IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

BROADREACH HEALTHCARE PTY LTD *Plaintiff*, vs. UNITED STATES, *Defendant.*	Case No.: 24-1719 C Judge _____

COMPLAINT

The Federal Grant and Cooperative Agreement Act ("FGCAA"), 31 U.S.C. § 6301 *et seq*., requires executive agencies to utilize procurement contracts, rather than grants or cooperative agreements, when the primary purpose of a transaction is to assist the agency in implementing its authorized programs. Here, the United States Agency for International Development ("USAID" or "Agency") issued Notice of Funding Opportunity No. 72067424RFA00009 ("NOFO") seeking assistance in performing its program to achieve and sustain HIV/AIDS and Tuberculosis epidemic controls in Mpumalanga Province, South Africa. USAID violated the FGCAA by selecting a cooperative agreement for this transaction. Plaintiff BroadReach Healthcare Pty Ltd d/b/a BroadReach Health Development Ltd ("BroadReach" or "Protester"), by and through its undersigned counsel, protests this improper Agency action as a violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. BroadReach asks this Court to order USAID to rescind the NOFO and to competitively resolicit this requirement as a procurement contract.

PARTIES

1. Plaintiff BroadReach is located at 3 Bridgeway, Century City, Cape Town, South Africa 7441.

2. Defendant is the United States of America, acting by and through USAID.

JURISDICTION, VENUE, AND STANDING

3. This Court has jurisdiction in this matter, and venue is proper, pursuant to 28 U.S.C. § 1491(b).

4. BroadReach is an interested party with standing to bring this protest pursuant to 28 U.S.C. § 1491(b)(1). BroadReach timely responded to the NOFO, has a direct economic interest in the NOFO, and but for the legal violations alleged herein would have a substantial chance of receiving an award for the work contemplated under the NOFO. *See Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006).

GOVERNING LAW

5. The NOFO cites the Foreign Assistance Act of 1961 ("FAA"), as amended, 22 U.S.C. § 2151 *et seq*., as the authority for this assistance activity. *See* Exh. 1, NOFO at 1. As explained below, there are various legal standards governing the NOFO.

The Foreign Assistance Act Establishes the Programs

6. The FAA is the Federal statute governing foreign assistance programs. It includes specific provisions authorizing assistance "to prevent, treat, and monitor HIV/AIDS" and "for the prevention, treatment, control, and elimination of tuberculosis." 22 U.S.C. §§ 2151b–2(c)(1) and 2151b–3(c).

7. Section 2395 of the FAA authorizes the use of various legal instruments when providing such assistance: "The President may make loans, advances, and grants to, make and

perform agreements and contracts with, or enter into other transactions with, any individual, corporation, or other body or persons . . . in furtherance of the purposes and within the limitations of this Act." *Id.* § 2395(b). This provision does not contain criteria or discretion for agencies to select among these various legal instruments.

The Federal Grant and Cooperative Agreement Act Governs the Selection of the Legal Instrument for a Transaction

8. The FGCAA is the Federal statute that prescribes how an agency shall select among three particular legal instruments—procurement contracts, grants, and cooperative agreements—where another law authorizes the agency to utilize those instruments but does not mandate the selection of the instrument. 31 U.S.C. § 6301 *et seq*.

9. The FGCAA requires agencies to make the selection determination based only on the *primary purpose* of the specific transaction. This generally means (a) an agency shall use a *grant or cooperative agreement* when *the primary purpose of the transaction is to benefit an authorized beneficiary*; and (b) an agency shall use a *procurement contract* when *the primary purpose of the transaction is to assist the agency in implementing its own programs*. *Id*. § 6304–06.

10. Congress enacted the FGCAA, *inter alia*, to "promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements" and to "maximize competition in making procurement contracts." 31 U.S.C. § 6301(3). It took this action in response to a finding that "[f]ailure to distinguish between procurement and assistance relationships has led to [] the inappropriate use of grants to avoid the requirements of the procurement system . . . ." S. Rep. No. 95-449, at 6 (1977).

