



# Other Transaction Protests: Navigating Uncharted Waters

Recent decisions provide guidance regarding where to file OTA bid protests and the types of challenges subject to review.



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**O**ther Transaction Agreements (OTAs) have been around since the 1950s. But the use of OTAs surged in recent years after Congress granted the Department of Defense (DoD) permanent authority to enter into OTAs for prototype projects in the 2016 National Defense Authorization Act.

As the DoD has made greater use of OTAs, contractors and agency officials have become increasingly interested in whether, and to what extent, OTA solicitations and awards may be challenged at the Government Accountability Office (GAO), the Court of Federal Claims (COFC), or federal district courts. Over the last several years, the scope of OTA bid protest jurisdiction has been

tested in all these forums.

Although the law in this area is far from settled, recent decisions provide important guidance to contractors and agencies regarding the types of challenges that may be raised and where they should be filed depending on the circumstances. This article provides an overview of the key decisions governing other transaction (OT) bid protest jurisdiction, and what they mean for contractors and DoD agencies.

## Prototype OTA Statutory Authority

OT agreements are not “procurement contracts” subject to the *Federal Acquisition Regulation (FAR)* or the require-

ment for full and open competition under the Competition in Contracting Act (CICA). DoD must, however, use some form of competitive procedures to the maximum extent practicable when awarding prototype OTs.<sup>1</sup>

A key feature of DoD’s OT authority is that it permits agencies to award sole-source, follow-on production contracts or transactions to participants in the prototype OT. The law provides that if the DoD uses competitive procedures to award an initial prototype OT, a follow-on production contract or transaction may be awarded without the use of competitive procedures under certain conditions.<sup>2</sup>

Specifically, the possibility of a

follow-on award must be provided for in the prototype OT.<sup>3</sup> Moreover, the prototype OT must be successfully completed before the DoD may award a follow-on production contract or transaction.<sup>4</sup>

### GAO's Limited OTA Protest Jurisdiction

Under CICA, GAO has jurisdiction to decide protests challenging the proposed award or award of contracts for the procurement of goods and services, and solicitations leading to such awards.<sup>5</sup> Because OT agreements are not procurement contracts, GAO does not have jurisdiction to review a protest challenging an agency's evaluation of proposals and award decision in connection with an OTA.<sup>6</sup>

GAO will, however, review a timely pre-award protest that an agency is improperly using its other transaction authority to procure goods and services.<sup>7</sup> For example, GAO has considered allegations that an agency improperly invoked its prototype OT authority because the work contemplated in the solicitation did not constitute a prototype project within the meaning of the statute.<sup>8</sup>

The statute does not include a definition for prototype projects. But GAO has relied on the expansive definition of that term in the DoD OT Guide<sup>9</sup> to determine whether the anticipated work in a solicitation is within the scope of authorized prototype projects.<sup>10</sup> The current OT Guide defines a prototype project as one that "addresses a proof of concept, model, reverse engineering to address obsolescence, pilot, novel application of commercial technologies for

defense purposes, agile development activity, creation, design, development, demonstration of technical or operational utility, or combinations of the foregoing."<sup>11</sup>

GAO has found that the OT Guide's definition is sufficiently broad to encompass a variety of activities. These include, for example, commercial cloud migration services and work required to develop standards and practices for the development of secure microelectronics and related processes for test articles and training.<sup>12</sup>

GAO also has exercised its limited OTA protest jurisdiction to review allegations that an agency's award of a follow-on production OTA violated statutory requirements. The landmark 2018 protest filed by Oracle America, Inc. challenged a follow-on production OT for cloud migration and cloud operation services.<sup>13</sup> Although GAO concluded that the services provided under the Army's prototype OTA properly consisted of a prototype project, GAO sustained Oracle's challenge to the follow-on production OTA.

GAO held that the Army did not comply with statutory requirements because the prototype OTA did not provide for the possibility of a follow-on production OTA.<sup>14</sup> GAO also determined that the follow-on award was improper because the prototype project had not been successfully completed as required by the statute.<sup>15</sup>

The DoD amended its OT Guide in the aftermath of the *Oracle* decision to emphasize that "[t]he original solicitation and original prototype OT agreement *shall* include notice that a follow-on production OT is possible

to allow greater flexibility to those government organizations planning to leverage production efforts without re-competing."<sup>16</sup> The OT Guide also clarifies that a "Prototype OT *shall* contain a provision that sets forth the conditions under which that prototype agreement must be successfully complete."<sup>17</sup>

### COFC or District Court?

Although GAO will review whether an agency's use of OT authority is consistent with statutory requirements, the law is clear that GAO will not entertain allegations challenging the evaluation and award of OTs. Such challenges only can be decided by the COFC or a federal district court but not both.

Whether the COFC or a federal district court will have jurisdiction in any given case depends on the specific factual circumstances surrounding the agency's OTA solicitation and award. To determine where an OTA protest should be filed, the contractor must consider whether the OT at issue is "in connection with" a procurement contract or not.

