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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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GAO Issues Its Latest Decision Involving Protests of Other Transaction Agreements

*By Cameron S. Hamrick**

Protesters are continuing to challenge other transaction agreements, or “OTAs,” at the Government Accountability Office. GAO recently issued a decision holding that it will not review the award of non-procurement instruments issued under an agency’s OTA authority. The author of this article discusses the decision and its implications

The Government Accountability Office’s (“GAO”) authority to hear protests involving other transaction agreements, or “OTAs,” has been in the headlines over the past year. GAO recently issued a decision holding that it will not review the award of non-procurement instruments issued under an agency’s OTA authority.¹ OTAs are legally-binding instruments, other than contracts, grants, or cooperative agreements, that generally are not subject to laws and regulations applicable to procurement contracts. The Department of Defense (“DoD”) has authority under 10 U.S.C. § 2371 to enter into OTAs to carry out basic, applied, and advanced research projects. And under 10 U.S.C. § 2371b, DoD can use the authority under Section 2371 to carry out certain types of prototype projects.

MD HELICOPTERS BACKGROUND

In *MD Helicopters*, the protester (a small business) challenged the Army’s decision not to enter into an OTA with the protester under a solicitation for the development of a future attack reconnaissance aircraft competitive prototype. Sikorsky Aircraft Corporation and The Boeing Company intervened in the protest. MD Helicopters argued that the Army unreasonably evaluated its proposal and failed to reasonably promote small business participation in accordance with 10 U.S.C. § 2371b(d)(1)—under Section 2371b(d), DoD cannot enter into a prototype project unless one of four conditions is met, and the condition in subsection (d)(1)(B) is “[all] significant participants in the transaction other than the Federal Government are small businesses . . . or nontraditional defense contractors.”

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¹ *MD Helicopters, Inc.*, B-417379, Apr. 4, 2019.

THE GAO DISMISSED

GAO did not address the merits of the protest and instead dismissed the protest because GAO does not review the award of non-procurement instruments issued under an agency's OTA authority. GAO explained that under the Competition in Contracting Act of 1984 ("CICA"), it reviews protests concerning alleged violations of procurement statutes or regulations by agencies in the award or proposed award of procurement contracts, and solicitations leading to such award. However, OTAs are not procurement contracts, and therefore GAO does not "generally" review protests of the award or solicitations for the award of OTAs. Rather, GAO's review of procurements involving OTAs is limited to a timely pre-award protest that an agency is improperly using its other transaction authority to procure goods or services. MD Helicopters' protest, which concerned the agency's evaluation of proposals and award decision, was not within GAO's jurisdiction.

MD Helicopters opposed dismissal of the protest by citing a GAO regulation, 4 C.F.R. § 21.5(m), which states that "GAO *generally* does not review protests of awards, or solicitations for award, of agreements other than procurement contracts" (emphasis added), and arguing that GAO should exercise its "considerable discretion" to hear the protest. GAO disagreed, explaining that it does not have broad discretion to limit its jurisdiction beyond the grant in CICA; OTAs are not procurement contracts and thus do not fall within that grant. Turning to the term "generally" cited by MD Helicopters, GAO stated that the term is not intended to connote some reserved discretion to consider protests involving the award or proposed award of an OTA. Instead, the term connotes that GAO may, in limited circumstances, hear a protest that tangentially impacts an agency's award or proposed award of other than a procurement contract. Specifically, GAO will review whether an agency has failed to comply with its statutory OTA authority and therefore is using an OTA to acquire goods and services in lieu of using a procurement contract. As support, GAO cited *Oracle America, Inc.*²

WHAT HAPPENED IN *ORACLE* ?

The *Oracle* decision is significant. In that case, GAO held that it had jurisdiction to hear a protest challenging the Army's entry into an OTA with REAN Cloud LLC, which was awarded a follow-on production OTA under 10 U.S.C. § 2371b(f) for cloud migration and operation services, with a not-to-exceed value of \$950 million. GAO explained that because Oracle argued that the Army did not appropriately use its authority under 10 U.S.C. § 2371b to

² B-416061, May 31, 2018, 2018 CPD ¶ 180.

award the production OTA to REAN, GAO had jurisdiction to review “this limited protest issue.” GAO sustained the protest on two grounds. First, GAO found that, pursuant to 10 U.S.C. §§ 2371b(f)(1) and (2), a follow-on production contract or transaction may be awarded without the use of competitive procedures *if* the prototype OTA provided for award of a follow-on production contract or transaction to the participants in the transaction, and the Army acknowledged that was not the case with the prototype OTA awarded to REAN. Second, GAO noted that 10 U.S.C. § 2371b(f)(2)(B) requires that the participants must have successfully completed the prototype project provided for in the transaction, and REAN had not completed the entire prototype project described in the transaction instrument.

The *Oracle* decision did not sit well with many DoD officials. In response to that decision, the National Defense Authorization Act for FY 2019 (“NDAA”) (signed into law on August 13, 2018) amended 10 U.S.C. § 2371b to add the following subparagraphs to section (f):

(3) A follow-on production contract or transaction may be awarded, pursuant to this subsection, when the Department determines that an individual prototype or prototype subproject as part of a consortium is successfully completed by the participants.

(4) Award of a follow-on production contract or transaction pursuant to the terms under this subsection is not contingent upon the successful completion of all activities within a consortium as a condition for an award for follow-on production or a successfully completed prototype or prototype subproject within that consortium.

DoD was not through with the *Oracle* decision. On November 20, 2018, DoD issued a memorandum concerning “Definitions and Requirements for Other Transactions Under Title 10, United States Code, Section 2371b.”³ The memo (1) provides a definition of “prototype project” in the context of OTAs; (2) addresses the requirement that the prototype project phase provide for award of a follow-on production transaction; and (3) provides a definition of “successful completion” before follow-on production OTAs can be awarded under 10 U.S.C. § 2371b.

ACI TECHNOLOGIES, INC.

MD Helicopters is the second GAO decision issued this year involving protests of OTAs, and neither decision deals with the changes in the FY 2019 NDAA or DoD’s November 2018 memo. In the other decision, *ACI*

³ https://aaf.dau.mil/wp-content/uploads/2018/11/Definitions-and-Requirements-for-Other-Transactions-Under-Title-10_USC_S....pdf.

Technologies, Inc.,⁴ GAO held that it had jurisdiction to hear a protest of the issuance of a Navy solicitation to enter into an OTA for prototype projects (citing *Oracle*), but denied the protest in part and dismissed it in part. GAO rejected the protester's arguments that (1) the solicitation anticipated performance of work unrelated to prototype projects and is therefore outside the agency's OTA statutory authority, and (2) the solicitation improperly provided for work that duplicated existing research in the protester's contract with the Navy.

CONCLUSION

Protesters are continuing to challenge OTAs at GAO. To date there have been no such protests at the Court of Federal Claims, but it is likely only a matter of time before the court entertains its first OTA protest.⁵ DoD will certainly continue to take a great interest in any protests involving its statutory OTA authority.

⁴ B-417011, Jan. 17, 2019, 2019 CPD ¶ 24.

⁵ The court has heard one case under its Contract Disputes Act jurisdiction that involved a follow-on procurement contract originally entered into under OTA authority, see *United Launch Servs., LLC v. United States*, 139 Fed. Cl. 664 (2018).