

EVEN FOR FRAUD ALLEGATIONS, GAO HAS NO JURISDICTION OVER PROTESTS OF OTHER TRANSACTION AUTHORITY PROCUREMENTS

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The Government Accountability Office (“GAO”) recently dismissed a protest involving an Other Transaction Authority (“OTA”) procurement by the National Aeronautics and Space Administration (“NASA”). *Lunar Resources, Inc.* B-421936, Nov. 13, 2003. In this protest, Lunar Resources, Inc. (“LRI”) protested that Blue Origin, LLC was not entitled to award of a partnership proposal because it made fraudulent representations in its proposal.

The National Aeronautics and Space Act of 1958, 51 U.S.C. § 20113(e), authorizes NASA “to enter into and perform such contracts, leases, cooperative agreements or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate.” (The Department of Defense also has OTA authority, found in 10 U.S.C. §2371). This procurement sought proposals for lunar service infrastructure and in-space infrastructure. However, the agreements awarded here were made pursuant to NASA’s OTA, and were not a competition subject to protest under the Federal Acquisition Regulation (“FAR”).

Under the Competition in Contracting Act of 1984 (“CICA”), the GAO may review alleged violations of procurement statutes and regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such award. 31 U.S.C. §§ 3551(1), 3552; 4 CFR §21.1(a). Where agencies have authority to enter into contracts or other transactions, contracts and agreements issued by these agencies under OTAs are not procurement contracts. GAO generally will not review protests or awards in such cases. The only exception to this general rule is that a timely pre-award protest alleging that the agency is improperly exercising its OTA to avoid using a procurement (FAR-based) contract, but should be acquired using a FAR-based contract.

The GAO dismissed LRI’s protest because it did not have jurisdiction to consider the allegation, *specifically* the allegation of fraudulent representations.

Takeaway. Unless you meet the exception noted above, taking a protest of an OTA solicitation or award to the GAO will result in its dismissal.

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