11. The FGCAA's legislative history also makes clear Congress's intent that, where an agency is funding a transaction with an intermediary third party to assist in performing the

agency's statutory functions, the agency *shall* use a procurement contract rather than a grant or cooperative agreement:

> The choice of instrument for an intermediary relationship depends solely on the principal federal purpose in the relationship with the intermediary. . . . What is important is whether the federal government's principal purpose is to acquire the intermediary's services, which may happen to take the form of producing a product or carrying out a service that is then delivered to an assistance recipient, or if the government's principal purpose is to assist the intermediary to do the same thing. Where the recipient of an award is not receiving assistance from the federal agency but is merely used to provide a service to another entity which is eligible for assistance, the proper instrument is a procurement contract.

See S. Rep. No. 97-180, at 3 (1981).

The Office of Management and Budget "Confuses" the Standards

12. In 1978, the Office of Management and Budget ("OMB") issued its *Guidance to Agencies for Implementing the Federal Grant and Cooperative Agreement Act*, 43 Fed. Reg. 36860-61 (Aug. 18, 1978). This document recited the FGCAA's principal purpose test—but then added additional considerations not found in the statute:

> The determinations of whether a program is principally one of procurement or assistance, and whether substantial Federal Involvement in performance will normally occur are basic agency policy decisions. . . . Congress intended the Act to allow agencies flexibility to select the instrument that best suits each transaction.

Id. at 63. As described below, the addition of "flexibility" and "policy decisions" to the required statutory analysis has muddied the waters for decades.

13. In 1980, GAO found that the OMB Guidance "confuses" the requirements of the FGCAA. *See* General Counsel, U.S. Government Accountability Office, *Interpretation of*

Federal Grant and Cooperative Agreement Act of 1977, B-196872-O.M. at 6 (Mar. 12, 1980).[1] GAO noted that select portions of the legislative history discuss limited agency flexibility, but confirmed that the law is clear when applied to the "third party" situation—*i.e.*, where the principal purpose of the transaction is to fund a third party to assist an agency in performing its functions. *Id.* at 10–12. "An example is where an agency is authorized to provide technical assistance to a certain [beneficiary], but rather than provide it directly through agency staff, the agency arranges with an organization having the required expertise to provide the assistance for it." *Id.* at 11. In such situations, the FGCAA *requires* agencies to use procurement contracts rather than grants or cooperative agreements. *Id.* at 10–12. GAO indicated that OMB should correct its guidance to reflect the proper interpretation of the law in this "third party" situation. *Id*. at 12.

14. In 1981, GAO observed that OMB had not corrected its guidance, resulting in agency "circumvention of the procurement system" and "unwarranted expansion of their authority to enter into" grants and cooperative agreements. *See* GAO, *Agencies Need Better Guidance for Choosing Among Contracts, Grants, and Cooperative Agreements,* GGD-81-88, at ii (Sep. 4, 1981). GAO again asked OMB to revise its guidance to reflect that the FGCAA permits consideration of only the primary purpose test, and not any other factor, in the "third party" situation, to achieve uniformity in the selection of instruments. *Id*. at 21.

[1] At the time this publication was issued, the publishing entity was the General Accounting Office. For ease of reference, this Complaint uses the current Government Accountability Office nomenclature.

15. To date, OMB still has not corrected or replaced its 1979 guidance as GAO requested, causing decades of confusion for agencies, enabling violations of the FGCAA, and undermining of the procurement system and competition.

16. Unfortunately, OMB's "confusion" has been repeated by executive agencies in their own implementing guidance. For example, USAID's internal guidance on selection of instruments states:

> Acquisition involves acquiring property or services (broadly defined to include goods, commodities, equipment, and other forms of property other than land) from a vendor or contractor:
>
> 1. For USAID's direct-use or direct-benefit.
>
> USAID must select acquisition when the principal purpose of the instrument is to acquire property or services for its own use or benefit.
>
> 2. In a specific instance as determined by the Agency.
>
> The CO has discretion in determining that a contract would be appropriate in a specific circumstance, but the instrument selection must not be arbitrary in this regard. . . .

