

ALERT

GAO Affirms No Jurisdiction over Post-Award Cooperative Agreement Challenges

June 8, 2020

WHAT: The Government Accountability Office (GAO) dismissed a protest requesting the review of the award of a cooperative agreement. A small business challenged its non-selection for the award under a U.S. Department of State (Agency) notice of funding opportunity (NOFO). The protest by Tactical Solutions International, Inc. (TSI) challenged the Agency's failure to adhere to the NOFO's stated criteria and document the Agency's decision for award. Under 4 C.F.R. § 21.5(m), GAO does not review protests of awards of grants, cooperative agreements, or other non-procurement instruments—as these procurement instruments do not involve award of procurement contracts covered by the Competition in Contracting Act of 1984 and GAO Bid Protest Regulations. GAO's review of procurements involving cooperative agreements is limited to timely pre-award protests alleging that an agency is improperly using a non-procurement instrument to procure goods or services.

WHEN: The GAO issued its decision on June 4, 2020.

WHAT DOES IT MEAN FOR INDUSTRY: Given the nature of the current pandemic, it is possible there will be a number of competitions where it is not clear whether the opportunity is properly classified as a procurement or a non-procurement (i.e., grant or cooperative agreement). To the extent that a company believes an opportunity it intends to compete for has been wrongly categorized as a cooperative agreement or grant, it should protest that designation prior to application/white paper/proposal submission to attempt to preserve any ability to later protest the agency's award decision.

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Practice Areas

Bid Protests
Government Contracts

Agencies are expected to use procurement contracts when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the government. 31 U.S.C. § 6303. On the other hand, cooperative agreements can be used when the principal purpose of the relationship is to transfer a thing of value to a recipient in order to carry out a public purpose of support or stimulation authorized by the federal government. 31 U.S.C. § 6305. For example, the government appropriately uses federal funding to issue grants for after-school programming to assist state and local efforts to reduce crime.

In TSI, the protester tried to argue that GAO had jurisdiction over its challenge on the merits because the NOFO's purpose was to acquire applicant services "for the direct benefit or use" of the government. The protester further asserted that given the purpose of the NOFO, this type of arrangement required the Agency to use a procurement contract, which is within GAO jurisdiction. However, GAO found this aspect of the argument untimely, as it amounted to a protest against the solicitation's terms, not award. As such, the protester would have needed to protest this issue to GAO before proposal submissions.

GAO found that the record clearly "reflect[ed] that the protest concerns the award of a cooperative agreement." As evidence, GAO discussed that the NOFO contemplated that all awards would be funded as cooperative agreements, contained multiple references to the "Grants Officer," and required "grant applicants to create accounts at a website called "mygrants.service-now.com." GAO highlighted that the NOFO did not contain any FAR provisions and mentioned the FAR only in conjunction with the prohibition on the allowance of profit to commercial organizations under assistance awards. As this was a post-award challenge to a cooperative, GAO lacked jurisdiction.