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COUNSEL COMMENTARY

Eye on the Prize

GAO concludes that it has authority to decide a protest challenging the outcome of an AI prize competition that narrowed the field of eligible competitors for a potential contract.



BY STEPHEN L. BACON

The procurement of artificial intelligence (AI) systems poses significant challenges for federal agencies. The long and complex procurement process used in traditional acquisitions is fundamentally misaligned with the rapid pace of innovation in the constantly evolving field of AI.

Prize competitions provide an attractive alternative for agencies seeking to accelerate the procurement of AI solutions.¹ These competitions give agencies the ability to rapidly assess a wide variety of solutions to solving real-life problems.

In 2013, the Government Accountability Office (GAO) ruled in the protest of *David Frankel* that it did not have jurisdiction to decide a challenge to the outcome of a prize contest.² According to GAO, a standalone prize contest does not involve the award or proposed award of a procurement

contract and is therefore outside GAO's review authority.

But agencies are increasingly using prize competitions as a streamlined method for evaluating solutions offered by companies that will be considered eligible to compete for a follow-on procurement contract. The integration of prize contests into the larger procurement process provides a pathway for agencies to quickly field new solutions, such as AI systems, that are demonstrated as part of a contest.

However, GAO recently decided in a separate protest filed by *ARiA* that this innovative approach is susceptible to being protested when the prize contest is used to down-select eligible competitors for a potential future contract.³ This latest GAO decision provides important guidance to agencies and contractors regarding when a prize contest may be challenged.

Background

In late 2023, the Army's xTech Program posted a "competition announce-

ment" that invited small businesses to submit white papers to address "scalable techniques for adversarial AI," including "comprehensive models capable of defending against universal AI threat vectors."⁴ The announcement provided that white papers would be evaluated and ranked using scoring criteria in six areas.

The announcement outlined three rounds of competition that could ultimately result in a "direct to phase II contract" under the Small Business Innovation Research Program (SBIR). In the first round, applicants submitted white papers through a tool called "Valid Eval" to compete for a \$10,000 cash prize and the chance to be one of eight applicants selected for round two.

The agency planned to award cash prizes to up to four applicants that would be selected in round two. In round three, the remaining applicants would be eligible to submit proposals for a direct-to-phase-II contract worth up to \$2 million.

The Army evaluated 133 valid white papers and selected the top eight applicants to move on to round two. ARiA filed a protest at GAO after it was notified by the Army that it was not one of the eight applicants selected to proceed to round two.

ARiA's protest challenged the Army's use of the Valid Eval system as an "invalid test instrument" that included faulty processes, mechanisms, and algorithms.⁵ ARiA also alleged that the Army applied "improper, inconsistent, and arbitrary criteria in the evaluation" of its white paper.⁶

GAO's Decision

The Army submitted a request to dismiss ARiA's protest, arguing that GAO did not have jurisdiction to decide the merits of ARiA's allegations. The Competition in Contract Act of 1984 authorizes GAO to decide "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 and services, and solicitations leading to such award."⁷

The Army argued that GAO lacked jurisdiction because ARiA's protest challenged a prize competition rather than the award or proposed award of a contract. In the Army's view, the cash prizes awarded in rounds one and two were "distinct" from the direct-to-phase-II contracts that would be awarded in round three.

But GAO concluded it was incorrect "to view the first round in a vacuum, separate from the entire procurement contemplated by the competition announcement."⁸ GAO agreed with the Small Business Administration,

which was invited to weigh in on the protest, that the first and second rounds of the competition operated like a "down-select or competitive range process" to weed out non-viable applicants.⁹

This made the Army's competition distinguishable from the prize competition at issue in *David Frankel*, which did not contemplate a subsequent procurement contract. GAO ruled that it had jurisdiction to decide ARiA's protest because, unlike the prize contest in *David Frankel*, the Army's competition announcement envisioned "a multi-phase procurement that ultimately may result in the proposed award of a contract."¹⁰

After concluding that it had jurisdiction to decide the protest, GAO dismissed ARiA's protest on other procedural grounds. Specifically, GAO found that ARiA's allegations were either untimely challenges to the terms of the Army's competition announcement, or too vague to state a valid basis for protest.

Conclusion

The ARiA decision places a significant check on agency authority to use prize contests as a way to narrow the field of competitors for a procurement contract. Although agencies have the flexibility to use prize contests in this manner, they now face the possibility that contest rules or outcomes may be challenged if the contest contemplates a potential follow-on contract.

Contractors should timely challenge any defects in the contest ground rules prior to deadline for submissions. Moreover, the outcome of any prize contest should be scrutinized for

reasonableness and consistency with the established rules for the contest.

As AI procurement continues to grow, agencies are likely to make more use of their authority to leverage the substantial benefits of prize contests. But there will inevitably be greater incentives for contractors to protest these contests if they will be used to set the field of eligible competitors for lucrative contracts. **CM**

The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

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ENDNOTES

- 1 The American Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science (COMPETES) Reauthorization Act of 2010 gives agencies the authority to "carry out a program to award prizes competitively to stimulate innovation that has the potential to advance the mission of the respective agency." 15 U.S.C. § 3719(b). The Department of Defense (DoD) also has specific authority "to award cash prizes and other types of prizes, including procurement contracts and other agreements," that are deemed "appropriate to recognize outstanding achievements in basic, advanced, and applied research, technology development, and prototype development" if certain conditions are satisfied. 10 U.S.C. § 4025(a).
- 2 *David Frankel*, B-408319, Jun. 7, 2013, 2013 CPD ¶ 144.
- 3 ARiA, B-422365 et al., May 28, 2024, 2024 CPD ¶ 104.
- 4 *Id.* at 2.
- 5 *Id.* at 6.
- 6 *Id.* at 4.
- 7 *Id.* at 4 (citing 31 U.S.C. §§ 3551(a), 3552; 4 C.F.R. § 21.1(a)).
- 8 *Id.* at 5.
- 9 *Id.*
- 10 *Id.*