See USAID Automated Directives System ("ADS") Chapter 304, Selecting the Appropriate Acquisition and Assistance (A&A) Instrument at 7 (Mar. 8, 2022). The last quoted sentence makes ambiguous whether agency "discretion in determining that a contract would be appropriate" can override the principal purpose test in the "third party" situation. This is the same ambiguity GAO found in the OMB Guidance.

Cases Applying the FGCAA Have Also Been Confused by OMB's Guidance

17. The confusing OMB Guidance has also led Courts to issue inconsistent decisions applying the principal purpose test in the "third party" situation.

18. In a series of cases involving the Department of Housing and Urban Development ("HUD"), the issue was whether HUD had properly selected cooperative agreements for

transactions with third parties to assist in distributing Section 8 Housing Program funds to intended beneficiaries. In the first bid protest, GAO strictly applied the principal purpose test to find that HUD must replace the cooperative agreement with a procurement contract. *Assisted Housing Services Corp.*, B-406738 *et al.*, Aug. 15, 2012, 2012 CPD ¶ 236. In a follow-on protest, the U.S. Court of Federal Claims ("COFC") permitted HUD's use of cooperative agreements based in part on "the policy goals set forth in the Housing Act." *CMS Contract Management Services v. United States*, 110 Fed. Cl. 537, 563 (2013). On appeal, the U.S. Court of Appeals for the Federal Circuit reversed and ruled that the FGCAA *required* HUD to use procurement contracts for these third-party transactions. 745 F.3d 1379 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015). Central to this ruling were the Federal Circuit's findings that: (a) whether a transaction is a procurement contract or an assistance agreement is a question of law that courts are to review *de novo*; (b) while the broad objective of the Housing Act and the Section 8 program is to provide public assistance, this does not dictate the primary purpose of the transactions with the intermediaries; and (c) HUD had created an intermediary relationship to procure assistance in providing benefits to the proper beneficiaries. *Id.* at 1385–1386.

19. Just two years later, however, these two courts reached opposite results in a similar situation—due, in part, to reliance on OMB Guidance. In *Hymas v. United States*, the issue was whether the U.S. Fish and Wildlife Service ("FWS") had properly selected cooperative agreements, rather than competitive procurement contracts, when entering transactions with farmers to manage public lands for the conservation of migratory birds and wildlife. 117 Fed. Cl. 466, 485 (2014). This time, the COFC found that the FGCAA's principal purpose test is mandatory, not discretionary; the farmers were intermediaries providing services to support FWS's activities; and therefore, the transactions must utilize procurement contracts rather than

cooperative agreements. *Id.* On appeal, the Federal Circuit overturned the COFC and sided with FWS in a split decision. 810 F.3d 1312, 1314 (Fed. Cir. 2016). The majority upheld FWS's selection of a cooperative agreement based, in part, on the 1978 OMB Guidance and *Chevron* deference. *See id*. at 1325–26 (quoting OMB Guidance for the proposition "that 'determinations of whether a program is principally one of procurement or assistance . . . are basic agency policy decisions' and that 'Congress intended the [FGCAA] to allow agencies flexibility to select the instrument that best suits each transaction.'"); *id*. at 1329 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 842 (1984)). In dissent, Judge Stoll found that the FGCAA "does not grant agencies flexibility in determining when to use a particular instrument in government contracting," and that FWS's determination is not entitled to *Chevron* deference. *Id.* at 1332–33.

PROCUREMENT BACKGROUND

Solicitation and BroadReach's Initial Response

20. USAID issued the NOFO on February 22, 2024. Exh. 1, NOFO at 1.

21. The NOFO seeks "applications for a Cooperative Agreement for funding of an activity entitled 'Achieving and Sustaining HIV/TB Epidemic Control in the Mpumalanga Province.'" *Id.*

22. The stated goal of the activity is—

> to support long, healthy lives for the population of Mpumalanga Province by achieving and sustaining HIV/TB epidemic control. USAID aims to reach this goal by achieving the following strategic objectives: (1) Close the gaps towards eliminating HIV/AIDS as a public health threat through tailored approaches; and (2) Sustain health gains through strengthened, improved, and resilient health systems.