Under the Tucker Act, the COFC's exclusive bid protest jurisdiction encompasses "any alleged violation of statute or regulation in connection with a procurement or proposed procurement."<sup>18</sup> The Tucker Act is "exclusively concerned with procurement solicitations and contracts" and, therefore, the COFC generally does not have jurisdiction when a procurement is not involved.<sup>19</sup>

"Procurement" is broadly defined to include "all stages of the process of acquiring property or services, beginning with the process of

determining a need for property or services and ending with contract completion and closeout.”<sup>20</sup> Prototype OTs occupy a jurisdictional grey area. Although they are not procurement contracts, nevertheless they can be connected to a procurement for a follow-on production contract.

#### *SpaceX v. United States*

The COFC’s prototype OTA jurisdiction was first tested in *Space Exploration Technologies Corp. v. United States (SpaceX)*.<sup>21</sup> In that case, the Air Force made prototype OT awards to three companies to develop space launch vehicles in Phase I of its National Security Space Launch Program. During Phase 2, the Air Force planned to conduct a follow-on FAR-based procurement for launch services that would not be limited to the three firms that received prototype OT awards.

The protester challenged the Air Force’s evaluation and prototype OT award decision. The COFC, however, determined that it lacked jurisdiction because those awards were not sufficiently connected to the Air Force’s future planned follow-on procurement in Phase 2.<sup>22</sup> The COFC reached that conclusion in part because the follow-on procurement would be a fully open competition. The lack of a prototype OT in Phase 1 would not preclude SpaceX from participating in Phase 2.<sup>23</sup>

The COFC granted SpaceX’s request to transfer its protest to a federal district court in California.<sup>24</sup> The district court exercised its jurisdiction to review the Air Force’s evaluation. It denied SpaceX’s protest under the Administrative Procedure Act’s

“arbitrary and capricious” standard of review that applies to final agency actions.<sup>25</sup>

#### *MD Helicopters, Inc. v. United States*

The COFC’s *SpaceX* decision left open the question of whether the COFC would ever exercise jurisdiction to review an OT award. It also remained unclear whether a district court would refuse to decide an OT protest because of the COFC’s exclusive jurisdiction to decide protests “in connection with a procurement or proposed procurement” under the Tucker Act.

The question was subsequently answered by a federal district court in Arizona in *MD Helicopters Inc. v. United States*.<sup>26</sup> After GAO dismissed its protest, MD Helicopters, Inc. (MDHI) filed suit in district court challenging prototype OT awards made by the Army for the Future Attack Reconnaissance Aircraft.

The prototype OT awardees would develop preliminary designs in Phase 1 and compete in a down-select for two or more awards in Phase 2.<sup>27</sup> The Army’s solicitation also contemplated that subsequent phases could involve a “follow-on production contract or transaction without the use of competitive procedures.”<sup>28</sup>

Unlike the anticipated follow-on contract in *SpaceX*, the potential follow-on contract contemplated by the Army was limited to firms that successfully completed a prototype OT.<sup>29</sup> The district court held that it lacked jurisdiction because MDHI’s protest “relates far more directly to an eventual procurement than the solicitation at issue in” *SpaceX*. Therefore, the protest was within the COFC’s exclusive jurisdiction under the Tucker Act.<sup>30</sup>

#### *Hydraulics International, Inc. v. United States*

The scope of the COFC’s OTA protest jurisdiction was probed again most recently in *Hydraulics International, Inc. v. United States*.<sup>31</sup> That case involved a challenge to the Army’s award of OTs for Aviation Group Power Unit (AGPU) prototypes used to service military helicopters.

The Army’s request for enhanced whitepapers (RWP) contemplated two prototype OT awards in the first phase followed by a down-select to one of the first phase vendors for a second phase of the prototype project. The RWP also provided that successful completion of the prototype “may result in the award of a follow-on production contract for over 150 AGPUs without the use of competitive procedures.” After evaluating whitepaper submissions, the Army selected two contractors for the award of prototype OTAs.

Hydraulics filed a complaint at the COFC challenging the Army’s evaluation of whitepapers. The Army argued that the COFC did not have jurisdiction to decide the protest because the prototype OTs were not “procurement contracts.” Nor were they, in the Army’s view, “in connection with” a procurement under the Tucker Act.

The COFC disagreed with the Army and concluded the prototype OTs were “in connection with” the Army’s procurement process for AGPUs “because they may result in the exclusion of [Hydraulics] for consideration of ‘a follow-on production contract.’”<sup>32</sup> The COFC adopted the logic of the district court in *MDHI*. It determined the situation in *SpaceX*, where the COFC declined to

exercise its Tucker Act jurisdiction, was distinguishable because the phase two procurement in *SpaceX* “was pre-terminated to be a separate *FAR*-based competition, fully open to those excluded from the OTA competition.”<sup>33</sup>

The COFC’s decision also relied heavily on a prior Federal Circuit Court of Appeals decision that broadly interpreted the Tucker’s Act’s “in connection with” jurisdiction to encompass actions that have “a connection with any stage of the federal contracting acquisition process.”<sup>34</sup>

The COFC reasoned that although the prototype OTs were not procurement contracts, they were “specifically tailored towards ‘determining’ the Army’s ‘need for property’ – upgraded AGPUs.”<sup>35</sup> Thus, even though the Army may never award a follow-on production contract for AGPUs, the COFC held that the Army’s prototype OTA awards were still sufficiently connected to a “procurement” to establish jurisdiction.

