Annual Review
Protest Panel
Supplementary Materials

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In the United States Court of Federal Claims

BID PROTEST
No. 19-742C
Filed Under Seal: August 26, 2019
Reissued: August 28, 2019[*]

SPACE EXPLORATION TECHNOLOGIES CORP.,	)	
Plaintiff,	)	Post-Award Bid Protest; Motion to Dismiss; Rule 12(b)(1); Other Transactions; 10 U.S.C. §§ 2371 and 2371b.
v.	)	
THE UNITED STATES,	)	
Defendant,	)	
v.	)	
BLUE ORIGIN, LLC, *et al.*,	)	
Defendant-Intervenors.	)	

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[*] This Memorandum Opinion and Order was originally filed under seal on August 26, 2019 (docket entry no. 75). The parties were given an opportunity to advise the Court of their views with respect to what information, if any, should be redacted from the Memorandum Opinion and Order. The parties filed a joint status report on August 27, 2019 (docket entry no. 76) indicating that no redactions are necessary. And so, the Court is reissuing its Memorandum Opinion and Order, dated August 26, 2019 as the public opinion.

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MEMORANDUM OPINION AND ORDER

GRIGGSBY, Judge

I. INTRODUCTION

In this post-award bid protest matter, Space Exploration Technologies Corp. ("SpaceX") challenges the United States Air Force Space and Missile Systems Center's (the "Air Force") evaluation and portfolio award decisions for a request for proposals to provide space launch services for national security missions, issued pursuant to the Department of Defense's ("DoD") authority to enter into other transaction agreements. *See generally* Compl. The government has moved to dismiss this matter for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). *See generally* Def. Mot. SpaceX has also moved to transfer this matter to the United States District Court for the Central District of California. *See generally* Pl. Resp. For the reasons discussed below, the Court: (1) **GRANTS** the government's motion to dismiss; (2) **GRANTS** SpaceX's motion to transfer venue; and (3) **DISMISSES** the complaint.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. Factual Background

SpaceX provides space launch services to the United States Government and to commercial customers. Compl. at ¶ 90. In this post-award bid protest matter, SpaceX

[1] The facts recited in this Memorandum Opinion and Order are taken from the complaint ("Compl."); the corrected administrative record ("AR"); and the government's motion to dismiss ("Def. Mot."). Except where otherwise noted, the facts stated herein are undisputed.

challenges the Air Force's evaluation and portfolio award decisions for launch service agreement ("LSA") request for proposal, Solicitation No. FA8811-17-9-001 (the "LSARFP"), to facilitate the development of launch systems in the United States. Compl. at 1. As relief, SpaceX requests, among other things, that the Court: (1) declare the Air Force's portfolio award decision to be contrary to Congress's mandate for assured access to space; (2) enjoin any further investment in the launch service agreements awarded by the Air Force; (3) enjoin further performance by the awardees; and (4) require the Air Force to reevaluate proposals. *Id*. at 78.

1. DoD's Authority To Use Other Transaction Agreements

As background, Congress granted the Department of Defense the authority to enter into other transactions ("OT"). 10 U.S.C. §§ 2371(a) and 2371b(a). OTs are agreements that are not procurement contracts, cooperative agreements, or grants. *See, e.g.*, 10 U.S.C. § 2371(a) (authorizing "transactions (other than contracts, cooperative agreements, and grants)"); 32 C.F.R. § 3.2 (defining "other transactions" as "transactions other than contracts, grants or cooperative agreements"); *see also* United States Department of Defense, Other Transactions Guide (2018), at 5 ("OT Guide"), https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf (defining OTs as "NOT: a. FAR-based procurement contracts; b. Grants; c. Cooperative Agreements; or d. Cooperative Research and Development Agreements (CRADAs)").

While not defined by statute, the Government Accountability Office ("GAO") has defined OTs as follows:

> An 'other transaction' agreement is a special type of legal instrument used for various purposes by federal agencies that have been granted statutory authority to use 'other transactions.' GAO's audit reports to the Congress have repeatedly reported that 'other transactions' are 'other than contracts, grants, or cooperative agreements that generally are not subject to federal laws and regulations applicable to procurement contracts.'

MorphoTrust USA, LLC, B-412711, 2016 WL 2908322, at *4 (Comp. Gen. May 16, 2016). The DoD's OT Guide also provides that OTs are intended "to give DoD the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments." OT Guide at 4. And so, OTs are "generally not subject to the Federal laws and regulations limited in applicability to contracts, grants or cooperative

agreements" and these agreements are "not required to comply with the Federal Acquisition Regulation (FAR) and its supplements." 32 C.F.R. § 3.2.

Pursuant to 10 U.S.C. § 2731b, DoD may use its other transaction authority to "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces." 10 U.S.C. § 2731b(a).[2] But, DoD may only use this authority if one of the four conditions set forth below have been met:

> (A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project.
>
> (B) All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. [§] 638)) or nontraditional defense contractors.
>
> (C) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.
>
> (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

10 U.S.C. § 2371b(d)(1); *see also* OT Guide at 13-14; 32 C.F.R. § 3.5. In addition, Congress has required that, "[t]o the maximum extent practicable, competitive procedures shall be used when entering into [OT] agreements to carry out the prototype projects." 10 U.S.C. § 2371b(b)(2).

2. The National Security Space Launch Program

The National Security Space Launch program—previously known as the EELV program (the "Program")—is charged with procuring launch services to meet the government's national security space launch needs. AR Tab 19 at 786. The Program has an overarching need through

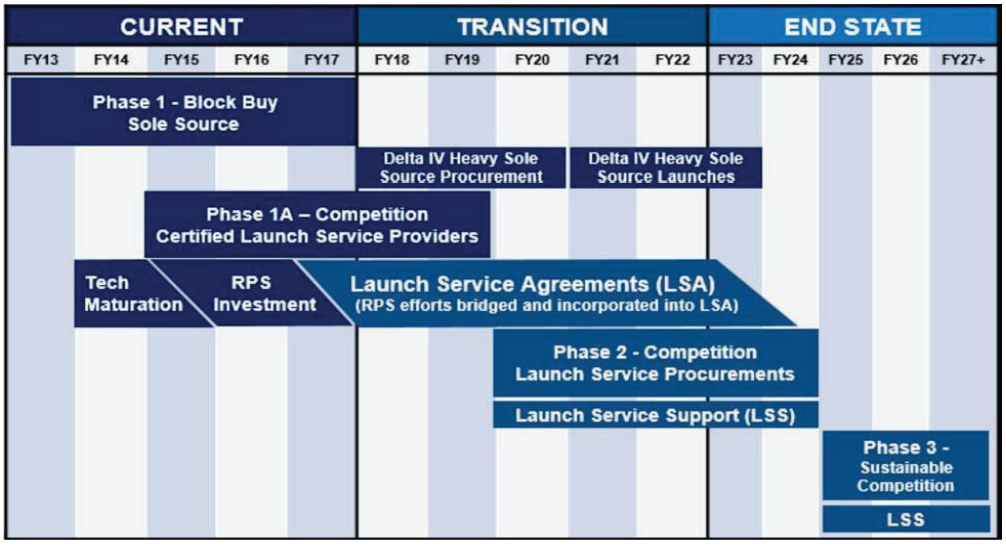
[2] Title 10, United States Code, section 2358 authorizes DoD to "engage in basic research, applied research, advanced research, and development projects." 10 U.S.C. § 2358(a).

FY30 to address the challenges of maintaining affordability and assured access to space, which requires the Air Force to sustain the availability of at least two families of space launch vehicles and a robust space launch infrastructure and industrial base. *Id.* at 787; *see also* 10 U.S.C. § 2273(b). The actions necessary to ensure continued access to space have been defined by Congress to include:

> (1) the availability of at least two space launch vehicles (or families of space launch vehicles) capable of delivering into space any payload designated by the Secretary of Defense or the Director of National Intelligence as a national security payload
>
> (2) a robust space launch infrastructure and industrial base; and
>
> (3) the availability of rapid, responsive, and reliable space launches for national security space programs to—
>
> > (A) improve the responsiveness and flexibility of a national security space system;
> >
> > (B) lower the costs of launching a national security space system; and
> >
> > (C) maintain risks of mission success at acceptable levels.

10 U.S.C. §2273(b).

As shown below, the Program involves a multi-phase strategy that will be implemented by the Air Force between FY 2013 and FY 2027 to accomplish the aforementioned actions. AR Tab 19 at 788.



Id.

a. The LSA Competition

The LSARFP involves a competition for the development of space launch vehicles (the "LSA Competition"). *Id.* at 788. During the LSA Competition, the Air Force sought to develop "launch system prototypes, to include the development and test of any required [rocket propulsion systems], the launch vehicle and its subsystems, infrastructure, manufacturing processes, test stands, and other items required for industry to provide domestic commercial launch services that meet all [National Security Space] requirements." AR Tab 38 at 1261. The prototype sought to be developed during the LSA Competition includes "[a] fully developed and certified EELV Launch System, including the validation of all non-recurring engineering (NRE) work." *Id.* And so, the awardees of the LSA will receive funding from the Air Force and these awardees "will perform prototype development, including system design and development, risk reduction activities, test and evaluation activities, and technical demonstration of system capabilities." AR Tab 19 at 796.

The Air Force expects that following its investment "in the development of prototypes for launch systems," those systems can be "used to provide commercial launch services that will also be extended to provide [National Security Space] launch services." *Id.* at 793. The Air Force also acknowledges that the LSAs will "facilitate development of at least three EELV Launch System prototypes as early as possible, allowing those launch systems to mature prior to a future selection of two [National Security Space] launch service providers for Phase 2 launch service procurements, starting in FY 20[20]." AR Tab 38 at 1260.

b. The Phase 2 Procurement

During Phase 2 of the Program, the Air Force anticipates awarding two requirements contracts for launch services, delivering multiple national security space missions with annual ordering periods from FY 2020 through FY 2024. Compl. Ex. B at 2. Congress has mandated that, with some exceptions, "the Secretary of Defense may not award or renew a contract for the procurement of property or services for space launch activities under the [Program] if such contract carries out such space launch activities using rocket engines designed or manufactured in the Russian Federation." FY 2015 National Defense Authorization Act, Pub. L. No. 113-291,

128 Stat. 3292, 3626 (2014). And so, a key goal of the Program is to transition from the use of non-allied space launch engines. AR Tab 38 at 1260.

The Air Force has described the Phase 2 Procurement as a "follow-on activit[y]." AR Tab 19 at 807; *see also id.* at 810 ("The follow-on activity will be procurement of launch services.") The Air Force has also stated that the "LSA is designed to work in synergy with commercial launch vehicle development efforts that will lead in space for decades to come." AR Tab 47 at 1351.

The Phase 2 Procurement is open to all interested offerors. AR Tab 19 at 807. And so, this procurement will not be limited to the organizations that have received awards during the LSA Competition. *See* AR Tab 19 at 786 ("FAR-based procurement contracts will be competitively awarded to certified EELV launch service providers, which could include companies that were not previously awarded LSAs"); *id.* at 807 ("[T]he Air Force intends to use a full and open competition to award FAR-based [firm-fixed priced] contracts to two launch providers for [National Security Space] launch service procurements . . ."); *see also* Status Conf. Tr. at 17:1-17:5, 18:15-18:18.

3. The LSA Award

The Air Force issued the LSARFP on October 5, 2017. *See generally* AR Tab 35. On March 21, 2018, the Assistant Secretary of the Air Force (Acquisition, Technology & Logistics) determined that "exceptional circumstances surrounding the [Program] and the domestic launch industry justify the use of a transaction that provides for innovative business arrangements and provide[s] an opportunity to expand the defense supply base in a manner that would not be feasible under a contract." AR Tab 47 at 1349. And so, the Air Force issued the LSARFP pursuant to DoD's authority to enter into other transactions. *Id*.

