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The black hole of protest jurisdiction: Can I challenge the award of an 'other transaction agreement'?

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While most federal procurements are conducted using the onerous regulations set forth in the Federal Acquisition Regulation (FAR) and agency supplements, agencies are increasingly relying on the more flexible, but lesser-known, Other Transaction Agreements (OTAs) to meet developmental requirements.

Congress has authorized only a limited number of agencies to use this authority, which was first included in NASA's enabling legislation to ensure NASA had the flexibility to meets its unique needs.

In FY20 alone, the federal government entered into OTAs worth over $16 billion, including approximately $9 billion on COVID-19-related purchases.

The authority is further limited to use by "non-traditional" government contractors. It is generally restricted to prototype/development work, although agencies are authorized to enter into follow-on production contracts with OTA prototype participants.

Despite these limitations, the ability to customize intellectual property terms, among others, has led to a significant increase in the use of OTAs over the past decade. In FY20 alone, the federal government entered into OTAs worth over $16 billion, including approximately $9 billion on COVID-19-related purchases.

But before a company pursues an OTA opportunity, it is essential to understand that ability to challenge OTA awards is limited. In addition, jurisdictional questions have created considerable uncertainty for aggrieved contractors who wish to file a protest in connection with these agreements.

Although pre-and post-award protests challenging FAR-based procurements can only be heard at the Government Accountability Office (GAO) or the Court of Federal Claims (COFC), recent decisions indicate that jurisdiction to hear OTA challenges at both is extremely limited.

And in the past year, U.S. district courts have held that they too have limited jurisdiction that hinges on whether the issue involves a procurement contract — either current or future.

GAO challenges limited to pre-award challenges for improper use of OTA authority

The GAO has made its position clear that because OTAs are not procurement contracts, its authority to hear challenges concerning OTAs is limited to where a protester challenges an agency's improper use of "a non-procurement instrument to procure goods or service," *i.e.*, that an "agency has failed to comply with its statutory OTA authority." Two recent GAO decisions illustrate this jurisdictional limitation.

The statute granting the Department of Defense (DoD) OTA authority, 10 U.S.C. § 2371b, permits DoD to award a non-competitive follow-on production OTA after a prototype OTA if the prototype OTA (1) explicitly provides for a follow-on production OTA; and (2) is to be completed before the award of a non-competitive production OTA.

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In *Oracle America, Inc.*, the protester alleged the DoD failed to meet these two statutory pre-requisites. The GAO agreed and sustained the protest.

But in *Air Tractor, Inc.,* the protester alleged that DoD improperly evaded the follow-on production OTA requirements of 10 U.S.C. § 2371b by using a separate statutory authority to make a non-competitive award of aircraft that was previously the subject of prototype OTAs under 10 U.S.C. § 2371b.

The protester also argued DoD's use of that separate statutory authority, 10 U.S.C. § 2373, was improper because the award was

not for experimental purposes as required by the statute. Although the GAO ultimately found the protester's challenge untimely, it concluded that nothing in either statute prohibited the agency from using a different statutory authority to purchase the aircraft.

Separately, the GAO found the agency sufficiently supported its intended use of the aircraft for experimental purposes in accordance with 10 U.S.C. § 2373 and that the statute did not impose competition requirements on the agency.

COFC authority related to and OTAs

In *Space Exploration Technologies Corporation [SpaceX] v. United States*,[1] COFC suggested for the first time that it might have jurisdiction over protests of OTAs, stating in an order granting the government's motion to dismiss and the protester's motion to transfer venue that —

> The Court does not reach the issue of whether other transactions generally fall beyond the Court's bid protest jurisdiction under the Tucker Act. The Court simply concludes that the specific facts in this case show that the [OTAs] at issue are not procurement contracts and therefore, the Air Force's decisions related to the award of these agreements may not be reviewed by the Court pursuant to the bid protest provision of the Tucker Act.

In *SpaceX*, the Air Force conducted a competition to award prototype OTAs under its authority pursuant to 10 U.S.C. § 2371b. The Air Force also contemplated the award of a "Phase 2" procurement, described as a follow-on procurement contract, which was intended to be a full and open competition of a FAR-based contract open to interested offerors beyond those awarded the prototype OTAs.

The parties agreed that the prototype OTAs were not procurement contracts, but that the Phase 2 procurement would result in a procurement contract. The protester argued that the Air Force's evaluation and award of the prototype OTAs were "in connection with" the Phase 2 procurement contract.

While COFC recognized that the results of the prototype OTA could impact the agency's follow-on procurement contract, (1) it would not dictate the outcome of the Phase 2 procurement, and (2) if it did, that could be the subject of a protest of the Phase 2 award.

