Space Launch Services Procurements: Whether and Where to Launch a Protest

By Danielle K. Muenzfeld and Daniel D. Straus

Potential or actual offerors on a federal procurement of goods or services, including space launch services, can challenge the terms of an agency solicitation or the contract award or proposed contract award by the agency involved through a "bid protest." But only "interested parties" may bring a bid protest. An interested party is "an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract."[1] The growing reliance of the federal government on the commercial space launch industry means that these companies will be faced with considering bid protests with greater frequency.

This article provides a high-level overview of the major federal bid protest forums, factors to consider when deciding whether to protest, and a discussion of three recent protests of space launch services procurements.

Where Can a Company Protest?

An interested party can file a protest with (1) the procuring agency (to the contracting officer (CO) or an official at least one level above the CO);[2] (2) the U.S. Government Accountability Office (GAO);[3] or (3) the U.S. Court of Federal Claims (COFC).[4] Bid protests challenging a Federal Aviation Administration (FAA) procurement decision must be brought in the FAA Office of Dispute Resolution (ODRA).[5] The facts and circumstances of a particular case, applicable case law, jurisdictional limitations, and the objectives of the protesting party will help to inform the choice of the best forum for a particular protest. This article will not address all aspects of bringing a protest in a particular forum.[6] Rather, it will provide an overview of some of the distinctions between and among the three main forums.

An agency-level protest generally is the most inexpensive and expedient bid protest forum. Agencies are required by regulation to make "best efforts" to resolve a protest within 35 days after it is filed.[7] A simple protest letter is sufficient to file an agency-level protest. A company may represent itself in an agency-level protest or be represented by outside legal counsel. Anecdotally, however, agency-level bid protests are "relatively rarely used by disappointed vendors today."[8] This is probably due to several reasons, including the lack of uniformity in agency protest procedures, the inability of a protester to review the procurement record, and the generally perceived weakness of this forum because of its lack of independence.

GAO[9] is the most common bid protest forum due to the specialized expertise of GAO's deciding officials, the mandatory stay of performance when a protest is timely filed,[10] and the relatively quick decision process (resolution within 100 days from filing the protest).[11] A company may represent itself or hire outside legal counsel to represent it. However, at GAO, only outside legal counsel and hired experts may, under a "protective order," view relevant source-selection and proprietary information pertaining to the procurement; in-house counsel typically may not.[12] Access to material under a protective order often helps counsel and experts confirm initial protest grounds and develop supplemental protests, which may increase the chance of success or cause the agency to decide voluntarily to correct procurement errors (known as "taking corrective action").

Of the three forums, COFC is the most expensive, complex, and lengthy. This is due in part to the court's procedural rules and the fact that there is no statutory deadline for resolving a protest at COFC. A protester must be represented by a lawyer at COFC.[13] Unlike GAO, COFC provides no automatic stay of the contract award or performance. If a protester wants performance to be halted pending the disposition of the protest, the protester must seek, and the court must grant, a preliminary injunction.[14] Like GAO, COFC may issue a protective order to provide outside counsel and experts with access to proprietary and source-selection information regarding the protest.[15]

Companies should be mindful when seeking to challenge a task or delivery order. GAO has exclusive jurisdiction over such order protests. Companies can protest a task or delivery order for civilian agencies if the task order value exceeds $10 million.[16] For Department of Defense agencies, companies can protest a task or delivery order if the value exceeds $25 million.[17] COFC lacks jurisdiction to hear protests that are "in connection with the issuance or proposed issuance of a task or

Danielle K. Muenzfeld *(muenzfeldd@gtlaw.com)* is an associate at Greenberg Traurig LLP in Washington, D.C., where she is a member of the firm's Government Contracts & Projects Practice Group. **Daniel D. Straus** is a government contracts attorney based in Washington, D.C.