SpaceX and three other companies—United Launch Alliance, LLC ("ULA"), Blue Origin, LLC ("Blue Origin") and Orbital Sciences Corporation ("Orbital ATK")—submitted proposals in response to the LSARFP. *See* AR Tab 136 at 41752. Following discussions, negotiations and the receipt of revised proposals, the Air Force awarded LSAs to Blue Origin, ULA, and Orbital ATK in October 2018. *Id.* at 41753. The LSAs awarded to ULA, Blue Origin, and Orbital ATK provide these awardees with investment funding to develop launch vehicle prototypes. AR Tab 38 at 1261.

SpaceX filed an objection to the aforementioned portfolio awards with the Air Force on December 10, 2018. Compl. at ¶ 76; Compl. Ex. R at 2. The Air Force subsequently denied SpaceX's objection on April 18, 2019. Compl. at ¶ 79; Compl. Ex. R at 1. SpaceX commenced this post-award bid protest action on May 17, 2019. *See generally* Compl.

B. Procedural Background

SpaceX commenced this post-award bid protest matter on May 17, 2019. *See generally id.* On May 21, 2019, Blue Origin and ULA filed unopposed motions to intervene in this matter. *See generally* Blue Origin Mot. to Intervene; ULA Mot. to Intervene. On May 22, 2019, the Court granted these motions and entered a Protective Order in this matter. *See generally* Scheduling Order, dated May 22, 2019; *see also* Protective Order, dated May 22, 2019. On May 22, 2019, Orbital ATK filed an unopposed motion to intervene. *See generally* Orbital Mot. to Intervene. On May 23, 2019, the Court granted this motion. *See generally* Order, dated May 23, 2019.

On June 11, 2019, the government filed the administrative record. *See generally* Initial AR. On June 13, 2019, the government filed a motion to dismiss this matter for lack of subject-matter jurisdiction. *See generally* Def. Mot. On June 26, 2019, the government filed a corrected administrative record. *See generally* AR.

On June 28, 2019, SpaceX filed a response and opposition to the government's motion to dismiss and, in the alternative, a motion to transfer venue. *See generally* Pl. Resp. On July 9, 2019, the government filed a reply in support of its motion to dismiss and a response to SpaceX's motion to transfer venue.[3] *See generally* Def. Reply. On August 15, 2019, the Court held oral argument on the parties' motions. *See generally* Oral Arg. Tr.

These matters having been fully briefed, the Court resolves the pending motions.

III. LEGAL STANDARDS

A. RCFC 12(b)(1)

When deciding a motion to dismiss upon the ground that the Court does not possess subject-matter jurisdiction pursuant to RCFC 12(b)(1), this Court must assume that all factual

[3] ULA, Blue Origin, and Orbital ATK have not participated in the briefing of the government's motion to dismiss.

allegations in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); RCFC 12(b)(1). But, a plaintiff bears the burden of establishing subject-matter jurisdiction, and it must do so by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (citing *Zunamon v. Brown*, 418 F.2d 883, 886 (8th Cir. 1969)). Should the Court determine that "it lacks jurisdiction over the subject matter, it must dismiss the claim." *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); RCFC 12(h)(3).

B. Bid Protest Jurisdiction

The Tucker Act grants the United States Court of Federal Claims 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 United States Court of Appeals for the Federal Circuit has held that the Tucker Act'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); *see also United States v. Testan*, 424 U.S. 392, 399 (1976) ("[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (citation omitted). And so, relief in bid protest matters pursuant to the Tucker Act is unavailable outside the context of a procurement or proposed procurement. *Res. Conservation*, 597 F.3d at 1245; *see, e.g.*, *Hymas v. United States*, 810 F.3d 1312, 1329-30 (Fed. Cir. 2016) (finding no jurisdiction over cooperative farming agreements).

The Tucker Act does not define the term "procurement." *See generally* 28 U.S.C. § 1491(b)(1). But, the Federal Circuit has relied upon the definition of procurement set forth in 41 U.S.C. § 111 to determine whether a procurement has occurred. *Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (this section was formerly cited as 41 U.S.C. § 403(2)). Section 111 defines procurement to cover "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 111; s*ee also AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1330 (Fed. Cir. 2018); 10 U.S.C. §2302(3) (stating

that the term "procurement" has the meaning provided in chapter 1 of title 41, United States Code). And so, the Federal Circuit has held that, to establish jurisdiction, a contractor must show "'that the government at least initiated a procurement, or initiated the process for determining a need for acquisition.'" *AugustaWestland*, 880 F.3d at 1330 (quoting *Distributed Sols.*, 539 F.3d at 1346) (internal quotations omitted).

Specifically relevant to this dispute, in *Hymas*, the Federal Circuit held that the competitive requirements of CICA did not apply to the United States Fish and Wildlife Service's cooperative farming agreements, because the cooperative farming agreements were not procurement contracts under the Federal Grant and Cooperative Agreement Act. 810 F.3d at 1320, 1329-30. And so, the Federal Circuit concluded that this Court must dismiss a bid protest action challenging the government's award of these agreements for lack of subject-matter jurisdiction. *Id*. at 1330.

The Federal Circuit has also considered the meaning of the phrase "in connection with a procurement or a proposed procurement." *See* 28 U.S.C. § 1491(b)(1). In this regard, the Federal Circuit has held that "[t]he operative phrase 'in connection with' is very sweeping in scope." *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999). The Federal Circuit has also held that an alleged statutory violation suffices to supply Tucker Act jurisdiction, so long as the statute has a connection to a procurement proposal. *Id*. In addition, the Federal Circuit has recognized that Congress intended for all objections connected to a procurement or proposed procurement to be heard by this Court. *See Emery Worldwide Airlines, Inc. v. United States,* 264 F.3d 1071, 1079 (Fed. Cir. 2001) (noting that the Administrative Dispute Resolution Act of 1996 made clear that "Congress sought to channel the entirety of judicial government contract procurement protest jurisdiction to the Court of Federal Claims"). And so, the Federal Circuit has held that "a narrow application of section 1491(b)(1) does not comport with the [Tucker Act's] broad grant of jurisdiction over objections to the procurement process." *Sys. App. & Techs., Inc. v. United States*, 691 F.3d 1374, 1381 (Fed. Cir. 2012).

There are, however, limits to the Court's bid protest jurisdiction under the Tucker Act. For example, the Federal Circuit held in *AgustaWestland* that an execution order regarding the use of Army helicopters was not "in connection with a procurement or proposed procurement," "because it did not begin 'the process for determining a need for property or services.'" 880

F.3d at 1331 (quoting *Distributed Sols*., 539 F.3d at 1345). In *Geiler/Schrudde & Zimmerman v. United States*, the Federal Circuit also held that the Department of Veterans Affairs' revocation of a bidder's status as a service-disabled veteran-owned small business was not a decision "in connection with a procurement or a proposed procurement," because the revocation had no effect upon the award or performance of any contract. 743 Fed. App'x 974, 977 (Fed. Cir. 2018).

Similarly, in *BayFirst Sols, LLC v. United States*, this Court addressed the limits of the phrase "in connection with a procurement or proposed procurement" in determining whether the Federal Acquisition Streamlining Act's bar on challenges in connection with the issuance or proposed issuance of a task or delivery order would bar the cancellation of a solicitation. 104 Fed. Cl. 493, 507 (2012). In that case, the Court determined that the cancellation decision was not "in connection with" the task order award, because the cancellation decision was "a discrete procurement decision and one which could have been the subject of a separate protest." *Id.* Lastly, in *R&D Dynamics Corp. v. United States*, this Court held that a Phase II Small Business Innovation Research ("SBIR") non-procurement award was not "in connection with" a Phase III procurement, because the SIBR Phase II program appeared to be "of a developmental nature." 80 Fed. Cl. 715, 722 (2007). And so, the Court determined that the SBIR award was not "in connection with" a procurement, notwithstanding the possibility that the SBIR award "may ultimately lead to the development of a capacity to provide goods or services in Phase III." *Id.*

C. 10 U.S.C. §§ 2371 And 2371b

Title 10, United States Code, section 2371 generally provides DoD with the statutory authority to enter into other transaction agreements in carrying out "basic, applied, and advanced research projects." 10 U.S.C. § 2371(a). Pursuant to Title 10, United States Code, section 2371b, DoD may use its OT authority to carry out certain prototype projects. 10 U.S.C. § 2371b. Specifically, this statute provides that DoD may:

> carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

10 U.S.C. §2371b(a)(1). Section 2371b also requires that, "[t]o the maximum extent practicable," DoD use competitive procedures when entering into agreements to carry out the

prototype projects. *Id.* at § 2371b(b)(2). In addition, the statute provides that DoD may only use this authority if one of the following conditions are met:

> (A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project.
>
> (B) All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. [§] 638)) or nontraditional defense contractors.
>
> (C) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.
>
> (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

Id. at § 2371b(d)(1).

D. Transfer Of Venue

Lastly, Title 28, United States Code, section 1631 provides that:

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court . . . in which the action or appeal could have been brought at the time it was filed or noticed.

28 U.S.C. § 1631. The Federal Circuit has held that the burden is on the party seeking transfer "to identify the proposed transferee court and show that jurisdiction would be proper there." *Maehr v. United States*, 767 Fed. App'x 914, 916 (Fed. Cir. 2019) (per curiam) (citing *Hill v. Dep't of the Air Force*, 796 F.2d 1469, 1470-71 (Fed. Cir. 1986)). And so, the Court may transfer a matter to a district court, if the Court determines that it lacks subject-matter jurisdiction to consider a matter and that a transfer of venue would be in the interest of justice. 28 U.S.C. § 1631.

IV. LEGAL ANALYSIS

The government has moved to dismiss this post-award bid protest matter for lack of subject-matter jurisdiction upon the ground that SpaceX's challenges to the Air Force's evaluation and portfolio award decisions are not "in connection with a procurement or proposed procurement," as contemplated by the Tucker Act. Def. Mot. at 24-32. The government also argues that the Court should dismiss this matter for want of subject-matter jurisdiction, because SpaceX does not allege a violation of a procurement statute. *Id*. at 32-33. And so, the government contends that the claims asserted in this bid protest matter fall beyond the boundaries of the Tucker Act. *Id*. at 20-24.

In its response and opposition to the government's motion to dismiss, SpaceX counters that the Court may entertain this bid protest matter because SpaceX alleges non-frivolous violations of law that are in connection with the Air Force's ongoing procurement of launch services during Phase 2 of the National Security Space Launch Program. Pl. Resp. at 19-25. SpaceX also contends that the Court possesses subject-matter jurisdiction to consider its claims, because the Air Force violated 10 U.S.C. § 2371b and the Administrative Procedure Act, 5 U.S.C. §§ 551-59, during the LSA Competition. *Id*. at 31-37. And so, SpaceX requests that the Court deny the government's motion to dismiss, or, alternatively, transfer this matter to the United States District Court for the Central District of California. *Id*. at 37-39.

For the reasons set forth below, SpaceX has not shown that the Court possesses subject-matter jurisdiction to consider any of its claims. And so, the Court: (1) **GRANTS** the government's motion to dismiss; (2) **GRANTS** SpaceX's motion to transfer venue; and (3) **DISMISSES** the complaint.

A. The Court May Not Consider SpaceX's Claims

The parties appear to agree that the launch service agreements at issue in this bid protest matter are not procurement contracts and that the LSARFP was not a procurement. *See* Def. Mot. at 1-2, 24; Pl. Resp. at 5, 16; Def. Reply at 4-6; Oral Arg. Tr. 9:20-10:10. The parties disagree, however, about whether the Air Force's evaluation and the portfolio award decisions for the LSA Competition are, nonetheless, "in connection with a procurement or proposed procurement," as contemplated by the Tucker Act. Def. Mot. at 24-32; Pl. Resp. at 19-25.

In this regard, SpaceX argues that the Air Force's evaluation and portfolio award decisions are "in connection with" the ongoing procurement of launch services during Phase 2 of the Program, because the LSA Competition "was the third step in a multi-stage procurement process that the [Air Force] devised to fulfill the [a]gency's identified need to procure domestic launch services." Pl. Resp. at 2; *see also id*. at 19-25. The government counters that the Air Force's decisions are not "in connection with a procurement or proposed procurement," because the LSA Competition involved a solicitation that was separate and distinct from the Phase 2 Procurement. Def. Mot. at 28-32; Def. Reply at 11-16. For the reasons set forth below, the Court agrees.