The COFC ultimately denied the merits of *Hydraulics*’ challenge to the Army’s evaluation.

## Final Thoughts

The decisions in *SpaceX*, *MDHI*, and *Hydraulics* apply a consistent framework. They all point to the COFC as the appropriate forum to resolve a bid protest challenging a prototype OTA award where the protester will be ineligible to compete for a potential follow-on production contract.

In the wake of the *Oracle* decision, DoD now *requires* agencies to provide for a potential sole-source, follow-on production contract in all prototype OT solicitations and contracts. As a

result, the COFC is likely to become the dominant forum for adjudicating challenges to prototype OT awards if judges continue to follow the rationale of *MDHI* and *Hydraulics*.

It remains to be seen, however, whether other judges will adopt the logic of these decisions. The conclusion in *MDHI* and *Hydraulics* that a prototype OTA can be sufficiently “in connection with” a potential follow-on contract that may never occur is open to differing interpretations. Other judges, including those at the appellate level, may conclude that prototype OTA awards are not procurement contracts nor are they “in connection with” a procurement where there is only the possibility that the prototype OT will result in a future follow-on production contract.

Contractors and DoD agencies will face legal uncertainty for the foreseeable future regarding the proper forum for challenging a DoD agency’s evaluation and award of a prototype OTA. For now, contractors will have to rely on a limited body of existing case law to make decisions about where they should file such a protest. **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 10 U.S.C. § 4022(b)(2).
- 2 10 U.S.C. § 4022(f)(2).
- 3 10 U.S.C. § 4022(f)(1)-(2).
- 4 10 U.S.C. § 4022(f)(3).
- 5 See 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. 21.1(a).
- 6 MD Helicopters, Inc., B-417379, Apr. 4, 2019, 2019 CPD ¶ 120 at 2.
- 7 *Id.*; see also 4 C.F.R. § 21.5(m).
- 8 ACI Technologies, Inc., B-417011, Jan. 17, 2019, 2019 CDP ¶ 24 at 3.
- 9 “Other Transactions Guide,” Office of the Under Secretary of Defense for Acquisition and Sustainment, November 2018 [https://www.google.com/url?sa=t&rt=j&q=&src=s&source=web&cad=&cad=rja&uact=8&ved=2ahUKEwi1p-cyl8Y\\_6AhUeM1kFHfQEC0AQFnoE-CAsQAQ&url=https%3A%2F%2Faaf.dau.edu%2Faaf%2Fot-guide%2F&usq=AOvVaw0iNR-SO38NjgS285ZX1MexA](https://www.google.com/url?sa=t&rt=j&q=&src=s&source=web&cad=&cad=rja&uact=8&ved=2ahUKEwi1p-cyl8Y_6AhUeM1kFHfQEC0AQFnoE-CAsQAQ&url=https%3A%2F%2Faaf.dau.edu%2Faaf%2Fot-guide%2F&usq=AOvVaw0iNR-SO38NjgS285ZX1MexA)
- 10 *Id.* at 5 (citing the 2017 DoD OT Guide); see also Oracle America, Inc., B-416061, May 31, 2018, 2018 CPD ¶ 180 at 14-15 (citing DoD OT Guide and refusing to apply the “dictionary definition” of “prototype”).
- 11 2018 DoD OT Guide at 31.
- 12 ACI, 2019 CDP ¶ 24 at 6-7; Oracle, 2018 CPD ¶ 180 at 14.
- 13 Oracle America, Inc., B-416061, May 31, 2018, 2018 CPD ¶ 180.
- 14 *Id.* at 17.
- 15 *Id.* at 18-19.
- 16 2018 DoD OT Guide at 7 (emphasis in original).
- 17 *Id.* at 20 (emphasis in original).
- 18 28 U.S.C. § 1491(b)(1).
- 19 Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010).
- 20 41 U.S.C. § 111.
- 21 Space Exploration Technologies Corp. v. United States, 144 Fed. Cl. 433 (2019).
- 22 *Id.* at 443-45.
- 23 *Id.* at 444.
- 24 *Id.* at 445-46.
- 25 Space Exploration Technologies Corp. v. United States, Case No. 2:19-cv-07927-ODW (GSx) (Sept. 24, 2020 C.D. Cal.).
- 26 MD Helicopters Inc. v. United States, 435 F.Supp.3d 1003 (2020).
- 27 *Id.* at 1006.
- 28 *Id.* at 1013.
- 29 *Id.*
- 30 *Id.*
- 31 *Hydraulics International, Inc. v. United States*, Case No. 22-364, 2022 WL3150517 (Aug. 8, 2022).
- 32 *Id.* at \*8.
- 33 *Id.*
- 34 *Id.* at \*6 (quoting *Distributed Sols. Inc. v. United States*, 539 F.3d 1340, 1346 (Fed. Cir. 2008)).
- 35 *Id.*