Published in *The Air & Space Lawyer*, Volume 33, Number 4, 2020.

delivery order except for . . . a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued."[18]

Other Transaction Agreements

Although Other Transaction Agreements (OTAs) are increasingly are being used, they are not procurement contracts. This factor impacts significantly the ability to protest an OTA. Because OTAs are not procurement contracts, GAO will not review protests of an OTA solicitation or award,[19] although it will review a protest claim that an agency is improperly using its Other Transaction authority (when, for example, a procurement contract should be used instead).[20] Likewise, last year COFC held that it lacks subject matter jurisdiction over an agency's evaluation and award of an OTA.[21] This case will be studied later in this article. The U.S. District Court for the District of Arizona similarly concluded recently that it lacked jurisdiction to hear a bid protest challenging the award of an OTA.[22] These decisions further limit the industry's ability to challenge OTA awards.

How Does a Company Identify Protest Grounds?

Prior to submitting an offer, a company should carefully review a solicitation to understand its requirements and to identify any ambiguous or unduly restrictive solicitation provisions or improperly included clauses. A potential offeror should use the solicitation's question and answer (Q&A) process to seek clarification of any ambiguous terms and/or to recommend specific changes to the solicitation. This process can be useful to determine whether there are protestable issues and to encourage the agency to resolve the identified issues without filing a protest. A company should consider its knowledge of the industry to determine whether a solicitation unnecessarily favors a particular company.

In the post-award context, a company that receives a notice of exclusion from a procurement or a non-award should gather as much information as possible to make an informed decision about whether to protest. An offeror should request feedback from the procuring agency in the form of a required (or, depending upon the circumstances, nonrequired) debriefing. An offeror is entitled to a debriefing if timely requested if the procurement was conducted on the basis of competitive procedures under Federal Acquisition Regulations (FAR) part 15 or as a task/delivery order competition resulting in an award under FAR subpart 16.5 exceeding $5.5 million. Through debriefings, a company can obtain information that may help to improve future proposals and to determine whether there are reasonable grounds for a bid protest and what those grounds may be.[23] Even if an agency is not required to provide a debriefing, a company should consider asking for information about why it did not receive the award.

A company also should take into consideration its industry knowledge when considering a protest. For example, a company may know that one of the awardee's proposed key personnel became unable to perform on the contract before the agency made its award decision. In such cases, a company may have a viable protest ground that the awardee materially misrepresented the availability of its proposed key personnel.[24]

Companies should consider common protest grounds in deciding whether to protest, as well as the viability of a protest. Common pre-award protest grounds include unduly restrictive solicitation requirements, inclusion of improper provisions or contract clauses, vague or ambiguous statements of work, unreasonable evaluation methods, requirements that restrict competition because they improperly favor one offeror, and improper cancellation of a solicitation.[25] Common post-award protest grounds include inadequate documentation of the record, unreasonable technical evaluation, unreasonable cost or price evaluation, unequal treatment, organizational conflicts of interest, and improper best-value trade-off analysis.[26]

Some disappointed offerors suspect that they lost a procurement due to bad faith or bias of government contracting officials. While a protester can allege bad faith or bias as a protest ground, the protester's burden of proof is very high, as government officials are presumed to act in good faith.[27] Therefore, a company should carefully evaluate the known and demonstrable facts to determine if it is worth asserting bias because the likelihood of success generally is low, while the likelihood of creating ill will could be high.

Remedies

GAO has wide latitude to recommend remedial action by the procuring agency if it sustains a bid protest. Applicable regulations direct GAO to recommend that the agency implement any combination of the following remedies:

1. refrain from exercising options under the contract;
2. terminate the contract;
3. recompete the contract;
4. issue a new solicitation;
5. award a contract consistent with statute and regulation; or
6. such other recommendation(s) as GAO determines necessary to promote compliance.[28]

While GAO bid protest decisions are nonbinding, agencies generally abide them. Similarly, as a result of a meritorious protest at the agency level, the agency may take any action that could have been taken if the protest had been filed at GAO.[29]

Generally, to prevail fully in a COFC protest, the protester must receive a permanent injunction. Based on its statutory authority, COFC has the discretion to provide injunctive relief, as well as award bid preparation and proposal costs, or a combination of the same.[30] The COFC

may award reasonable attorney fees and expenses under the Equal Access to Justice Act to certain successful protesters that are smaller and have a lower net worth.