1. LSAs Are Not Procurement Contracts

As an initial matter, there can be no genuine dispute that the LSAs at issue in this dispute are not procurement contracts that fall within the purview of this Court's bid protest jurisdiction. The administrative record shows that the Air Force entered into the LSAs pursuant to the authority that Congress granted to the DoD to enter into other transactions under 10 U.S.C. §§ 2371 and 2371b. AR Tab 38 at 1263; 10 U.S.C. §§ 2371 and 2371b; *see also* Def. Mot. at 1-2, 18, 24; Pl. Resp. at 5, 16, 26. Neither this Court nor the Federal Circuit has examined the question of whether the Court's bid protest jurisdiction extends to disputes involving the award of LSAs. But, the Federal Circuit has made clear that the Tucker Act'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); *see also United States v. Testan*, 424 U.S. 392, 399 (1976) ("[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (citation omitted). And so, this dispute must concern a procurement solicitation or contract to fall within the boundaries of the Tucker Act.

The Federal Circuit has also held that this Court must dismiss a bid protest action challenging the award of cooperative farming agreements for lack of subject-matter jurisdiction, because cooperative farming agreements are not procurement contracts. *Hymas*, 810 F.3d at 1320, 1329-30. And so, the Court reads *Hymas* to require that it must dismiss a bid protest matter challenging agency decisions that are related to the award of an agreement that is not a procurement contract. *Id.*

In this case—like in *Hymas*—the record evidence makes clear that the LSAs are not procurement contracts. *See* 10 U.S.C. § 2371(a); *see also* 32 C.F.R. § 3.2. Rather, the administrative record shows that the Air Force entered into the LSAs pursuant to the authority that Congress has granted to DoD to enter into other transactions pursuant to 10 U.S.C. § 2371b. The administrative record also shows that LSAs are are not subject to the federal laws and regulations applicable to procurement contracts. AR Tab 38 at 1263; *see also MorphoTrust USA, LLC*, B-412711, 2016 WL 2908322, at *4 (Comp. Gen. May 16, 2016). Given this, the Court agrees with the government that this Court may not exercise its bid protest jurisdiction under the Tucker Act to consider a challenge to the Air Force's evaluation and portfolio award decisions.[4] *Hymas*, 810 F.3d at 1320, 1329-30; *Res. Conservation Grp.*, 597 F.3d at 1245 (stating that the Tucker Act's bid protest language "is exclusively concerned with procurement solicitations and contracts"); RCFC 12(b)(1).

2. SpaceX Has Not Shown That The Air Force's Decisions Are In Connection With A Procurement

SpaceX also has not shown that the Air Force's evaluation and portfolio award decisions during the LSA Competition are "in connection with a procurement or proposed procurement." The Federal Circuit has held that "[t]he 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). But, the Federal Circuit has also recognized that there are limits to this Court's bid protest jurisdiction under the Tucker Act. *See, e.g.*, *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1330 (Fed. Cir. 2018). And so, not every decision *related* to a procurement is "in connection with a procurement or proposed procurement" as contemplated by the Tucker Act.

In this case, SpaceX argues with some persuasion that the Air Force's evaluation and portfolio award decisions are related to the Air Force's Phase 2 Procurement, because the LSA portfolio award will lead to the development of launch vehicles to be bid during the Phase 2 Procurement. Pl. Mot. at 2; Oral Arg. Tr. at 36:23-36:25. In this regard, the administrative

[4] The Court does not reach the issue of whether other transactions generally fall beyond the Court's bid protest jurisdiction under the Tucker Act. The Court simply concludes that the specific facts in this case show that the LSAs at issue are not procurement contracts and therefore, the Air Force's decisions related to the award of these agreements may not be reviewed by the Court pursuant to the bid protest provision of the Tucker Act.

record shows that the LSA Competition and Phase 2 Procurement share the mission of assuring the Nation's access to space and eliminating reliance upon Russian-made rocket engines. AR Tab 19 at 791; *see also* AR Tab 19 at 786; AR Tab 38 at 1260 (stating the goal of the Program "is to leverage commercial launch solutions in order to have at least two domestic, commercial launch service providers that also meet [National Security Space] requirements, including the launch of the heaviest and most complex payloads"). During oral argument, SpaceX also correctly observed that the funding provided by the Air Force pursuant to the LSAs will aid the development of prototype launch vehicles that Blue Origin, Orbital ATK and ULA will bid during the Phase 2 Procurement. Oral Arg. Tr. at 29:21-29:25; 36:21-37:1; 57:5-57:12. And so, the record evidence shows that the funding provided pursuant to the LSAs will help the Air Force competitively procure launch services during the Phase 2 Procurement. AR Tab 38 at 1260.

But, the record evidence also shows that, while related to the Phase 2 Procurement, the Air Force's evaluation and portfolio award decisions are not "in connection with" that procurement for several reasons.

First, as the government persuasively argues in its motion to dismiss, the administrative record shows that the LSA Competition and the Phase 2 Procurement involve separate and distinct solicitations. Def. Mot. at 28-29; Def. Reply at 12-13. It is a well-established tenet of procurement law that a selection decision made under one procurement or solicitation does not govern the selection under a different procurement or solicitation. *SDS Int'l v. United States*, 48 Fed. Cl. 759, 772 (2001); *see also Griffy's Landscape Maint. LLC v. United States*, 51 Fed. Cl. 667, 671 (2001) ("[A]n attack upon a new solicitation or upon any other aspect of the administration of the previous contract, must stand on its own."). And so, generally, the Court must view the Air Force's evaluation and portfolio award decisions during the LSA Competition separately from the selection of awardees for the Phase 2 Procurement for launch services contracts. *Id*.

In this case, the Air Force's Acquisition Strategy Document for the Program makes clear that the Program consists of a four-phase strategy that will employ different solicitations and other steps to be implemented by the Air Force between FY 2013 to FY 2027. *See* AR Tab 19 at 788. Specifically, this document provides that the LSA Competition sought certified launch

service providers to develop launch system prototypes and that this competition commenced in FY 2017 and will conclude in FY 2024. *Id. Id.* at 786, 788. By comparison, the Air Force's Acquisition Strategy Document shows that the Phase 2 Procurement will involve a procurement for launch services and that this procurement will commence in FY 2020 and will conclude in FY 2024. *Id*. at 788. And so, the record evidence supports the government's view that the LSA Competition and the Phase 2 Procurement are two separate and distinct parts of a multi-phase program.

Second, the administrative record also shows that the LSA Competition and the Phase 2 Procurement involve different acquisition strategies. Def. Mot. at 29-30; Def. Reply at 13. As discussed above, the Air Force issued the LSARFP to facilitate the successful development of launch systems pursuant to the DoD's authority to enter into other transactions. AR Tab 38 at 1263. And so, the LSA Competition was not subject to the requirements of the FAR. AR Tab 35 at 1068 ("[T]he FAR and its supplements do not apply to this selection process"); s*ee also* AR Tab 19 at 794-95; 10 U.S.C. §§ 2371 and 2371b; Def. Mot. at 29. In contrast, the Phase 2 Procurement will involve a FAR-based competition. AR Tab 19 at 807 (stating that "the Air Force intends to use a full and open competition to award FAR-based [firm-fixed priced] contracts to two launch providers for [National Security Space] launch service procurements"). Given this, the record evidence makes clear that the LSA Competition and the Phase 2 Procurement also differ with regards to how bidders will compete and the legal requirements that govern each solicitation.

The administrative record also makes clear that the specific goals of the LSA Competition and the Air Force's Phase 2 Procurement differ. The goal of the LSA competition is to increase the pool of launch vehicles that meet the Air Force's needs by "invest[ing] in industry to develop enhanced configurations to support all [National Security Space] requirements." AR Tab 19 at 789. By comparison, the goal of the Phase 2 Procurement is to procure, through requirements contracts awards, "launch services." *Id.* at 786.

In addition—and perhaps more significantly—the administrative record makes clear that the LSA Competition did not involve the procurement of any goods or services by the Air Force. AR Tab 38 at 1261; *see also* Oral Arg. Tr. at 21:3-21:12. While it is undisputed that the Air Force will provide funding to develop launch service prototype vehicles under the LSAs, the Air

Force will not purchase or own these prototypes. AR Tab 38 at 1261; Oral Arg. Tr. at 21:3-21:20. Nor will the Air Force acquire any services under the LSAs. AR Tab 38 at 1261; Oral Arg. Tr. at 21:15-21:16; 26:15-26:22. And so, unlike the Phase 2 Procurement, the LSA Competition did not involve an acquisition of goods or services.

Given the aforementioned differences between the LSA Competition and the Phase 2 Procurement, the record evidence supports the government's view that the evaluation and portfolio award decisions during the LSA Competition are distinct agency decisions that are not connected to the Phase 2 Procurement. *BayFirst Sols., LLC v. United States*, 104 Fed. Cl. 493, 507 (2012).

The Court is also not persuaded by SpaceX's arguments that the Court may consider its claims, notwithstanding the evidence showing that the LSA Competition and Phase 2 Procurement are distinct and separate solicitations.

First, SpaceX argues without persuasion that Tucker Act jurisdiction is established in this case, because the Air Force's portfolio award decision will impact the government's acquisition of launch services in the future. Pl. Resp. at 21-23. But, in *R&D Dynamics Corp. v. United States*, this Court recognized that the fact that resources expended by the government during one phase of a government program may lead to the development of the capacity to provide goods and services in the future does not, alone, render an award a "procurement." 80 Fed. Cl. 715, 722 (2007) (holding that a Phase II Small Business Innovation Research ("SBIR") award was not a procurement, and therefore the award could not be "in connection with" a Phase III procurement as contemplated by the Tucker Act). Similarly here, the fact that the development of prototype launch vehicles could eventually lead to the Air Force's acquisition of launch services is not sufficient, alone, to render the Air Force's decisions "in connection with" the Phase 2 Procurement in this case. *Id.*

SpaceX's argument that the LSA Competition must be "in connection with" the Phase 2 Procurement is also contradicted by the undisputed fact that the Phase 2 Procurement will be a fully open competition. Notably, the administrative record shows that the Phase 2 Procurement will be open to all interested offerors and that this procurement will not be limited to the three companies that have been awarded LSAs. AR Tab 19 at 786 ("FAR-based procurement contracts will be competitively awarded to certified EELV launch service providers, which could

include companies that were not previously awarded LSAs"); *id.* at 807 ("[T]he Air Force intends to use a full and open competition to award FAR-based [firm-fixed priced] contracts to two launch providers for [National Security Space] launch service procurements . . . ").

During oral argument, SpaceX acknowledged that it will compete for the award of a launch services contract during the Phase 2 Procurement, even though SpaceX was not awarded a launch service agreement during the LSA Competition. Oral Arg. Tr. at 37:14-37:21. Given this, the record evidence makes clear that the Air Force's portfolio award decision during the LSA Competition will not dictate the outcome of the Phase 2 Procurement, as Space X suggests. Pl. Resp. at 23.

Indeed, while SpaceX raises understandable concerns that it may be disadvantaged in the future by the fact that the Air Force is funding the development of launch vehicle prototypes by Blue Origin, ULA and Orbital, such concerns involve a potential challenge to the *Phase 2 Procurement*—which is not the subject of this dispute. Oral Arg. Tr. at 37:5-37:8; 39:22-40:6. The Court also acknowledges that the question of whether the decisions made by the Air Force during the LSA Competition are "in connection with" the Phase 2 Procurement is a close one, given the evidentiary record in this case. But, the Court must answer this question based upon the totality of the record evidence and this evidence indicates that, while related, the LSA Competition and the Phase 2 Procurement are separate and distinct solicitations for the National Security Space Launch Program.

