur to accelerate response
    - State citizenship requirements for requests?
    - Follow-up on information for future use, even if not available for protest
  - Agency may provide information per protest procedures
    - Generally, state/local agencies are not required to provide information to protestors
    - May provide information informally, on request
  - Client records are usually the core of the protest
- Protest Content
  - Basis for Protest
  - Violation of relevant law or regulation
  - Request for relief
  - Exhibits and Declarations to support protest as necessary
  - May require filing a protest bond

# Protest Procedures and Timing

- Protest procedures vary
  - Agency Regulations / Procedures
  - Local Law / Regulations
  - State Law / Regulations can control local protests in some states
- Protest may be directed to state/local agency OR administrative agency with oversight over protests
- Protest content and requirements
  - Deadlines for Notice and Protest
    - Separate timelines for Notice of Protest and Protest?
    - Deadline for filing Protest
- Pre-award Protest Available?
  - May be formal or informal
- Automatic stay of contract award? TRO necessary?
- Deadlines for responses, decision, possible appeal
- Timing and requirements for potential lawsuit if necessary

# California State and Local Protests

- California State Agency Protests
  - Governing Law: Public Contract Code, Agency Regulations and Procedures, State case law
  - Timeline – Varies, typically 5-7 days after notice of award or event giving rise to protest
  - Procedure – Protest to Agency, may file Writ of Mandate in Court if protest is denied
- Local Agencies / Universities
  - Local Law/Regulation for Protests, varies widely
  - Typically still bound by California law and legal principles

# Tennessee State and Local Protests

- Tennessee State Agency Protests
  - Governing Law: Public Property, Printing, and Contracts Code; Central Procurement Office Rules and Regulations
  - Timeline – 7 days after notice of award or event giving rise to protest
  - Procedure – Protest to state Chief Procurement Officer, submit protest bond, automatic stay of contract award, CPO must resolve within 60 days
  - Judicial review is limited
- Local Agencies / University of Tennessee / Exempt State Agencies
  - Separate Law/Regulation for Protests, varies
  - State law provides guidance even where not binding



**Jeffery M. Chio**  
**Greenberg Traurig, LLP**

<https://www.gtlaw.com/en/professionals/c/chio-jeffery-m>

[jeff.chio@gtlaw.com](mailto:jeff.chio@gtlaw.com)

**202.331.3149**