While not a formal remedy, agencies may also choose to take "corrective action" to resolve a protest before a decision on the merits is rendered by the chosen forum. Under corrective action, the agency voluntarily decides to address an issue with the procurement.

Case Studies

Space Exploration Technologies Corp. v. United States
On August 26, 2019, in *Space Exploration Technologies Corp. v. United States* (*SpaceX*), a case of first impression, COFC granted the government's motion to dismiss and Space Exploration Technologies Corp.'s (SpaceX's) motion to transfer SpaceX's bid protest challenging the Department of the Air Force's award of Launch Service Agreements (LSAs) under Phase 1A of the National Security Space Launch (NSSL) program.[31] The government argued that COFC lacked jurisdiction over SpaceX's bid protest because the Air Force's award was made under the OTA authority of the Department of Defense (DOD).[32] The court held that it lacked subject matter jurisdiction over SpaceX's bid protest because the "LSAs are not procurement contracts" and because the Air Force's LSA award decisions were not "in connection with" the award of a procurement contract.[33]

The NSSL is intended to meet the Air Force's requirement to sustain the availability of at least two families of space launch vehicles and robust space launch infrastructure and industrial base. The Air Force's NSSL Phase 1A solicitation contemplated the award of LSAs to fund the development of "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 commercial launch services that meet all [NSSL] requirements."[34] Separately, the Air Force advanced the NSSL Phase 2 procurement, which was unrestricted and open to all interested offerors, whether or not they had received NSSL Phase 1A prototype awards. In October 2018, using its OTA authority under 10 U.S.C. §§ 2371 and 2371b, the Air Force awarded three Phase 1A LSAs, one each to Blue Origin, United Launch Alliance, and Orbital ATK. SpaceX subsequently filed a post-award bid protest at COFC.

The court found that it lacked subject matter jurisdiction over SpaceX's bid protest because the Tucker Act[35] did not cover the Air Force's LSA awards. The parties and the court agreed that the LSAs were not "procurement contracts" because DOD OTAs are "not subject to the federal laws and regulations applicable to procurement contracts."[36] The court rejected SpaceX's argument that the NSSL Phase 1A LSAs were awarded "in connection with" the NSSL Phase 2 procurement. First, the court found that the Phase 1A LSAs and the Phase 2 procurement used separate solicitations and acquisition strategies and that awards under the two competitions would be made separately and independently. Second, the court emphasized that the Phase 2 procurement was unrestricted, meaning that interested offerors could compete for the awards whether or not they received a Phase 1A LSA. As of this writing, the case was pending in the District Court for the Central District of California.

The *SpaceX* protest illustrates that offerors must carefully consider whether the solicitation or award decision being challenged involves a procurement contract such that COFC jurisdiction can be established. For many protests involving OTA agreements, it remains unclear which forum, if any, is proper for a bid protest.[37]

In re Blue Origin Florida, LLC
On November 18, 2019, in *In re Blue Origin Florida, LLC*, GAO sustained a pre-award bid protest brought by Blue Origin Florida, LLC, against the terms of the Air Force's NSSL Phase 2 Launch Service Procurement Solicitation (Phase 2 Solicitation).[38] Blue Origin, one of four offerors, alleged that the solicitation failed to provide an intelligible, common basis for award; unduly restricted competition; and was impermissibly contrary to common commercial practices. GAO sustained Blue Origin's protest in part, finding that the Air Force's solicitation failed "to provide an intelligible and common basis for award" in violation of FAR 15.304(b); however, GAO denied all other protest grounds.[39]