The Court also takes into consideration the intent expressed by Congress to remove the LSAs—which are not procurement contracts—from the legal requirements and process that govern procurement contracts. *See* 10 U.S.C. §§ 2731, 2731b; *see also* Def. Mot. at 6-7; Oral Arg. Tr. at 17:21-18:8. And so, for these reasons, the Court **GRANTS** the government's motion to dismiss this bid protest matter for lack of subject-matter jurisdiction. RCFC 12(b)(1).

Because the Court finds that the LSAs are not procurement contracts and that the Air Force's evaluation and portfolio award decisions during the LSA Competition are not "in connection with" the Phase 2 procurement, the Court does not reach the remaining jurisdictional issues raised in the government's motion to dismiss.

B. Transfer Of This Matter Is In The Interest Of Justice

As a final matter, the Court agrees with SpaceX that a transfer of this matter to the United States District Court for the Central District of California would be in the interest of justice. SpaceX requests that the Court transfer this matter to the United States District Court for the Central District of California, should the Court determine that it lacks subject-matter jurisdiction to consider its claims. Pl. Resp. at 37-39. Title 28, United States Code, section 1631 provides that the Court "shall" transfer an action to another federal court when: (1) the transferring court finds it lacks jurisdiction; (2) the proposed transferee court is one in which the case could have been brought at the time it was filed; and (3) the transfer is in the interest of justice. 28 U.S.C. § 1631; *see also Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1303 (Fed. Cir. 2008). Each of these circumstances has been met here.

First, SpaceX persuasively argues that the claims asserted in the complaint could have been brought in the United States District Court for the Central District of California at the time Space X commenced this action. Pl. Resp. at 37-38; *see also* 28 U.S.C. § 1391(b)(2) (stating that a civil action may be brought against the United States in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated"). SpaceX represents that its principal place of business is located within the Central District of California and that the Air Force office that made the evaluation and portfolio award decisions for the LSARFP is also located within that district. Pl. Resp. at 38. And so, Space X has shown that that the events giving rise to its claims occurred within in the Central District of California.

SpaceX has also shown that it would be in the interest of justice to transfer this case to the district court. *See* Pl. Resp. at 38-39; *see also Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1000 (Fed. Cir. 1987) (stating that "[t]he phrase 'if it is in the interest of justice' relates to claims which are nonfrivolous and as such should be decided on the merits (citing *Zinger Constr. Co. v. United States*, 753 F.2d 1053, 1055 (Fed. Cir. 1985)). SpaceX alleges non-frivolous claims in this matter that the Air Force's evaluation and portfolio award decisions were unreasonable and in violation of federal law. Compl. at ¶¶ 101, 209. Specifically, SpaceX alleges, among other things, that the Air Force based the portfolio award decision on an arbitrary and unequal evaluation process and that the Air Force's portfolio award decision violates the

assured access to space requirements mandated by Congress. *See* Compl. at ¶ 227. Given the non-frivolous nature of SpaceX's claims, the Court believes that SpaceX should be afforded the opportunity to pursue these claims in the district court. And so, the Court **GRANTS** SpaceX's motion to transfer venue to the United States District Court for the Central District of California.

V. CONCLUSION

In sum, the administrative record in this bid protest matter makes clear that the LSAs are not procurement contracts and that the Air Force's evaluation and portfolio award decisions during the LSA Competition were not "in connection with" the Phase 2 Procurement. Space X has also shown that it is in the interest of justice to transfer this matter to the United States District Court for the Central District of California. And so, for the foregoing reasons, the Court:

1. **GRANTS** the government's motion to dismiss;
2. **GRANTS** SpaceX's motion to transfer venue; and
3. **DISMISSES** the complaint.

The Clerk is directed to transfer the above captioned case to the United States District Court for the Central District of California.

Each party to bear its own costs.

The Clerk shall enter judgment accordingly.

Some of the information contained in this Memorandum Opinion and Order may be considered protected information subject to the Protective Order entered in this matter on May 22, 2019. This Memorandum Opinion and Order shall therefore be filed **UNDER SEAL**. The parties shall review the Memorandum Opinion and Order to determine whether, in their view, any information should be redacted in accordance with the terms of the Protective Order prior to publication.

The parties shall **FILE** a joint status report identifying the information, if any, that they contend should be redacted, together with an explanation of the basis for each proposed redaction, on or before **October 30, 2019**.

IT IS SO ORDERED.

s/ Lydia Kay Griggsby
LYDIA KAY GRIGGSBY
Judge

In the United States Court of Federal Claims

No. 19-1205
Filed: September 24, 2019
Reissued: September 30, 2019[1]

PAE-PARSONS GLOBAL LOGISTICS SERVICES, LLC, Plaintiff, v. THE UNITED STATES, Defendant, and FLUOR INTERCONTINENTAL, INC., Defendant-Intervenor.	Motion to Dismiss; RCFC 12(b)(1); RCFC 12(b)(6); Federal Acquisition Streamlining Act of 1994; Standing; Jurisdiction; Interested Party; Indefinite-Delivery Indefinite-Quantity Contract; Task Order.

Anuj Vohra, Crowell & Moring LLP, Washington, DC, for plaintiff.

William Porter Rayel, U.S. Department of Justice, Civil Division, Washington, DC, for defendant.

Andrew Emil Shipley, Wilmer Cutler, et al., LLP, Washington, DC, for defendant-intervenor.

OPINION AND ORDER

***SMITH*, Senior Judge**

This case presents a fact pattern not seen by the Court before. Here the government has merged an indefinite-delivery indefinite-quantity ("IDIQ") contract and a task order into one process. Plaintiff, PAE-Parsons Global Logistics Services, LLC ("P2GLS"), challenges the ratings it received from the Department of the Army's ("Agency" or "Army") as part of the IDIQ technical evaluation. Those ratings directly resulted in plaintiff's failure to receive both a specific IDIQ contract and its related task order. The government argues that the Federal Acquisition Streamlining Act of 1994 ("FASA") bars any court relief. However, if the Court were to accept that, an agency would be beyond judicial scrutiny in every circumstance in which

[1] An unredacted version of this opinion was issued under seal on September 24, 2019. The parties were given an opportunity to propose redactions, but no such proposals were made.

the government simultaneously awards an IDIQ contract and a task order. It is clear that FASA's purpose is not to bar review of potentially all bid protests. This could happen if the government's reading of FASA were accepted. Here plaintiff is not complaining about the task order but the underlying technical evaluations in the award process. The plaintiff was directly harmed by this process because the technical ratings had immediate economic consequences. The government argues that, as plaintiff received one of the IDIQ contracts and was not a disappointed bidder—despite the clear flaws in the procurement process—plaintiff lacks standing to bring this protest. To argue otherwise is to use words without form or substance. Functionally, the government created four separate IDIQ contracts. If plaintiff later succeeds on the merits, the flawed technical evaluations directly resulted in Fluor receiving a contract for which P2GLS is better qualified.

This action is before the Court on defendant's Motion to Dismiss. Plaintiff challenges Army's decision to award IDIQ contract to defendant-intervenor, Fluor Intercontinental, Inc. ("Fluor"), under Request for Proposal No. W52P1J-16-R-0001 ("RFP" or "Solicitation"). On August 21, 2019, defendant filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"), alleging that (1) P2GLS's protest is barred by the FASA, and (2) P2GLS is not an "interested party" under 28 U.S.C. § 1491(b) and therefore lacks standing to challenge the IDIQ contract award to Fluor. *See generally* Defendant's Motion to Dismiss (hereinafter "Def.'s MTD"). For the following reasons, the Court denies defendant's Motion to Dismiss.

I. Background

On November 20, 2017, the Army issued a solicitation for the Logistics Civil Augmentation Program ("LOGCAP") V contract for logistics support services. Def.'s MTD at 4. The Solicitation provided that the Army would issue a minimum of four and up to six IDIQ contract awards to cover the six Geographic Combatant Commands ("COCOMs") and Afghanistan, as well as seven concurrently awarded task orders. *Id*. Specifically, the RFP indicated that the Army would award a "[b]asic IDIQ and associated Task Order(s)" to the offeror that provided the best value for each COCOM. PAE-Parsons Global Logistics Services, LLC's Response to Defendant's Motion to Dismiss (hereinafter "Pl.'s Resp.") at 6 (citing RFP § M.7).

The Army issued LOGCAP V awards on a best value basis according to the following factors: (1) Technical/Management; (2) Past Performance; (3) Small Business Participation; and (4) Cost/Price. Def.'s MTD at 5 (citing RFP § M.5). The Army conducted separate best value determinations for each COCOM and for Afghanistan. *Id.* The RFP further directed that the Army would select the successful offeror for each COCOM in descending order according to three "Operational Priority Groupings." Pl.'s Resp. at 6 (citing RFP § L.10.1(a)). Operational Priority Grouping 1 included the European Command ("EUCOM") and Pacific Command ("PACOM") regions. *Id.* (citing RFP § L.10.1(a)). Operational Priority Grouping 2 included the Central Command ("CENTCOM"), Northern Command ("NORTHCOM"), African Command ("AFRICOM"), and Southern Command ("SOUTHCOM") regions. *Id.* (citing RFP § L.10.1(a)). Operational Priority Grouping 3 covered the Afghanistan region. *Id.* (citing RFP § L.10.1(a)). Offerors were only eligible for one COCOM award in any Operational Priority Grouping. *Id.*

(citing RFP § L.10.1(a)). The RFP provided that the Afghanistan region was to be awarded solely through a task order, and it could only be awarded to an IDIQ awardee that had already received a higher-priority COCOM. RFP § M.7. The LOGCAP V IDIQ awards were made in order of descending priority based on which offeror was determined to provide the best value for a particular COCOM region. Def.'s MTD at 5 (citing RFP § M.7). Each IDIQ award included different monetary values and provided awardees with different rights to specific task orders. Pl.'s Resp. at 7.

In April of 2019, the Army awarded four IDIQ contracts and the associated task orders. Def.'s MTD at 6. In addition to its LOGCAP V IDIQ contract awards, Fluor received the AFRICOM task order, and P2GLS received the SOUTHCOM task order. *Id.* at 7. In May of 2019, P2GLS, in addition to three other LOGCAP V offerors, filed a protest with the Government Accountability Office ("GAO") challenging the Army's award of the AFRICOM task order to Fluor. Pl.'s Resp. at 9. On July 31, 2019, the GAO denied a separate protest filed by Dyncorp International, LLC ("Dyncorp"), and on August 5, 2019—mere days before the GAO would have issued a decision in P2GLS's protest—Dyncorp filed a protest with this Court. *Id.* As a result, the GAO denied P2GLS's protest as academic. *Id.*

Plaintiff filed its Complaint with this Court on August 14, 2019. *See generally* Complaint. Defendant filed its Motion to Dismiss pursuant to RCFC 12(b)(1) and 12(b)(6) on August 21, 2019. *See generally* Def.'s MTD. Plaintiff filed its Response to defendant's Motion to Dismiss on August 28, 2019. *See generally* Pl.'s Resp. Defendant filed its Reply in support of its Motion to Dismiss on September 4, 2019. *See generally* Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss (hereinafter "Def.'s Reply"). Oral Argument was held on September 9, 2019, and defendant's Motion to Dismiss is fully briefed and ripe for review.

II. Standard of Review

This Court's jurisdictional grant is found primarily in the Tucker Act, which provides the Court of Federal Claims with the power "to render any 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 . . . in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2018). Although the Tucker Act explicitly waives the sovereign immunity of the United States against such claims, it "does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Rather, in order to fall within the scope of the Tucker Act, "a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc* in relevant part).

The Tucker Act also grants this Court jurisdiction over bid protest actions. 28 U.S.C. § 1491(b). Standing in bid protests is framed by 28 U.S.C. § 1491(b)(1), which requires that the bid protest be brought by an "interested party." A protestor is an "interested party" if it is an actual or prospective bidder that possesses the requisite direct economic interest. *Weeks Marine, Inc., v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009) (citing *Rex Serv. Corp. v. United*

States, 448 F.3d 1305, 1308 (Fed. Cir. 2006)). "To prove a direct economic interest as a putative prospective bidder, [the bidder] is required to establish that it had a 'substantial chance' of receiving the contract." *Id.*; *see also Info. Tech. & Appl. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003) ("To establish prejudice, [the protestor] must show that there was a 'substantial chance' it would have received the contract award but for the alleged error in the procurement process."); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1580 (Fed. Cir. 1996).