COFC also found that connection between the prototype OTA and the Phase 2 contract was too attenuated, as they involved separate and distinct solicitations and acquisition strategies. And the court noted that the Phase 2 procurement would be a full and open competition resulting in a FAR-based procurement contract, in which the protester intended to participate. COFC found that while the prototype OTA and Phase 2 procurement were related, the former was not "in connection with" the latter.

After COFC held that it did not have jurisdiction it transferred the case to the U.S. District Court for the Central District of California. The district court did decide the bid protest on the merits, holding in a brief October 2020 filing following a sealed September 2020 decision, that "the Air Force's actions were not arbitrary, capricious, or in violation of the law, and that SpaceX was not entitled to any relief in this action."

More recently, in a September 17 decision, the COFC held that it did have jurisdiction over a protest involving a novel Air Force acquisition authority, commercial solutions opening (CSO), a pilot program related to DoD's OTA authority, but that its jurisdiction was limited to evaluating whether the government "followed its own process."

The decision suggests that COFC will apply this limited standard to protests of OTA awards, and even that review may be limited to situations in which the OTA includes or clearly requires an order or contract under which the government is procuring goods.

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In the absence of such a requirement, it is possible, if not likely, that COFC may effectively limit OTA protests in the same way as the GAO to pre-award challenges to the use of the OTA procedure.

A CSO, which is part of DoD's OTA authority, is a selection process authorized by Congress as a pilot program that permits the Air Force to award both FAR-covered contracts and non-FAR-covered contracts such as OTAs.

In that case, *Kinemetrics v. United States*,[2] the Air Force sought innovative commercial solutions to replace equipment used to monitor nuclear treaty compliance. After the Air Force rejected its proposal and awarded the work to a competitor, Kinemetrics protested.

The Air Force initially argued that CSOs were exempt from judicial review, an argument it later abandoned in favor of the position that COFC did not have bid protest jurisdiction because the CSO was not in connection with a procurement.

Seemingly because the CSO included an initial delivery order, COFC rejected that Air Force's position. It also held that Kinemetrics had standing to challenge the award because the Air Force determined that Kinemetrics' solution had a substantial chance of award.

Having found that it had jurisdiction and Kinemetrics had standing, COFC then denied the protest on the merits. Importantly, COFC held that it could not second guess the Air Force's determination in light of its broad discretion to decide the "best approach" to satisfy its requirements, rejecting the protestor's arguments that the Air Force had used unstated evaluation criteria and had irrationally evaluated the technical proposals.

District courts appear to not have jurisdiction

In January 2020, the U.S. District Court of Arizona issued an order dismissing a protest based on alleged improprieties made by the

Army in the selection process for an OTA for lack of subject matter jurisdiction.

Judge Teilborg found that exclusive jurisdiction rested with the COFC pursuant to the Tucker Act because this OTA was "in connection with" a procurement. The protest was previously filed before the GAO where it was also dismissed for lack of subject matter jurisdiction because the GAO generally does not review protests of OTA awards as they are not "procurement contracts."

Although the Arizona District Court's ruling appears to leave protesters without any recourse given COFC's position that it also lacked subject matter jurisdiction in a recent protest involving an OTA, subject matter jurisdiction at all three forums is much more nuanced.

The Arizona District Court's ruling in *MD Helicopters, Incorporated v. United States*,[3] distinguished COFC's discussion in *SpaceX*. In *MD Helicopters*, the Army issued a solicitation for the award of several OTAs, contemplating a down-select process by which only successful OTA awardees would advance through subsequent phases of the program, with the intent to eventually award a non-competitive follow-on production contract pursuant to 10 U.S.C. § 2371b. MD Helicopters protested the agency's decision not to select MD Helicopters for a prototype OTA.

The district court found that the agency's rejection of MD Helicopters' proposal "relates far more directly to an eventual procurement" than the solicitation in *SpaceX,* noting that the entire purpose of the Army's award of the prototype OTAs was to support a decision to enter into a production effort chosen from the pool of successful prototype OTA awardees.

Unlike the facts in *SpaceX*, the agency's decision not to select MD Helicopters for a prototype OTA automatically precluded its participation in the subsequent phases and eventual production contract.

The district court's ruling, however, requires an interpretation that a follow-on production contract awarded pursuant to 10 U.S.C. § 2371b(f) is a procurement such that the decision made leading up to the follow-on production contract are "in connection with" a procurement, on which COFC has yet to rule.

While the body of case law on subject matter jurisdiction of OTA protests is still developing, these recent decisions demonstrate the jurisdictional hurdles for contractors wishing to challenge the solicitation and award of OTAs.

Notes

[1] https://bit.ly/30Fa7mY

[2] https://bit.ly/3mZ2vD6

[3] https://bit.ly/3G5n8Xb

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