The Air Force's Phase 2 Solicitation was an unrestricted follow-on award to the Phase 1A OTA agreement at issue in the *SpaceX* protest discussed above. The solicitation contemplated the award of two fixed-price requirements contracts pursuant to FAR part 12 (commercial items and services) and FAR part 15 (negotiated procurements) procedures. Normally, best-value solicitations state that an award will be made to the highest-rated offer or offers. However, in this case, the Air Force's Phase 2 Solicitation stated that the award would be made to the two offerors that, "when combined, represent the best value to the Government."[40] That is, the Phase 2 Solicitation stated that instead of evaluating the offers on their individual merits (i.e., rating offers A, B, C, D individually), the Air Force would evaluate offers on their merits when paired with other offers (i.e., rating pairs AB, AC, AD, BC, BD, and CD).

GAO found that the Phase 2 Solicitation violated the FAR requirement that solicitations include evaluation factors that (1) represent the key areas of importance and emphasis to be considered in the source-selection decision and (2) support meaningful comparison and discrimination between and among competing proposals. Specifically, GAO found that the Air Force's solicitation, which included criteria for evaluating individual offers, failed to disclose how the Air Force would evaluate paired offers. More fundamentally, GAO found that the Phase 2 Solicitation failed to provide an

intelligible basis for award because there was no way for offerors to propose compatible proposals "short of colluding with other potential offerors to coordinate their respective proposals."[41]

Although Blue Origin's other protest grounds were denied, GAO ultimately recommended that the Air Force amend the solicitation consistent with its decision and reimburse Blue Origin for its fees and costs associated with filing and pursuing the protest.

The *Blue Origin* protest illustrates that offerors should carefully review solicitations and consider filing pre-award bid protests when an ambiguity cannot be resolved through the agency's Q&A process during the solicitation period.

In re Peraton, Inc.

On June 11, 2019, in *In re Peraton, Inc.*,[42] GAO sustained a post-award bid protest brought by Peraton, Inc. against the Air Force's award of the engineering, development, integration, and sustainment (EDIS) services contract to Engility Corporation for satellite systems for the Air Force Space Command, Space Warfighting Construct. GAO concluded that Engility's proposal was ineligible for award because it did not meet the solicitation's small business participation requirement.

The solicitation contemplated the award of a $655 million single indefinite-delivery, indefinite-quantity (IDIQ) contract with a five-year base period of performance and two one-year options. The award was to be made on a best-value trade-off basis, weighing cost/price, systems engineering, and program management. The systems engineering factor was to be considered more important than the program management factor, which itself was to be considered more important than cost/price. The solicitation required offerors to submit a small business participation commitment document ensuring 25 percent small business utilization based on the "percentage of small business costs/prices on labor [Contract Line Item Numbers] CLINs only."[43] Significantly, the solicitation stated that "[f]ailure to meet" the small business participation requirement "will result in an 'unawardable' rating."[44]

The Air Force awarded the contract to Engility. Peraton subsequently filed a protest challenging various aspects of the Air Force's technical evaluation and award decision. Following the receipt of the agency's report, Peraton filed a supplemental protest alleging, in part, that Engility's offer was ineligible for the award because it did not meet the solicitation's 25 percent small business participation requirement.

Peraton noted that Engility included in its small business participation requirement both amounts "actually paid to small businesses" and "fees added on by Engility as the large business prime contractor" to its small business subcontractor's work. The Air Force contended that this was permitted by the solicitation, which stated that the percentage of small business utilization "shall be calculated on an annual basis by dividing *total small business expenditures* by total labor costs/prices on all [task orders]."[45]

While an agency's interpretation of a solicitation normally is entitled to deference, GAO found that the Air Force's interpretation was unreasonable. Recognizing that the purpose of the small business participation factor was to increase the amount of work performed by small business subcontractors, GAO reasoned that the Air Force's interpretation was "plainly unreasonable" because it would allow "money charged to the government as fees for the large business prime to be counted as payment to small businesses for work performed by small businesses."[46] GAO's decision to reject the Air Force's interpretation was also driven by the lack of "any documentation to show that the agency contemporaneously calculated and verified Engility's proposed small business subcontracting percentage."[47] Ultimately, GAO recommended that the Air Force terminate Engility's contract and make a new award based on either the offerors' original proposals or the offerors' revised proposals (following discussions).