III. Discussion

In this procurement, the Agency made a single contemporaneous award of the LOGCAP V IDIQ contracts and their associated task orders. Pl.'s Resp. at 6 (citing RFP § M.7). If FASA applies, the Court has no jurisdiction to review the protest. The government argues that if FASA does not apply, plaintiffs who receive awards of lesser value in lower-priority regions lack standing to bring a protest because they do not meet the disappointed bidder requirement. In effect, the Agency created a system in which the plaintiffs are left without any judicial recourse or remedy. For the following reasons, the Court does not understand FASA to bar the Court's jurisdiction under the circumstances surrounding this case.

A. Jurisdiction

In its Motion to Dismiss, the government argues that P2GLS's protest is barred by FASA because the protest is "'in connection with' the proposed issuance of the AFRICOM task order to Fluor." Def.'s MTD at 9. On its face, the government's argument seems correct. FASA explicitly divests this Court of jurisdiction over protests of task orders. 41 U.S.C. § 4106(f). FASA states, in relevant part, the following:

> (f) Protests.–
>
> (1) 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.[2]
>
> (2) 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).

Id. This Court has extended this FASA jurisdictional bar to include task order protests of corrective action that "relates to, and is connected with, the issuance of a task order." *Mission*

[2] Section 835 of the 2017 National Defense Authorization Act increased this threshold to $25,000,000 for task orders issued by the Department of Defense, NASA, or the Coast Guard. The change has been codified at FAR 16.505(a)(10), but FASA has not been amended.

Essential Pers., LLC v. United States, 104 Fed. Cl. 170, 179 (2014); *see also Nexagen Networks, Inc. v. United States*, 124 Fed. Cl. 645, 653 (2015).

Plaintiff argues that it is not protesting the award of the AFRICOM task orders, but rather it is protesting the AFRICOM IDIQ contract award, and, as such, FASA does not bar this protest. Pl.'s Resp. at 12. Classifying the protest as against the "AFRICOM IDIQ," rather than referring to it as the LOGCAP V IDIQ associated with the AFRICOM task order, is somewhat confusing. Such an argument highlights the connection between the IDIQ contract and task order awards, seemingly cementing the applicability of the FASA bar. Despite that confusion, the Court agrees with plaintiff's underlying contention that FASA does not apply under the specific circumstances of this protest.

Pursuant to the RFP, the Agency made LOGCAP V IDIQ contract awards in order of descending COCOM priority, and each offeror who received a regional award was ineligible for any lower-priority awards within that same Occupational Priority Grouping. *Cf.* RFP § M.7. Thus, the order in which an offeror was slotted to receive its IDIQ contract award was directly based on its technical ratings and also directly impacted the task orders for which it would then become eligible. *Id.* Moreover, the Agency made *separate* best value determinations and "assign[ed] a separate adjectival rating" to each offeror for each COCOM and for Afghanistan. *Id.* The Agency issued all four IDIQ awards simultaneously. However, the manner in which the Agency determined which offeror would receive each award—in descending order of priority, with separate best value determinations and adjectival ratings for each COCOM—clearly indicates that the Army functionally issued four *separate and distinct* LOGCAP V IDIQ contract awards. The fact that task orders resulted from those IDIQ awards does not divest this Court of its jurisdiction over the IDIQ contract awards themselves, as the task order awards are inextricably linked to the ratings for the IDIQ contract.

B. Standing

In addition to its argument that FASA divests the Court of its jurisdiction over P2GLS's protest, the government also contends that plaintiff lacks standing to protest the LOGCAP V award because an awardee is not an interested party. Def.'s MTD at 16. In making this argument, the government posits that "the legislative history of 28 U.S.C. § 1491(b)(1) indicates that Congress intended that only 'disappointed bidders' would be able to bring post-award bid protests in this Court." Def.'s MTD at 17 (citing *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) ("[T]he legislative history of § 1491(b)(1) suggests that congress intended standing under the statute to be limited to disappointed bidders.")). The Court does not agree with the government's interpretation of 28 U.S.C. § 1491(b)(1) in the context of this case.

In order to establish standing in bid protest actions, a protester must be an interested party. 28 U.S.C. § 1491(b)(1). An "interested party" is an actual or prospective bidder with a direct economic interest in the solicitation. *Weeks Marine*, 575 F.3d at 1361. In a post-award bid protest, a plaintiff "must show that it had a 'substantial chance' of receiving the contract" in order to prove a direct economic interest. *Sys. Appl. & Techs. Inc.*, 691 F.3d at 1381 (citing *Rex. Serv. Corp.*, 448 F.3d at 1307). P2GLS is an actual bidder with a substantial chance of receiving

the contract because it actually bid on the LOGCAP V Solicitation, and it was one of the six offerors that were included in the competitive range and participated in multiple rounds of discussions. *See* Source Selection Decision at 4.

Of note, this Court has previously held that "status as a contract awardee does not by itself deprive this court of bid protest jurisdiction." *Nat'l Air Cargo Grp., Inc. v. United States*, 126 Fed. Cl. 281, 295 (2016); *see also*, *cf. Sys. Appl. & Techs. Inc.*, 691 F.3d at 1381–82. Moreover, this Court has also held that "a protestor that won an IDIQ contract had standing to challenge the government's award of another IDIQ contract under the same solicitation to different offeror." *Nat'l Air Cargo Grp, Inc.*, 126 Fed. Cl. at 296 (citing *Glenn Defense Marine (ASIA) PTE, Ltd. v. United States*, 97 Fed. Cl. 311, 317 n. 3 (2011), *appeal on other grounds dismissed as moot after government settled with plaintiff,* 469 Fed.Appx. 865 (2012)). Essentially, an awardee still has an "economic interest" in "stopping the government from stepping outside stated procurement terms in making further awards." *Id.* at 294 (citing *Magnum Opus Techs., Inc. v. United States*, 94 Fed Cl. 512, 530 (2010)). In keeping with the prior relevant decisions of this Court, P2GLS retains its standing despite the fact that it received a LOGCAP V IDIQ contract award.

Even if this Court were to determine that a successful awardee lacks standing to protest another offeror's inclusion in an IDIQ pool, P2GLS would still have standing to bring this protest. The nature of this Solicitation essentially resulted in four concurrently awarded—but very different—IDIQ contracts. As eligibility for each specific LOGCAP V IDIQ contract was predicated on an offeror's success or failure to receive a higher-priority LOGCAP V IDIQ contract, plaintiff is clearly a disappointed bidder with regard to the specific IDIQ contract at issue here. While P2GLS unquestionably received *a* LOGCAP V award, it did not receive the LOGCAP V award that served as the mandatory prerequisite to receive the AFRICOM task order. As the Agency performed a separate best value determination for each COCOM—and as the task orders were so intrinsically linked to the IDIQ awards as to be nearly indistinguishable from the IDIQ contract awards themselves—the IDIQ contract associated with the SOUTHCOM task orders was clearly a different IDIQ contract than that which was associated with the AFRICOM task order. Therefore, plaintiff clearly has standing as a disappointed bidder with regard to the IDIQ contract award at issue in this case.

IV. Conclusion

FASA undoubtedly bars this Court's review of ordinary task order award decisions. However, FASA does not divest this Court of its jurisdiction under the unique circumstances surrounding P2GLS's protest. However, review of IDIQ contract awards, regardless of the issuance of subsequent or concurrent task orders, clearly falls within the jurisdictional purview of the Court of Federal Claims. Therefore, this Court will hear the merits of P2GLS's protest insofar as they are based on the limited circumstances surrounding the Army's evaluation of LOGCAP V IDIQ contract awards. The Court does not look to the merits of the AFRICOM task order award, but only to the evaluation process surrounding plaintiff's bid.

For the reasons set forth above, defendant's MOTION to Dismiss is **DENIED**. A Status Conference will be set in the coming days, setting forth a proposed procedural schedule.

IT IS SO ORDERED.

s/ *Loren A. Smith*
Loren A. Smith,
Senior Judge

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2016

Public Law 114–92
114th Congress

An Act

Nov. 25, 2015
[S. 1356]

To authorize appropriations for fiscal year 2016 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

National Defense Authorization Act for Fiscal Year 2016.

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Defense Authorization Act for Fiscal Year 2016".

SEC. 2. ORGANIZATION OF ACT INTO DIVISIONS; TABLE OF CONTENTS.

(a) DIVISIONS.—This Act is organized into four divisions as follows:

(1) Division A—Department of Defense Authorizations.

(2) Division B—Military Construction Authorizations.

(3) Division C—Department of Energy National Security Authorizations and Other Authorizations.

(4) Division D—Funding Tables.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

(B) any reorganization or process changes that will link and streamline the requirements, acquisition, and budget processes of the Armed Force concerned; and

(C) any cross-training or professional development initiatives of the Chief concerned or the Commandant.

(2) For each description under paragraph (1)—

(A) the specific timeline associated with implementation;

(B) the anticipated outcomes once implemented; and

(C) how to measure whether or not those outcomes are realized.

(3) Any other matters the Chief concerned or the Commandant considers appropriate.

SEC. 809. ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS.

(a) ESTABLISHMENT.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall establish under the sponsorship of the Defense Acquisition University and the National Defense University an advisory panel on streamlining acquisition regulations.

(b) MEMBERSHIP.—The panel shall be composed of at least nine individuals who are recognized experts in acquisition and procurement policy. In making appointments to the advisory panel, the Under Secretary shall ensure that the members of the panel reflect diverse experiences in the public and private sectors.

(c) DUTIES.—The panel shall—

(1) review the acquisition regulations applicable to the Department of Defense with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage; and

(2) make any recommendations for the amendment or repeal of such regulations that the panel considers necessary, as a result of such review, to—

(A) establish and administer appropriate buyer and seller relationships in the procurement system;

(B) improve the functioning of the acquisition system;

(C) ensure the continuing financial and ethical integrity of defense procurement programs;

(D) protect the best interests of the Department of Defense; and

(E) eliminate any regulations that are unnecessary for the purposes described in subparagraphs (A) through (D).

(d) ADMINISTRATIVE MATTERS.—

(1) IN GENERAL.—The Secretary of Defense shall provide the advisory panel established pursuant to subsection (a) with timely access to appropriate information, data, resources, and analysis so that the advisory panel may conduct a thorough and independent assessment as required under such subsection.

(2) INAPPLICABILITY OF FACA.—The requirements of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the advisory panel established pursuant to subsection (a).

(e) REPORT.—

(1) PANEL REPORT.—Not later than two years after the date on which the Secretary of Defense establishes the advisory panel, the panel shall transmit a final report to the Secretary.

(2) ELEMENTS.—The final report shall contain a detailed statement of the findings and conclusions of the panel, including—

(A) a history of each current acquisition regulation and a recommendation as to whether the regulation and related law (if applicable) should be retained, modified, or repealed; and

(B) such additional recommendations for legislation as the panel considers appropriate.

(3) INTERIM REPORTS.—(A) Not later than 6 months and 18 months after the date of the enactment of this Act, the Secretary of Defense shall submit a report to or brief the congressional defense committees on the interim findings of the panel with respect to the elements set forth in paragraph (2).

(B) The panel shall provide regular updates to the Secretary of Defense for purposes of providing the interim reports required under this paragraph.

(4) FINAL REPORT.—Not later than 30 days after receiving the final report of the advisory panel, the Secretary of Defense shall transmit the final report, together with such comments as the Secretary determines appropriate, to the congressional defense committees.

(f) DEFENSE ACQUISITION WORKFORCE DEVELOPMENT FUND SUPPORT.—The Secretary of Defense may use amounts available in the Department of Defense Acquisition Workforce Development Fund established under section 1705 of title 10, United States Code, to support activities of the advisory panel under this section.

10 USC 2545 note.

SEC. 810. REVIEW OF TIME-BASED REQUIREMENTS PROCESS AND BUDGETING AND ACQUISITION SYSTEMS.

