

Protests



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Task/Delivery Order Protest Jurisdiction

- The GAO is the exclusive forum for task and delivery order protests, subject to \$10M/\$25M threshold:
 - (f) Protests.—
 - Protests not authorized.—A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for:
 - (A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or
 - (B) a protest of an order in excess of \$10,000,000.
 - Jurisdiction over protests. – Notwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).
 - 41 U.S.C. § 4106(f).
- Unless an order falls under one of the exceptions, the Court of Federal Claims lacks jurisdiction to consider the protest.

Task/Delivery Order Protest Jurisdiction

- LOGCAP V Procurement: Large Army competition for award of four to six IDIQ contracts, combined with issuance of 10 initial task orders corresponding to seven geographical regions.
- Seven separate region-based best value decisions, with tiered awards. For first region an offeror wins, it receives a LOGCAP contract and the task orders associated with that region; if it wins a subsequent region, it receives additional task orders but no additional contract.
- Army awarded four IDIQ contracts and 10 task orders to four of six offerors.

Task/Delivery Order Protest Jurisdiction

- Four protests filed at the GAO (two awardees objecting to the particular task orders they received, and two offerors that were awarded nothing).
- The GAO denied the first protest on the merits. *DynCorp Int'l, LLC*, B-417506, B-417506.10, July 31, 2019, 2019 CPD ¶ ____.
- Before the GAO decided the other three protests, the first protester refiled at the Court of Federal Claims, causing the GAO to dismiss the remaining protests. *AECOM Mgmt. Servs., Inc., et al.*, B-417506.2 *et al.*, Aug. 7, 2019, 2019 CPD ¶ ____.

Task/Delivery Order Protest Jurisdiction

- Does the Court of Federal Claims have jurisdiction to hear the protests of the two IDIQ contract awardees who wanted different task orders? Judge Loren Smith answered the question in PAE-Parsons Global Logistics Services, LLC v. United States, No. 19-1205 (Sept. 30, 2019).
- The judge found the Court had jurisdiction over these protests because the same best-value analysis used to select IDIQ contract awardees was also used to determine which task orders to issue to which offerors.
- What about standing as an interested party?

Task/Delivery Order Protest Jurisdiction

- Impact of the *PAE* decision?
- Probably minimal: LOGCAP V's award structure is unusual: most task/delivery order protests will be distinguishable on the facts.
- Most likely to affect competitions where initial task orders are issued together with multiple-award IDIQ contract **AND** there are material differences among the task orders.
- Not clear that the Federal Circuit would agree Judge Smith was right on the jurisdictional question.

LPTA Solicitations – Disfavored Status

- Latest shift in historical swings along the acquisition continuum
- Procurements have been the subject of a number of statutory restrictions on LPTA use dating back several years
- DoD took lead with new DFARS LPTA restrictions effective 10/1/19
 - Amend DFARS and add new Section 215.101-2 (primarily DFARS 215.101-2-70) to implement provisions from 2017, 2018 NDAA's
 - LPTA limitations are applicable not only to DFARS Part 215 negotiated procurements, but also to Part 208 Supply Schedule procurements, Part 212 commercial item procurements, Part 213 simplified acquisitions, and Part 216 orders placed under IDIQ contracts
- Until proposed FAR Rule finalized and implemented, only DoD subject to these LPTA restrictions

LPTA Solicitations – Disfavored Status

DoD must “avoid, to the maximum extent practicable” LPTA procedures for procurements “predominately for the acquisition of”:

- Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, or other knowledge-based professional services;
- Personal protective equipment; or
- Knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq

LPTA Solicitations – Disfavored Status

New DFARS LPTA Restrictions

- LPTA **prohibited** for DoD solicitations for:
 - Items designated by the requiring activity as personal protective equipment or an aviation critical safety item, when the requiring activity advises the contracting officer that the level of quality or failure of the equipment or item could result in combat casualties;
 - Engineering and manufacturing development for a major defense acquisition program for which budgetary authority is requested beginning in FY2019; or
 - An auditing contract
- DFARS now includes list of 7 criteria that must be met in order for LPTA procedures to be permissible for procurement
- CO required to document “the circumstances justifying the use of” LPTA procedures
 - Format not specified
 - No publication requirement

LPTA Solicitations – Disfavored Status

Proposed Rule to Amend FAR (issued 10/2/19, comments due on or before 12/2/19)

- Civilian agencies would be required to “avoid, to the maximum extent practicable, using” LPTA procedures for procurements that are “predominately for the acquisition of” same categories as in DFARS revision but also audit or audit readiness services, health care services and records, and telecommunications devices and services
- Mirrors 5 of the 7 DFARS requirements necessary to utilize LPTA
- CO required to document in contract file “the circumstances that justify the use of the lowest price technically acceptable source selection process”
- Unlike DFARS no LPTA prohibition for specific types of procurements
- Proposed rule does not apply to FSS and provides that GSA will separately address applicability of NDAA provision to schedules program

