With the recent significant increase in the use of nonprocurement instruments at TACOM-ARDEC, some contracting officers have asked if such instruments may be protested to the GAO. The general rule is that the GAO will NOT review protests regarding award of cooperative agreements (CA's) or other nonprocurement instruments (like grants, other transactions (OT's) and cooperative research and development agreements (CRADAs)).

Under the Competition in Contracting Act (CICA) and the GAO Bid Protest Regulations (4 C.F.R. 21), the GAO has jurisdiction over protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods or services, and solicitations leading to such awards. Grants and cooperative agreements reflect a relationship between the United States Government and a recipient when the principal purpose is to transfer a thing of value to carry out a public purpose of support or stimulation (Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6304 and 6305). CRADA's may only be used where the purpose of the agreement is to transfer technology from a federal laboratory to a nonfederal entity for the purpose of conducting specified research or development work in collaboration with the nonfederal entity (15 U.S.C. Sections 3702, 3710a (c(2) (1988)). In contrast, a contract is used only when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the United States Government (31 U.S.C. 6303 and FAR 35.003(a)). Therefore, the GAO has held that they do not review protests of nonprocurement instruments (CA's , Grants, OT's and CRADAs) because they do not involve the award of a "contract". See, Sprint Communications Co., L.P., B-256586, B-256586.2, May 9, 1994, 94-1 CPD 300; Resource Dev. Program & Servs., Inc., B-235331, May 16, 1989, 89-1 CPD 471.

There is, however, a limited exception to this general rule where the GAO will review a timely protest of a nonprocurement instrument. The GAO will consider a protest that alleges an agency improperly used a cooperative agreement, grant, CRADA or other nonprocurement instrument where a "procurement contract" is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. See, Renewable Energy, Inc., B-203149, June 5, 1981, 81-1 CPD 451. In the case of a grant or CA, the scope of this review involves a consideration of whether the agency's actions are proper in light of the parameters set forth for use of a grant or CA in the Federal Grant and Cooperative Agreement Act. In the case of a CRADA, the review
involves whether or not the CRADA is being used properly in accordance with the terms of the Federal Technology Transfer Act (15 USC 3710a). See, Spire Corporation, B-258267, December 21, 1994, 94-2 CPD 257.

Finally, although the GAO will explore whether or not an agency properly used a nonprocurement instrument as opposed to a contract, it has refused to consider the pure issue of whether or not the correct nonprocurement instrument was used. In Energy Conversion Devices, Inc., B-260514, June 16, 1995, the protester (ECD) challenged ARPA's choice of an other transaction for the development and demonstration of a vapor phase manufacturing technology. ECD pointed out that the authority of 10 U.S.C. 2371 (use of an other transaction) is only available when "the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate". ECD complained that ARPA had not shown that it could not accomplish its goals by use of "a standard contract, grant, or cooperative agreement" as required by the statute. While ARPA did not address the issue of whether or not it could have used a grant or cooperative agreement, it did convince the GAO that the principle purpose of the protested action was to stimulate or support research and development for a public purpose. The GAO held that ECD had not shown that a procurement contract was the required instrument and stated that "We need not resolve whether ARPA has satisfied the statutory prerequisites to entering into an "other" instrument under section 2371 since the agency's choice of which nonprocurement instrument or authority to rely on is irrelevant to the question of whether we will consider ECD's protest".

In view of the above discussion, it is increasingly important when using a nonprocurement instrument to justify in writing why the use of a procurement contract is not appropriate in your particular circumstances. Your choice of a nonprocurement instrument rather than a procurement contract may be subject to review by the GAO where the case will focus on your justification of that selection.

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