(a) TIME-BASED REQUIREMENTS PROCESS.—The Secretary of Defense and the Chairman of the Joint Chiefs of Staff shall review the requirements process with the goal of establishing an agile and streamlined system that develops requirements that provide stability and foundational direction for acquisition programs and shall determine the advisability of providing a time-based or phased distinction between capabilities needed to be deployed urgently, within 2 years, within 5 years, and longer than 5 years.

(b) BUDGETING AND ACQUISITION SYSTEMS.—The Secretary of Defense shall review and ensure that the acquisition and budgeting systems are structured to meet time-based or phased requirements in a manner that is predictable, cost effective, and efficient and takes advantage of emerging technological developments.

Entities, and Significant Alternatives Considered. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

155. The Commission believes that the steps described below to facilitate participation in 833 Auction will result in both operational and administrative cost savings for small entities and other auction participants. For example, assigning toll free numbers through competitive bidding will benefit smaller entities rather than the prior first-come first-served basis which favored larger, more sophisticated entities that had invested in obtaining enhanced connectivity to the Toll Free Database. Moreover, the Commission also elected to allow potential subscribers, many of which are smaller entities, the choice between participating directly in the auction or indirectly through a RespOrg. In addition, the Commission created an alternative payment mechanism that will be available for both upfront and final payments, in which applicants can submit payments via ACH instead of wire transfer if the payments are below a $300 threshold. The Commission believes such measures will benefit small entities, who may be interested in only acquiring one or perhaps a few toll free numbers.

156. The procedures adopted in the *833 Auction Procedures Public Notice* to facilitate participation in the 833 Auction will result in both operational and administrative cost savings for small entities and other auction participants. In light of the numerous resources that will be available from the Commission and Somos at no cost, the processes and procedures adopted in the *833 Auction Procedures Public Notice* should result in minimal economic impact on small entities. For example, prior to the auction, small entities and other auction participants may seek clarification of or guidance on complying with application procedures, reporting requirements, and the bidding system. Small entities as well as other auction participants will be able to avail themselves of (1) a web-based, interactive online tutorial to familiarize themselves with auction procedures, filing requirements, bidding procedures, and other matters related to the 833 Auction and (2) a telephone hotline to assist with issues such as access to or navigation within the auction application system. The Commission and Somos also make copies of Commission decisions available to the public without charge, providing a low-cost mechanism for small businesses to conduct research prior to and throughout the auction. In addition, Somos will post public notices on its website, making this information easily accessible and without charge to benefit all 833 Auction applicants, including small businesses. These steps are made available to facilitate participation in the 833 Auction by all eligible bidders and may result in significant cost savings for small business entities who utilize these alternatives. Moreover, the adoption of bidding procedures in advance of the auctions is designed to ensure that the 833 Auction will be administered predictably and fairly for all participants, including small businesses.

157. The Commission will send a copy of the *833 Auction Procedures Public Notice,* including the Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *833 Auction Procedures Public Notice* (or summary thereof) will also be published in the **Federal Register**.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–20526 Filed 9–25–19; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 208, 212, 213, 215, 216, 217, 234, and 237

[Docket DARS–2018–0055]

RIN 0750–AJ74

Defense Federal Acquisition Regulation Supplement: Restrictions on Use of Lowest Price Technically Acceptable Source Selection Process (DFARS Case 2018–D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2017 and 2018 that establish limitations and prohibitions on the use of the lowest price technically acceptable source selection process.

DATES: Effective October 1, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 83 FR 62550 on December 4, 2018, to implement the limitations and prohibitions on use of the lowest price technically acceptable (LPTA) source selection process provided in sections 813, 814, and 892 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328) and sections 822, 832, 882, and 1002 of the NDAA for FY 2018 (Pub. L. 115–91). Sixteen respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Significant Changes as a Result of Public Comments

No changes from the proposed rule are made in the final rule as a result of the public comments received.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Several respondents express support for the rule.

Response: DoD acknowledges support for the rule.

2. General Comments

Comment: A respondent expresses concern that the rule will be interpreted as a complete prohibition on the use of the LPTA source selection process. The respondent recommends revising the rule to clarify that use of the process is acceptable and expand on the circumstances in which it is or is not appropriate for use in acquisitions.

Response: It is not the intent of the rule to prohibit the use of the LPTA source selection process. The LPTA source selection process is a valuable part of the best value continuum and an acceptable and appropriate source selection approach for many acquisitions. Instead, the intent of the

rule is to implement the statutory language, which aims to identify meaningful circumstances that must exist for an acquisition to use the LPTA source selection process and certain types of requirements that will regularly benefit from the use of tradeoff source selection procedures. If a requirement satisfies the limitations for use of the LPTA source selection process, then the process may be used as a source selection approach. Supplemental information to contracting officers on when and from whom to seek additional guidance on whether a requirement satisfies the limitations at 215.101–2–70(a)(1) will be published in the DFARS Procedures, Guidance, and Information (PGI) in conjunction with this final rule.

Comment: One respondent expresses concern about how the agencies using fully automated systems to award contracts are going to implement this rule.

Response: Each Department or agency is required to implement the requirements of this final rule in its acquisition business processes and procedures.

Comment: One respondent expresses support for additional training and guidance that will assist acquisition personnel in making best value decisions.

Response: Training is readily available to DoD personnel on a variety of acquisition topics, including best value decisions. Upon publication of the final rule, the DFARS PGI will be updated to provide contracting officers with information on when and from whom to seek additional guidance when acquiring supplies and services that are impacted by this rule.

3. Expansion of the Applicability of the Rule

Comment: Some respondents recommend applying greater restrictions on the types of acquisitions that can use the LPTA source selection process. For example, a respondent suggests revising this rule to only authorize the use of the LPTA source selection process when acquiring goods that are predominantly expendable in nature, non-technical, or have a short shelf life or life expectancy. Another respondent suggests limiting the use of the LPTA source selection process to only commercial and commercial-off-the-shelf items valued at or below the simplified acquisition threshold, while expressly prohibiting its use for all other requirements.

Response: To ensure that DoD is not denied the benefit of cost and technical tradeoffs in the source selection process, the rule identifies meaningful circumstances that must exist for an individual requirement to use the LPTA source selection process. Each requirement has a unique set of circumstances that should be considered when developing a source selection approach. The LPTA source selection process is a valuable part of the best value continuum and can be used to facilitate an effective and competitive acquisition approach, depending on the circumstances of the acquisition. Limiting the use of the LPTA source selection process to only goods, commercial items under a specific dollar threshold, or other broadly defined groupings does not fully consider the circumstances of an individual requirement and could result in additional and unnecessary time and cost burdens for both Government and industry.

4. Limitation Criteria at 215.101–2–70(a)(1)

a. Application of Criteria

Comment: Some respondents recommend revising the rule to clarify whether each limitation listed at 215.101–2–70(a)(1) applies to supplies, services, or both supplies and services. In particular, a respondent suggests that the rule text be clarified to ensure that the limitations at 215.101–2–70(a)(i) through (iv) are applied to both supplies and services. The respondent also suggests restructuring the rule text by dividing the limitations into two paragraphs: One paragraph that identifies the limitations that apply to the acquisition of supplies, and one that identifies the limitations that apply to the acquisition of services. In contrast, another respondent expresses support for retaining the existing structure of the rule.

Response: The statutory language being implemented by the rule does not categorize the limitations into those that apply to supplies or services. As a result, the list of limitations at 215.101–2–70(a)(1)(i) through (viii) is written to apply to any acquisition that utilizes the LPTA source selection process. In consideration of these limitations, the contracting officer must document the contract file with a description of the circumstances that justify the use of the LPTA source selection process.

One exception is the limitation at 215.101–2–70(a)(1)(vi), which implements paragraph (a)(3) of section 822 of the NDAA for FY 2018 that states the limitation is ''with respect to a contract for the procurement of goods;'' as such, this rule specifically identifies that goods must meet this limitation.

b. Additional Criteria

Comment: Some respondents suggest that additional criteria be added to the list of limitations in order to satisfy Congressional intent. Specifically, one respondent suggests that ''non-complex'' be added to the additional criteria for goods at 215.101–2–70(a)(1)(vi). The respondent also suggests adding another factor to the list that expressly limits the use of LPTA source selection procedures to procurements where the risk of unsuccessful performance is minimal.

Response: The intent of this rule is to implement the statutory language, which does not include ''non-complex'' as a criteria to meet when purchasing goods, or a limitation on acceptable performance risk, when using the LPTA source selection process. Comprehensively, the consideration of each limitation at 215.101–2–70(a)(1) provides an effective evaluation of a requirement's suitability to use of the LPTA source selection process and reflects the intent of the statutory language; therefore, no additional limitation criteria are included in this final rule.

c. Clarification of Terms

Comment: Some respondents indicate that the terms used in the rule are unclear. Specifically, one respondent suggests modifying paragraph 215.101–2–70(a)(1)(ii) to expressly state that ''value'' includes both qualitative and quantitative value to be realized by DoD. Another respondent advises that it is unclear what ''full life-cycle costs'' means when acquiring services.

Response: Supplemental guidance will be published in DFARS PGI in conjunction with this final rule to assist contracting officers in documenting the contract file with a determination that the lowest price reflects full life-cycle costs. The term ''value'' includes monetary and non-monetary benefits, as applicable to the requirement. The term also considers whether DoD is willing to pay more than a minimum price in return for non-monetary benefits (*e.g.,* greater functionality, higher performance, or lower performance risk). The rule does not place any limitations on the meaning of the term.

d. Documentation of Justification

Comment: A respondent expresses concern that this rule requires a written justification when using the LPTA source selection process. As acquisition planning already requires the contracting officer to document the acquisition process and the rationale behind the decision to use one process

or method over another, the respondent views the documentation required by this rule to be unnecessary. In contrast, another respondent suggests that this rule expand the documentation requirement to include a description and analysis of the all the requirements at 215.101–2–70(a)(1) in order to justify the use of the LPTA source selection process and require the justification to be posted with the solicitation.

Response: This rule implements statutory language that requires a contracting officer document the contract file with the circumstances justifying the use of the LPTA source selection process. The rule does not specify a format or method to be used to meet this statutory requirement. The appropriate format of the justification and the method of incorporation into the contract file is left to the discretion of each Department or agency. When developing a source selection approach, acquisition personnel consider the unique circumstances of a requirement and determine the method that will result in the best value to DoD. Publicizing the justification with the solicitation is not required by statute and could result in increased cost and time burden to both Government and industry.

5. List of Services and Supplies at 215.101–2–70(a)(2)

Comment: A respondent suggests that the rule specify how a contracting officer determines that a procurement is predominately for a specific category of service.

Response: For solicitation and reporting purposes, contracting officers assign each acquisition a product or service code that best represents the predominant dollar amount of supplies or services being procured on an award. This code will determine whether the acquisition is subject to the limitations at 215.101–2–70(a)(2).

Comment: A respondent recommends that the list include services directly related to national security, in order to implement the intent of Congress.

Response: The intent of this rule is to implement the requisite statutory language, which does not include ''services directly related to national security'' in the list of service categories that must avoid using the LPTA source selection process, to the maximum extent practicable; as such, the rule text does not include such services in 215.101–2–70(a)(2)(i).

Comment: A respondent suggests that the list of services at 215.101–2–70(a)(2)(i) expressly include advisory and assistance services, as the term ''knowledge-based professional services'' may be misinterpreted to not include advisory and assistance services.

Response: The intent of this rule is to implement the requisite statutory language, which does not explicitly include advisory and assistance services; therefore, the rule text does not identify advisory and assistance services in 215.101–2–70(a)(2)(1).

Comment: Section 880(c) of the NDAA for FY 2019 restricts civilian agencies from using the LPTA source selection process for procurements that are predominately for the same services listed at 215.101–2–70(a)(2)(i), and also includes ''health care services and records'' and ''telecommunication devices and services'' to the list. To harmonize the requirements between the FAR and the DFARS or comply with statute, a couple of respondents suggest the rule incorporate the two additional categories from section 880(c) into the restrictions at 215–101–2–70(a)(2).