Id. at 5.

23. The NOFO seeks responses from "[e]ligible organizations interested in submitting an application" for award of the cooperative agreement. *Id.*

24. The NOFO sets forth a two-phase application process: submit a Concept Paper "where the Applicant provides an overview and vision of its idea" and, upon invitation by USAID, submit a full technical and cost application. *Id.* at 38–39.

25. The NOFO anticipates awarding one cooperative agreement and providing up to $190 million in total USAID funding over a five-year period. *Id.* at 1.

26. The NOFO states: "This funding opportunity is authorized under the Foreign Assistance Act (FAA) of 1961, as amended. The resulting award will be subject to 2 CFR 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, and USAID's supplement, 2 CFR 700, as well as the additional requirements found in Section F." *Id.* at 4.

BroadReach's Interest in this NOFO

27. BroadReach is an eligible organization under the NOFO terms and timely submitted a Concept Paper to USAID.

28. To date, USAID has not notified BroadReach as to whether it will be invited to submit a full application or when such an application may be due.

GAO Bid Protest

29. While waiting for this solicitation process to continue, BroadReach has determined that USAID is violating the FGCAA by selecting a cooperative agreement instead of a procurement contract for this scope of work.

30. On September 26, 2024, BroadReach filed a GAO bid protest, docketed as B-422990.1, challenging the Agency's decision to use a cooperative agreement rather than a procurement contract.[2]

31. On October 11, 2024, GAO dismissed BroadReach's protest as untimely under its rules.

This Bid Protest

32. BroadReach now brings its protest at this Court to challenge the illegality of this NOFO.[3]

33. As the analysis below demonstrates, the significance of this matter transcends this particular NOFO.

34. For decades, GAO has repeatedly raised concerns that agencies are sidestepping the FGCAA to use grants and cooperative agreements to avoid competition. OMB's "confused" guidance from 1978 has enabled this Executive Branch non-compliance, as has corresponding

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[2] In its GAO protest, BroadReach stated that USAID had reached a decision on which companies would be invited to submit full applications. However, this was based upon rumor rather than knowledge; for all BroadReach knows, it may still be invited to submit a full application. In other words, the status of this process is still prior to full applications.

[3] BroadReach submits that it has timely filed this protest "prior to the close of the bidding process," as required by *Blue & Gold, Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). The courts have not yet defined what that phrase means where a protester merely filed a "concept paper" in response to a NOFO but the Agency has not yet rejected its concepts or established a deadline for complete applications. BroadReach asks that the Court, in this case of first impression, treat this protest as timely filed—or at least not decide this timeliness issue until it has considered BroadReach's entire argument and is ready to issue a merits-based decision on the count of this Complaint. BroadReach also requests the Court use this opportunity to clarify the meaning of "the close of the bidding process" in this context so that offerors can be certain as to the required timing for protests.

agency guidance suggesting that officials have the flexibility to disregard the FGCAA's principal purpose test.

35. Indeed, even the Federal Circuit was lulled into an erroneous ruling in *Hymas* based on the OMB Guidance. This case presents an opportunity for this Court to address the *Hymas* majority's ruling, particularly since the U.S. Supreme Court recently struck down *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244 (2024).

36. The amount of taxpayer dollars subject to agency circumvention of the procurement system is staggering. The present NOFO is only anticipated to be $190 million. But the funds spent by agencies on grants and cooperative agreements dwarf those spent on procurement contracts.[4]

Year	Grants	Cooperative Agreements	Contracts
FY2023	$1.08T	$63.9B	$760.4B
FY2022	$1.08T	$59B	$694.4B
FY2021	$1.28T	$86.2B	$645.5B

37. This case presents an opportunity for this Court to clarify and enforce Congress's intent in enacting the FGCAA: to stop agencies from using grants and cooperative agreements to circumvent the competitive procurement system.