The *Peraton* protest illustrates, among other things, the benefit of having outside counsel review the agency's record. Although none of Peraton's initial protest grounds were found to be meritorious, GAO sustained a supplemental protest ground that only became apparent during the course of the proceeding and under the terms of the case protective order. Had Peraton not brought its bid protest, it never would have learned about Engility's proposal deficiencies.

Conclusion

As the federal government expands its use of the commercial space launch industry for launch services, launch companies will face the question of whether to protest procurements with greater regularity. A company deciding whether to file a protest should carefully weigh legal and business strategy considerations.

Specifically, a company should quickly determine if it is an interested party and is able to bring a timely protest. A company also should analyze its potential protest grounds, often while having limited information, to determine whether those grounds are based on facts (rather than speculation), are legally cognizable protest errors (rather than mere disagreement with an agency's subjective judgment), and are prejudicial. The company also must identify its business objectives in bringing the protest. Is it a matter of being able to compete at all? To ensure a fair and level playing field? Is the company trying to get a chance to revise its proposal? And of course, a company should also take into account the agency/customer and any potential relationship sensitivities. Finally, whether to bring a protest and where to bring a protest are important decisions involving both business and legal considerations. These decisions should be made carefully and with the advice of a company's

business leaders, those involved with the proposal preparation, and in-house and outside legal counsel. And, as discussed, space launch providers must be particularly mindful of whether the opportunity that it wants to challenge is for a procurement contract or for an OTA because of the noted jurisdictional concerns.

Endnotes

1. Gen. Servs. Admin. et al., Federal Acquisition Regulation (FAR) subpt. 33.101 . Generally, a company that did not submit a proposal, a subcontractor, and an individual joint venture partner (as opposed to the joint venture itself) are not considered interested parties and therefore cannot file bid protests.

2. FAR subpt. 33.103(d)(4); *see also* Agency FAR supplements and other agency guidance regarding agency level protests; James Tucker, *A Road Less Traveled: Agency-Level Protests*, Gov't Contracts Insights (Sept. 26, 2016), https://govcon.mofo.com/protestslitigation/agency-level-protests.

3. 31 U.S.C. §§ 3551–57; 4 C.F.R. pt. 21; FAR subpt. 33.104; *see also* U.S. Gov't Accountability Office, GAO-18-510SP, Bid Protests at GAO: A Descriptive Guide (10th ed. 2018), https://www.gao.gov/assets/700/691596.pdf.

4. 28 U.S.C. § 1491(b)(1); FAR subpt. 33.105; *see also* Rules of the U.S. Court of Federal Claims (RCFC), Appendix C: Procedure in Procurement Protest Cases Pursuant to 28 U.S.C. § 1491(b) [hereinafter Appendix C].

5. *See Office of Dispute Resolution for Acquisition (ODRA)*, Federal Aviation Administration, https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70 (last visited July 15, 2020); *see also* Jay Carey, Kayleigh Scalzo & Carl Wiersum, *Flying in Friendly Skies: An In-Depth Look at the Federal Aviation Administration's Unique Bid Protest Forum*, 19-10 Briefing Papers (Sept. 2019).

6. This article does not discuss timeliness, which is a critical aspect of bringing a bid protest. For an in-depth analysis of the pros and cons of the three forums, see Michael J. Schaengold, T. Michael Guiffré & Elizabeth M. Gill, *Choice of Forum for Federal Government Contract Bid Protests*, 18 Fed. Cir. B.J. 243 (2009).

7. FAR subpt. 33.103(g).

8.Christopher Yukins, Stepping Stones to Reform: Making Agency-Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government (May 1, 2020), https://www.acus.gov/sites/default/files/documents/Agency%20Bid%20Protests%20Report.pdf.