Response: The intent of this rule is to implement the statutes at sections 813, 814, and 892 of the NDAA for FY 2017, and sections 822, 832, 882, and 1002 of the NDAA for FY 2018. Section 880 of the NDAA for FY 2019 is being implemented via FAR case 2018–016, Lowest Price Technically Acceptable Source Selection Process, and does not apply to DoD.

6. Suggestion for Technical Edit

Comment: One respondent suggests that the two sentences regarding audit services at 215.101–2–70(b)(3) be reversed to state the prohibition upfront and follow with how award decisions shall be made for such services.

Response: The primary intent of the text, as arranged, is to address the action a contracting officer shall take when awarding an auditing contract; therefore, no change is made to the final rule.

C. Other Changes

An editorial change was made to the rule to update the reference at 213.106–1(a)(2)(ii) from 215.101–70 to 215.101–2–70.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not create any new DFARS clauses or amend any existing DFARS clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

This rule primarily affects the internal Government procedures, including requirements determination and acquisition strategy decisions, and contract file documentation requirements. However, a final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328) and the NDAA for FY 2018 (Pub. L. 115–91). These sections establish a preference for the use of the tradeoff source selection process for certain safety items and auditing services; prohibit the use of reverse auctions or the lowest price technically acceptable (LPTA) source selection process for specific supplies and services; and specify criteria for the use of the LPTA source selection process.

No public comments were received in response to the initial regulatory flexibility analysis.

DoD does not have information on the total number of solicitations issued on an annual basis that specified the use of the LPTA source selection process, or the number or description of small entities that are impacted by certain solicitations. However, the Federal Procurement Data System (FPDS) provides the following information for fiscal year 2016:

DoD competitive contracts using FAR part 15 procedures. DoD awarded 18,361 new contracts and orders using competitive negotiated procedures, of

which 47% were awarded to 5,221 unique small business entities. It is important to note that FPDS does not collect data on the source selection process used for a solicitation. Therefore, this data includes competitive solicitations using LPTA or tradeoff source selection processes, which will be subject to future considerations and restrictions provided by section 813 of the NDAA for FY 2017 and section 822 of the NDAA for FY 2018.

Personal protective equipment. DoD competitively awarded 9,130 new contracts and orders potentially for combat-related personal protective equipment items that could be impacted by restrictions in section 814 of the NDAA for FY 2017. Of those new contracts and orders, 89% were awarded to 668 unique small business entities.

Aviation critical safety items. As discussed during the rulemaking process for DFARS clause 252.209–7010 published in the **Federal Register** at 76 FR 14641 on March 17, 2011, the identification of aviation critical safety items occurs entirely outside of the procurement process and is not captured in FPDS. Therefore, it is not possible for DoD to assess the impact of section 814 of the NDAA for FY 2017, as amended by 822 of the NDAA for FY 2018 on small business entities.

Audit-related services. DoD competitively awarded 46 new contracts and orders for audit services that could be impacted by section 1002 of the NDAA for FY 2018. Of those new contracts and orders, 61% were awarded to 17 unique small business entities.

Major defense acquisition programs (MDAPs). The impact to small businesses resulting from implementation of sections 832 and 882 of the NDAA for FY 2018 cannot be assessed, since FPDS does not collect data for MDAPs or specific acquisition phases (*i.e.,* engineering and manufacturing development (EMD)). Subject matter experts within DoD know of no instances where the LPTA source selection process has been used for procurement of EMD of an MDAP.

This rule does not include any new reporting, recordkeeping, or other compliance requirements.

This rule implements the statutory requirements, as written. There are no known alternative approaches to the rule that would meet the stated objectives of the applicable statutes.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 208, 212, 213, 215, 216, 217, 234, and 237

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 208, 212, 213, 215, 216, 217, 234, and 237 are amended as follows:

■ 1. The authority citation for 48 CFR parts 208, 212, 213, 215, 216, 217, 234, and 237 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 208—REQUIRED SOURCES OF SUPPLIES OR SERVICES

■ 2. Amend section 208.405 by redesignating the text as paragraph (1) and adding paragraphs (2) and (3) to read as follows:

208.405 Ordering procedures for Federal Supply Schedules.

* * * * *

(2) See 215.101–2–70 for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to orders placed under Federal Supply Schedules.

(3) See 217.7801 for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Add section 212.203 to subpart 212.2 to read as follows:

212.203 Procedures for solicitation, evaluation, and award.

(1) See 215.101–2–70 for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to the acquisition of commercial items.

(2) See 217.7801 for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Revise section 213.106–1 to read as follows:

213.106–1 Soliciting competition.

(a) *Considerations.*

(2)(i) Include an evaluation factor regarding supply chain risk (see subpart 239.73) when acquiring information technology, whether as a service or as a supply, that is a covered system, is a part of a covered system, or is in support of a covered system, as defined in 239.7301.

(ii) See 215.101–2–70 for limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to simplified acquisitions.

(iii) See 217.7801 for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

PART 215—CONTRACTING BY NEGOTIATION

■ 5. Add section 215.101–2 heading to read as follows:

215.101–2 Lowest price technically acceptable source selection process.

■ 6. Add section 215.101–2–70 to read as follows:

215.101–2–70 Limitations and prohibitions.

The following limitations and prohibitions apply when considering the use of the lowest price technically acceptable source selection procedures.

(a) *Limitations.*

(1) In accordance with section 813 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328) as amended by section 822 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91) (see 10 U.S.C. 2305 note), the lowest price technically acceptable source selection process shall only be used when—

(i) Minimum requirements can be described clearly and comprehensively and expressed in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;

(ii) No, or minimal, value will be realized from a proposal that exceeds the minimum technical or performance requirements;

(iii) The proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;

(iv) The source selection authority has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit;

(v) No, or minimal, additional innovation or future technological

advantage will be realized by using a different source selection process;

(vi) Goods to be procured are predominantly expendable in nature, are nontechnical, or have a short life expectancy or short shelf life (See PGI 215.101–2–70(a)(1)(vi) for assistance with evaluating whether a requirement satisfies this limitation);

(vii) The contract file contains a determination that the lowest price reflects full life-cycle costs (as defined at FAR 7.101) of the product(s) or service(s) being acquired (see PGI 215.101–2–70(a)(1)(vii) for information on obtaining this determination); and

(viii) The contracting officer documents the contract file describing the circumstances justifying the use of the lowest price technically acceptable source selection process.

(2) In accordance with section 813 of the National Defense Authorization Act for Fiscal Year 2017, as amended by section 822 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91) (see 10 U.S.C. 2305 note), contracting officers shall avoid, to the maximum extent practicable, using the lowest price technically acceptable source selection process in the case of a procurement that is predominately for the acquisition of—

(i) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, or other knowledge-based professional services;

(ii) Items designated by the requiring activity as personal protective equipment (except see paragraph (b)(1) of this section); or

(iii) Services designated by the requiring activity as knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

(b) *Prohibitions.*

(1) In accordance with section 814 of the National Defense Authorization Act for Fiscal Year 2017 as amended by section 882 of the National Defense Authorization Act for Fiscal Year 2018 (see 10 U.S.C. 2302 note), contracting officers shall not use the lowest price technically acceptable source selection process to procure 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. See 252.209–7010 for the definition and identification of critical safety items.

(2) In accordance with section 832 of the National Defense Authorization Act for Fiscal Year 2018 (see 10 U.S.C. 2442 note), contracting officers shall not use the lowest price technically acceptable source selection process to acquire engineering and manufacturing development for a major defense acquisition program for which budgetary authority is requested beginning in fiscal year 2019.

(3) Contracting officers shall make award decisions based on best value factors and criteria, as determined by the resource sponsor (in accordance with agency procedures), for an auditing contract. The use of the lowest price technically acceptable source selection process is prohibited (10 U.S.C. 254b).

PART 216—TYPES OF CONTRACTS

■ 7. Amend section 216.505 by—

■ a. Removing paragraphs (1) and (2);

■ b. Adding paragraph (a);

■ c. Adding a paragraph (b) heading: and

■ d. Adding paragraph (b)(1).

The additions read as follows:

216.505 Ordering.

(a) *General.*

(6) Orders placed under indefinite-delivery contracts may be issued on DD Form 1155, Order for Supplies or Services.

(S–70) Departments and agencies shall comply with the review, approval, and reporting requirements established in accordance with subpart 217.7 when placing orders under non-DoD contracts in amounts exceeding the simplified acquisition threshold.

(b) *Orders under multiple-award contracts.*

(1) *Fair opportunity.*

(A) See 215.101–2–70 for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to orders placed against multiple award indefinite delivery contracts.

(B) See 217.7801 for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

* * * * *

PART 217—SPECIAL CONTRACTING METHODS

■ 8. Add new subpart 217.78 to read as follows:

217.78—REVERSE AUCTIONS

Sec.
217.7801 Prohibition.

217.78—REVERSE AUCTIONS

217.7801 Prohibition.

In accordance with section 814 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328) as amended by section 882 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115–91) (see 10 U.S.C. 2302 note), contracting officers shall not use reverse auctions when procuring 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. See 252.209–7010 for the definition and identification of critical safety items.

PART 234—MAJOR SYSTEM ACQUISITION

■ 9. Add section 234.005–2 to read as follows:

234.005–2 Mission-oriented solicitation.

See 215.101–2–70(b)(2) for the prohibition on the use of the lowest price technically acceptable source selection process for engineering and manufacturing development of a major defense acquisition program for which budgetary authority is requested beginning in fiscal year 2019.

PART 237—SERVICE CONTRACTING

■ 10. Amend section 237.270 by–

■ a. Redesignating paragraph (a)(2) as paragraph (a)(3); and

■ b. Adding new paragraph (a)(2) to read as follows:

237.270 Acquisition of audit services.

(a) * * *

(2) See 215.101–2–70(b)(3) for the prohibition on the use of the lowest price technically acceptable source selection process when acquiring audit services.

* * * * *

[FR Doc. 2019–20557 Filed 9–25–19; 8:45 am]

BILLING CODE 5001–06–P

■ 21. Amend section 52.209–5 by revising the date of the provision and removing from paragraph (a)(1)(i)(D) introductory text ''$3,500'' and adding ''the threshold at 9.104–5(a)(2)'' in its place.

The revision reads as follows:

52.209–5 Certification Regarding Responsibility Matters.

* * * * *

Certification Regarding Responsibility Matters (DATE)

* * * * *

■ 22. Amend section 52.212–1 by revising the date of the provision and removing from paragraph (j) ''$3,500, and offers of $3,500'' and adding ''the micro-purchase threshold, and offers at the micro-purchase threshold'' in its place.

The revision reads as follows:

52.212–1 Instructions to Offerors—Commercial Items.

* * * * *

Instructions to Offerors—Commercial Items (DATE)

* * * * *

■ 23. Amend section 52.212–3 by—

■ (a) Revising the date of the provision;

■ (b) Removing from paragraph (h)(4) introductory text ''$3,500'' and adding ''the threshold at 9.104–5(a)(2)'' in its place; and

■ (c) Removing from paragraph (o)(2)(iii) ''$3,500'' and adding ''the threshold at 25.703–2(a)(2)'' in its place.

The revision reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (DATE)

* * * * *

■ 24. Amend section 52.212–5 by—

■ (a) Revising the date of the clause;

■ (b) Removing from paragraph (b)(17)(i) ''(Aug 2018)'' and adding ''(DATE); and

■ (c) Removing from paragraph (b)(17)(v) ''(Aug 2018)'' and adding ''(DATE) in its place.

The revision reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (DATE)

* * * * *

■ 25. Amend section 52.219–9 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (d)(11)(iii) ''$150,000'' and adding ''the simplified acquisition threshold'' in its place;

■ c. Revising the date of Alternate IV; and

■ d. In Alternate IV, removing from (d)(11)(iii) ''$150,000'' and adding ''the simplified acquisition threshold'' in its place.

The revisions read as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (DATE)

* * * * *

Alternate IV (DATE). * * *

* * * * *

■ 26. Amend section 52.225–25 by revising the provision title and date, and removing from paragraph (c)(3) ''$3,500'' and adding ''the threshold at 25.703–2(a)(2)'' in its place.