LPTA Solicitations – Disfavored Status

Procurement and Protest Implications of LPTA Disfavored Status

- Likely increases in pre-award protests still relying on LPTA
- Likely increase in post-award protests of best-value procurements
 - *i.e.*, agency unfamiliarity with greater complexities for best-value procurements, evaluation inconsistencies with RFP
- Greater reliance on hybrid RFP with more simplistic evaluation criteria – *i.e.*, performance/price trade-off – or greater weight given to cost/price in trade-off
- Need for internal agency guidance on process/documentation for LPTA procurements

Other Transaction Authority Protests

- Other Transaction Agreements (OTAs): “transactions other than contracts, grants or cooperative agreements” 32 C.F.R. § 3.2.
- Congress has granted DoD and certain other agencies authority to enter into OTAs. Authority varies from agency to agency.
- The FAR does not govern OTAs because OTAs are defined as not being procurement contracts.
- In recent years, there has been increasing use of OTAs.
- Although the GAO will review the threshold question of whether an agency is improperly using an OTA approach rather than a traditional procurement approach, it generally will not review protests of the award or solicitations for the award of an OTA. *See, e.g., MorphoTrust USA, LLC*, B-412711, May 16, 2016, 2016 CPD ¶ 133.
- What about the Court of Federal Claims?

Other Transaction Authority Protests

- Court of Federal Claims has jurisdiction over bid protests brought 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)(1).
- The Federal Circuit has held that the Court’s bid protest language “is exclusively concerned with procurement solicitations and contracts.” *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010).

Other Transaction Authority Protests

- *Space Exploration Technologies Corp. v. United States*, No. 19-742C (Fed. Cl. Aug. 28, 2019).
- Air Force OTA competition for development of space launch vehicles.
- The solicitation also contemplated a later phase-2 competition for two FAR-based requirements contracts for launch services, which would be open to all offerors – not just the OTA awardees.
- Four companies submitted proposals. The Air Force awarded OTAs to three of the offerors.
- SpaceX, the disappointed offeror, protested the award decision to the Court of Federal Claims.

Other Transaction Authority Protests

- Judge Lydia Kay Griggsby considered the Government's motion to dismiss the protest for lack of jurisdiction.
- The parties agreed that the OTA competition itself was not a "procurement" in the strict sense of that term, but disagreed whether the competition was "in connection with a procurement or proposed procurement."
- Apparently relying on Federal Circuit precedent that the Court's protest jurisdiction "is exclusively concerned with **procurement** solicitations and contracts," the Court did not analyze whether the protest triggered jurisdiction simply by objecting "to a proposed award or the award of a contract." Although OTAs are not procurement contracts, they likely satisfy the common-law definition of a contract as an enforceable agreement between two parties.
- Court held that, although the Phase 2 competition would be a procurement, and the Phase 1 OTA competition was "related to" the Phase 2 procurement, it was not "in connection with" it: different solicitations, different acquisition strategies, different goals, and the Government would not own the prototypes to be developed under the OTAs.
- Court did **not** hold that the Court lacks jurisdiction to entertain **any** OTA protest, but the *SpaceX* holding could have fairly broad applicability – assuming other judges follow Judge Griggsby's non-precedential lead.

Other Transaction Authority Protests

- Court dismissed the protest and transferred the case to U.S. District Court for the Central District of California.
- Bid protests in Federal district court?
- Prior to January 2001, district courts had concurrent jurisdiction over bid protests under the Administrative Procedure Act. *See Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). Congress eliminated that jurisdiction with the Administrative Dispute Resolution Act (ADRA), making the Court of Federal Claims the only court with jurisdiction over bid protests.
- If the Tucker Act as amended by ADRA applies only to “procurements,” and the Court of Federal Claims will not hear OTA protests, then does *Scanwell* jurisdiction survive for bid protests of non-procurements, such as OTAs?

GAO Bid Protests Fiscal Years 2015-2019

	FY2019	FY2018	FY2017	FY2016	FY2015
Cases Filed	2198 (down 16%)	2607 (less than 1% increase)	2596 (down 7%)	2789 (up 6%)	2639 (up 3%)
Cases Closed)	2200	2642	2672	2734	2647
Merit (Sustain + Deny) Decisions	587	622	581	616	587
Number of Sustains	77	92	99	139	68
Sustain Rate	13%	15%	17%	23%	12%
Effectiveness Rate	44%	44%	47%	46%	45%
ADR (cases used)	40	86	81	69	103
ADR Success Rate	90%	77%	90%	84%	70%
Hearings	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)	3.10% (31 cases)

- “Advisory Panel on Streamlining and Codifying Acquisition Regulations” a/k/a Section 809 Panel: Tasked by Congress to develop recommendations to enhance efficiency of the DOD acquisition system. Pub. L. No. 114-92, § 809, Nov. 25, 2015.
- Full Report available at Section809Panel.org.
- All bid protest recommendations would require new legislation.
- 3rd and Final Volume Issued January 2019.

- **Recommendation No. 35:** Replace commercial buying and the existing simplified acquisition procedures and thresholds.
- **Recommendation No. 66:** Establish a purpose statement for bid protests.
- **Recommendation No. 67:** Eliminate the opportunity to file a protest with the Court of Federal Claims (COFC) after filing at the GAO, and require the COFC to issue a decision within 100 days where the court orders a delay.
- **Recommendation No. 68:** Limit protests filed at GAO and COFC to procurements over \$75,000.



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