9. GAO is "an independent, nonpartisan agency that works for Congress." *About GAO*, U.S. Government Accountability Office, https://www.gao.gov/about/ (last visited July 15, 2020). GAO has a statutory mandate for the "inexpensive and expeditious resolution of protests." 31 U.S.C. § 3554(a)(1).

10. 4 C.F.R. § 21.6; 31 U.S.C. § 3553(c).

11. 4 C.F.R. § 21.9.

12. *Id*. § 21.4; U.S. Gov't Accountability Office, GAO-19-63SP, Guide to GAO Protective Orders (rev. 10th ed. 2019), https://www.gao.gov/assets/700/699422.pdf.

13. Ct. Fed. Cl. R. 83.1(a)(3) (July 1, 2019).

14. Protesters also can negotiate with the government for a voluntary stay instead of seeking a preliminary injunction.

15. Appendix C, *supra* note 4, at VI(16), (17) (Protective Orders).

16. 41 U.S.C. § 4106(f).

17. 10 U.S.C. § 2304c(e).

18. 41 U.S.C. § 4106(f)(1)(A); 10 U.S.C. § 2304c(e)(1)(A).

19. *See, e.g.*, *In re* MD Helicopters, Inc., B-417379, 2019 CPD ¶ 120 (Apr. 4, 2019).

20. *See, e.g.*, *In re* Rocketplane Kistler, B-310741, 2008 CPD ¶ 22 (Jan. 28, 2008).

21. Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019).

22. MD Helicopters Inc. v. United States, Civ. A. No. 19-02236-PHX-JAT (D. Ariz. Jan. 24, 2020).

23. *See, e.g.*, Steven W. Feldman, *Legal and Practical Aspects of Debriefings: Adding Value to the Procurement Process*, Army Law. (Sept./Oct. 2001).

24. *In re* Patricio Enters. Inc., B-412738, B-412738.2, 2016 CPD ¶ 145, at 4 (May 26, 2016).

25. For a discussion of these and other pre-award protest grounds, see Marko Kipa, Keith Szeliga & Jessica Madon, *Identifying Viable Preaward Bid Protest Allegations at the GAO*, 10-6 Briefing Papers (May 2010).

26. For a discussion of these and other post-award protest grounds, see Keith Szeliga, Marko Kipa & Daniel Marcinak, *Identifying Viable Postaward Bid Protest Allegations at the GAO*, 9-4 Briefing Papers (Mar. 2009).

27. *See, e.g.*, *In re* BTAS, Inc.; Innovative Techs., Inc., B-415810.4 et al., 2018 CPD 346, at 10 n.11 (Oct. 3, 2018) ("Government officials are presumed to act in good faith, and a protester's contention that contracting officials are motivated by bias or bad faith thus must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition.").

28. 4 C.F.R. § 21.8(a).

29. FAR subpt. 33.102(b)(1).

30. 28 U.S.C. § 1491(b)(2).

31. Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019) (Griggsby, J.).

32. 10 U.S.C. §§ 2371, 2371b.

33. *SpaceX*, 144 Fed. Cl. at 432.

34. *Id*., at 437.

35. 28 U.S.C. § 1491(b)(1).

36. *SpaceX*, 144 Fed. Cl. at 442.

37. Ralph C. Nash, *Postscript II: Protesting Other Transactions*, 34 Nash & Cibinic Rep. NL ¶ 16 (Mar. 2020) ("It's going to be awhile before we know the rules of this game.").

38. *In re* Blue Origin Fla., LLC, No. B-417839, 2019 CPD ¶ 388 (Nov. 18, 2019).

39. *Id*. at 7.

40. *Id*. at 5.]

41. *Id*. at 8.]

42. *In re* Peraton, Inc., Nos. B-417358, B-417358.2, 2019 CPD ¶ 216 (June 11, 2019).

43. *Id*. at 3.]

44. *Id*. at 3.

45. *Id*. at 9 (emphasis added).

46. *Id*. at 7.

47. *Id*. at 8.