The revisions read as follows:

52.225–25 Prohibition on Contracting with Entities Engaging in Certain Activities or Transactions Relating to Iran—Representation and Certifications.

* * * * *

Prohibition on Contracting With Entities Engaging in Certain Activities or Transactions Relating to Iran—Representation and Certifications (DATE)

* * * * *

[FR Doc. 2019–20796 Filed 10–1–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, 15, 16, and 37

[FAR Case 2018–016; Docket No. FAR–2018–0016, Sequence No. 1]

RIN 9000–AN75

Federal Acquisition Regulation: Lowest Price Technically Acceptable Source Selection Process

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which specifies the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation; and requires procurements predominantly for the acquisition of certain services and supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before December 2, 2019 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2018–016 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2018–016''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2018–016''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''FAR Case 2018–016'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite ''FAR Case 2018–016'', in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 or *michaelo.jackson@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite ''FAR Case 2018–016''.

SUPPLEMENTARY INFORMATION:

I. Background

Section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note) makes it the policy of the Government to avoid using Lowest Price Technically Acceptable (LPTA) source selection criteria in circumstances that would

deny the Government the benefits of cost and technical tradeoffs in the source selection process. The section requires that LPTA source selection criteria be used only when: (1) An executive agency is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers; (2) the executive agency would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal; (3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal; (4) the executive agency has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the executive agency; (5) the contracting officer has included a justification for the use of an LPTA evaluation methodology in the contract file; and (6) the executive agency has determined that the lowest price reflects total costs, including for operations and support.

Additionally, section 880 requires that the use of LPTA source selection criteria be avoided, to the maximum extent practicable, in procurements that are predominantly for the acquisition of: information technology services; cybersecurity services; systems engineering and technical assistance services; advanced electronic testing; audit or audit readiness services; health care services and records; telecommunications devices and services; 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.

II. Discussion and Analysis

This proposed rule would require contracting officers to: ensure procurements meet the criteria of section 880 before including LPTA source selection criteria in solicitations; document the contract file with a justification for the use of the LPTA source selection process, when applicable; and, to avoid, to the maximum extent practicable, the use of LPTA source selection criteria in procurements that are predominantly for the supplies and services identified in section 880. This rule does not address the applicability of section 880 to the Federal Supply Schedules Program (Schedules Program). GSA will separately address the applicability of section 880 to the Schedules Program.

In addition, section 880 does not apply to DoD. Instead, section 813 of the NDAA for FY 2017 (10 U.S.C. 2305 Note) and section 822 of the NDAA for FY 2018 (10 U.S.C. 2305 Note) establish a similar, but not the same, set of criteria for DoD procurements to meet in order to use LPTA source selection criteria in solicitations. These sections are being implemented in a separate Defense Federal Acquisition Regulation Supplement case (2018–D010).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This proposed rule does not create any new provisions or clauses, nor does it change the applicability of any existing provisions or clauses included in solicitations and contracts valued at or below the SAT, or for commercial items, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

The rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq*. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) are proposing to revise the Federal Acquisition Regulation (FAR) to:

- Specify the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation; and,
- Require procurements predominantly for the acquisition of certain services or supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable.

The objective of the rule is to avoid using LPTA source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process. The legal basis for the rule is section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). The rule does not cover DoD, which has already been covered by section 813 of the NDAA for FY 2017 and section 822 of the NDAA for FY 2018.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq*. The rule primarily affects internal Government requirements determination decisions, acquisition strategy decisions, and contract file documentation requirements. The Government does not collect data on the total number of solicitations issued on an annual basis that do or do not specify the use of the LPTA source selection process. However, the Federal Procurement Data System (FPDS) provides the following information for fiscal year 2018:

- Federal competitive contracts and orders awarded using FAR parts 13, 15, or 16.5 procedures. In FY 2018, the Federal Government, excluding DoD, awarded approximately 82,337 new contracts and orders using the competitive procedures of FAR 13, 15, or 16.5. This data excludes acquisitions for the supply/service categories identified in section 880(c) of the NDAA for FY 2019. Of the 82,337 contracts and orders, approximately 69 percent (or 56,622 contracts and orders) were awarded to approximately 27,029 unique small businesses. It is important to note that FPDS does not collect data on solicitations, but does collect information on competitively awarded contracts using various FAR procedures. Therefore, this data represents contracts that were awarded using LPTA and tradeoff source selection procedures.
- Federal competitive contracts and orders awarded for certain services and supplies. In FY 2018, the Federal Government, excluding DoD, awarded approximately 22,581 new contracts and orders potentially for the supplies and services identified in section 880(c) of the NDAA for FY 2019 using the competitive procedures of FAR parts 13, 15, and 16.5, of which approximately 63 percent (or 14,285 contracts and orders) were awarded to approximately 10,129 unique small businesses.

The proposed rule does not impose any Paperwork Reduction Act reporting or

recordkeeping requirements on any small entities. The rule may impact some small businesses. Some offerors may need to change the structure of their quotes or offers to conform to instructions and corresponding evaluation criteria in solicitations that use tradeoff source selection criteria, as LPTA source selection criteria is now unavailable for use in some circumstances. This impact, which represents the incremental difference between preparing a noncomplex proposal to be evaluated using LPTA criteria and preparing the additional information necessary to evaluate a proposal using tradeoff criteria, is expected to be minimal.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2018–016) in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 12, 13, 15, 16, and 37

Government procurement.

William F. Clark,

Director,

Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 12, 13, 15, 16 and 37 as set forth below:

■ 1. The authority citation for 48 CFR parts 12, 13, 15, 16 and 37 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Revise section 12.203 by redesignating the text as paragraph (a) and adding paragraph (b) to read as follows:

12.203 Procedures for solicitation, evaluation, and award.

* * * * *

(b) Contracting officers shall ensure the criteria at 15.101–2(c) are met when using the lowest price technically acceptable source selection process.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 3. Amend section 13.106–1 by adding paragraphs (a)(2)(i) and (a)(2)(ii) to read as follows:

13.106–1 Soliciting competition.

(a) * * *

(2) * * *

(i) Except for DoD, contracting officers shall ensure the criteria at 15.101–2(c)(1)–(5) are met when using the lowest price technically acceptable source selection process.

(ii) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101–2(d).

* * * * *

■ 4. Amend section 13.106–3 by—

■ a. In paragraph (b)(3), removing ''statements—'' and adding ''statements, when applicable—'' in its place;

■ b. In paragraph (b)(3)(i), removing ''; or'' and adding '';'' in its place;

■ c. In paragraph (b)(3)(ii), removing ''.'' and adding ''; and''

■ d. Adding paragraph (b)(3)(iii).

The addition reads as follows:

13.106–3 Award and documentation.

* * * * *

(b) * * *

(3) * * *

(iii) Except for DoD, when using lowest price technically acceptable source selection process, justifying the use of such process.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 5. Amend section 15.101–2 by adding paragraphs (c) and (d) to read as follows:

15.101–2 Lowest price technically acceptable source selection process.

* * * * *

(c) Except for DoD, in accordance with section 880 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note), the lowest price technically acceptable source selection process shall only be used when—

(1) The agency can comprehensively and clearly describe the minimum requirements in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;

(2) The agency would realize no, or minimal, value from a proposal that exceeds the minimum technical or performance requirements;

(3) The agency believes the technical proposals will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;

(4) The agency has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit to the agency;

(5) The agency determined that the lowest price reflects the total cost, including operation and support, of the product(s) or service(s) being acquired; and

(6) The contracting officer documents the contract file describing the circumstances that justify the use of the lowest price technically acceptable source selection process.

(d) Except for DoD, in accordance with section 880 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note), contracting officers shall avoid, to the maximum extent practicable, using the lowest price technically acceptable source selection process in the case of a procurement that is predominantly for the acquisition of—

(1) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services;

(2) Personal protective equipment; or

(3) Knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

PART 16—TYPES OF CONTRACTS

■ 6. Amend section 16.505 by—

■ a. Removing from the end of paragraph (b)(1)(ii) ''must—'' and adding ''shall—'' in its place;

■ b. Removing from paragraph (b)(1)(ii)(D) ''contract; and'' and adding ''contract;'' in its place;

■ c. Removing from paragraph (b)(1)(ii)(E) ''decision.'' and adding ''decision;'' in its place;

■ d. Adding paragraphs (b)(1)(ii)(F) and (b)(1)(ii)(G); and

■ e. Adding paragraph (b)(7)(iii).

The additions read as follows:

16.505 Ordering.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(F) Except for DoD, ensure the criteria at 15.101–2(c)(1)–(5) are met when using the lowest price technically acceptable source selection process; and

(G) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101–2(d).

* * * * *

(7) * * *

(iii) Except for DoD, the contracting officer shall document in the contract file a justification for use of the lowest price technically acceptable source selection process, when applicable.

* * * * *

PART 37—SERVICE CONTRACTING

■ 7. Amend section 37.102 by adding paragraph (j) to read as follows:

37.102 Policy.

* * * * *

(j) Except for DoD, see 15.101–2(d) for limitations on the use of the lowest price technically acceptable source selection process to acquire certain services.

[FR Doc. 2019–20798 Filed 10–1–19; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14, 15, 30, and 52

[FAR Case 2018–005; Docket No. FAR–2018–0006, Sequence No. 1]

RIN 9000–AN69

Federal Acquisition Regulation: Modifications to Cost or Pricing Data Reporting Requirements

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to increase the threshold for requiring certified cost or pricing data.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before December 2, 2019 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2018–005 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2018–005''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2018–005''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''FAR Case 2018–005'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite ''FAR Case 2018–005'', in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite ''FAR Case 2018–005''.

SUPPLEMENTARY INFORMATION:

I. Background

Cost or Pricing Data: Truth in Negotiations, 10 U.S.C. 2306a, and Required cost or pricing data and certification, 41 U.S.C. 3502, require that the Government obtain certified cost or pricing data for certain contract actions listed at 15.403–4(a)(1), such as negotiated contracts, certain subcontracts and certain contract modifications. Section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 amends 10 U.S.C. 2306a and 41 U.S.C. 3502 to increase the threshold for requesting certified cost or pricing data from $750,000 to $2 million for contracts entered into after June 30, 2018.

II. Discussion and Analysis

DoD, GSA and NASA are proposing to amend the FAR to implement section 811 of the NDAA for FY 2018 to increase the threshold for requesting certified cost or pricing data from $750,000 to $2 million for contracts entered into after June 30, 2018.

In the case of a change or modification made to a prime contract that was entered into before July 1, 2018, the threshold for obtaining certified cost or pricing data remains $750,000, with the following exception. Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration to reflect a $2 million threshold for obtaining certified cost or pricing data from subcontractors. Similarly for sealed bidding, upon request by a contractor, the contracting officer shall modify the contract without requiring consideration to replace the relevant clause.

The proposed changes to the FAR are summarized in the following paragraphs.

A. Subpart 14.2, Solicitation of Bids, is revised to add the prescription for Alternate I of the clause at FAR 52.214–28, Subcontractor Certified Cost or Pricing Data-Modifications-Sealed Bidding. The Alternate I will be used in the circumstances described at FAR 14.201–7(c)(1)(ii).

B. Subpart 15.4, Contract Pricing, is revised to incorporate the revised threshold for obtaining certified cost or pricing data at FAR 15.403–4(a)(1). The example provided of a price adjustment is also revised to reflect the increased threshold. A new paragraph (a)(3) is added to allow a contractor with a prime contract entered into before July 1, 2018, to request that the contracting officer modify the contract without requiring consideration to reflect a $2 million threshold for obtaining certified cost or pricing data on subcontracts entered on and after July 1, 2018, by replacing the following clauses, as applicable. The prescriptions at FAR 15.408 will instruct the contracting officer to:

- Replace FAR clause 52.215–12, Subcontractor Certified Cost or Pricing Data, with its Alternate I.
- Replace FAR clause 52.215–13, Subcontractor Certified Cost or Pricing