CAUSE OF ACTION

38. In a bid protest, a court reviews an agency's procurement-related actions under the standards set forth in the APA, which provides that a reviewing court shall set aside the agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

[4] USASpending.com (Oct. 16, 2024), available at www.usaspending.gov.

with law." 5 U.S.C. § 706; *see also*, *e.g.*, *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1350–51 (Fed. Cir. 2004).

COUNT I

The Agency is Violating the Statutory Requirements to Use a Procurement Contract to Acquire These Services and Should Not Be Afforded Deference

39. BroadReach hereby incorporates the preceding allegations as if fully set forth herein.

40. The APA requires Courts to exercise independent judgment in deciding whether an agency has acted within its statutory authority. 5 U.S.C. § 706.

41. The Executive Branch's interpretation of perceive ambiguities in the FGCAA is entitled to no deference. *Loper Bright Enterprises*, 603 U.S. at 2273.

42. Whether the Agency violated the FGCAA in selecting a cooperative agreement, rather than a procurement contract, for this transaction is a question of law that this Court should review *de novo*. *CMS Contract Management Services v. United States*, 745 F.3d 1379 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015).

43. The FGCAA requires that an agency apply the primary purpose test to "third party" situations and select a procurement contract as the instrument for such transactions. 31 U.S.C. § 6304.

44. Here, the primary purpose of the NOFO is to acquire services from a third party to assist USAID in providing foreign assistance to combat HIV/AIDS and Tuberculosis, as authorized by FAA §§ 2151b–1(a)(1) and 2151b–2(c)(1). *See* Exh. 1, NOFO at 8. If not for this transaction, the Agency is relying upon a third party to provide services it would otherwise be providing itself.

45. The circumstances here are similar to the facts in *CMS Contract Management Services,* where the Agency had "merely created an intermediary relationship with" the funded entities, and these entities were "not receiving assistance from the federal agency but [were] merely used to provide a service to another entity which is eligible for assistance." 745 F.3d at 1386 (internal citations omitted). The FGCAA requires the use of a procurement contract in both "third party" situations.

46. Consequently, the Agency's selection of a cooperative agreement, rather than a procurement contract, for this transaction violates 31 U.S.C. § 6304 and 5 U.S.C. § 706.

47. Furthermore, USAID's selection of a cooperative agreement for this NOFO is arbitrary and capricious. USAID selected a procurement contract for this same type of activity in Zambia in the USAID Empowered Children and Adolescents Program ("ECAP") I. *See* Exh. 2, Request for Proposals ("RFP") No. 72061122R00006. That solicitation stated: "the goal of USAID ECAP I is to mitigate the impact of HIV and improve the health and well-being of Vulnerable Children and Adolescents (VCA) through the delivery of high impact, evidence-based, and age-appropriate interventions with a family-centered, customized approach for each VCA sub-population." *Id.* at 8. In the ECAP I procurement, USAID reached the correct conclusion that the contractor would be a third-party intermediary providing support for the local Zambian population—support that USAID would otherwise be providing itself. Here, where USAID is acquiring nearly identical services from a third-party intermediary providing support for the South Africans living in Mpumalanga Province, USAID is required to use the same instrument. The Agency instead selected a cooperative agreement for this NOFO, which is arbitrary and capricious in violation of 5 U.S.C. § 706.

48. For these reasons, this Court should sustain this protest and require USAID to resolicit this requirement as a procurement contract in compliance with the law and regulations.

49. BroadReach also asks this Court to address OMB's faulty 1978 guidance to give proper effect to the FGCAA and to end the confusion regarding the role of the principal purpose test in the "third party" situation.

PRAYER FOR RELIEF

WHEREFORE, BroadReach requests that the Court (i) enjoin the Agency from beginning any performance under the NOFO;[5] (ii) grant judgment in BroadReach's favor on Count I; (iii) require that the Agency rescind the NOFO and conduct this opportunity as a procurement contract; (iv) award BroadReach its reasonable attorneys' fees and costs incurred pursuing this protest; and (v) grant such other and further relief as the Court deems just and appropriate.

Date: October 22, 2024

Respectfully submitted,

s/Robert Nichols

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[5] BroadReach reserves the right to move for a temporary restraining order and/or preliminary injunction if necessary.