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# Other Transaction (OT) Bid Protests: A Call For Clarity And Consistency

*By Locke Bell*[*]

For decades, bid protests were filed in federal district courts across the United States. This led to inconsistent rulings, which in turn inspired forum shopping and "the fragmentation of Government contract law."[1] So, in 1996, Congress passed the Administrative Dispute Resolution Act (ADRA), establishing exclusive jurisdiction for procurement-related protests in the U.S. Court of Federal Claims, appropriately seated next door to the White House in Washington, D.C.[2] Congress hoped this would "develop a uniform national law on bid protest issues" and give litigants the benefit of "the substantial experience and expertise the Court of Federal Claims has developed in the Government contracting area."[3] And for nearly 30 years, government contracts lawyers have watched this play out, many from their own D.C. offices, without widespread desire to return to the way things were before.

There is now a great disturbance in the Force: so-called "other transaction" agreements, or OTs or OTAs, for short. These lightly regulated agreements are not particularly new, but their application has evolved and grown substantially recent years, driven largely by the expansion of the authority of the Department of Defense (DOD) to award OTs for prototype projects with the potential for sole-source follow-on production work.[4] DOD reportedly obligated more than $37.3 billion on prototype-related OT awards alone in fiscal years 2019 through 2021.[5] Where go the appropriations, so too come the bid protests.

But who will hear them? That question has vexed government contracts lawyers and their clients for years. Many have wrongly assumed that OTs are "protest-proof" by design—that Congress, having exempted OTs from the Competition in Contracting Act (CICA) and other procurement laws to promote flexibility and speed in contracting, must want them free from judicial oversight as well. But nothing in any statute says as much, nor has Congress indicated it intends to shield OT awards

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from bid protest review. Absent that, "[t]he relevant question is not *whether* [a disappointed bidder] can bring suit, but *where* it must do so"—either in the Court of Federal Claims or in one of the many federal district courts.[6]

A rule has begun to emerge: If an OT is properly characterized as a "procurement" of goods or services, or at least "in connection with" one, the Court of Federal Claims has exclusive jurisdiction over related bid protests. If not, challenges to the award decision must be brought in a federal district court of general jurisdiction.

Easy enough. But when is an OT a "procurement"? The answer is less clear and has been inconsistently applied. That is the focus of this BRIEFING PAPER. Recent cases chart a path to broad OT bid protest jurisdiction at the Court of Federal Claims. And that is a good thing! The alternative is a return to the days of arguing bid protests in any of the 94 districts across the United States, in front of judges who may (or may not) be well versed in administrative law but almost certainly are less familiar (if at all) with the canon of government contracts bid protest law that has developed in the nation's capital.

## What Is An OT Or OTA?

Before digging in, we must set the table with a brief introduction to "OTs" (in DOD's parlance) or "OTAs" (everyone else's). Going forward, this BRIEFING PAPER uses "OT" to refer specifically to a DOD prototype and production "other transaction" agreement and the more general "OTA" to refer to an "other transaction agreement" awarded by other authorized agencies like the National Aeronautics and Space Administration Agency (NASA), the Federal Aviation Administration, and the National Institutes of Health.

Most federally funded agreements take one of three forms: a "procurement contract," where the government is acquiring goods or services for its direct benefit or use;[7] a "grant," where the government provides U.S. government assistance, often in the form of funding, to carry out some public purpose;[8] or a "cooperative agreement," which, like a grant, is an assistance agreement, except the government remains substantially involved in performance.[9]

Select agencies are further authorized to enter into other types of agreements in certain circumstances. Such "other transactions," as a category of legal instruments, are hard to pin down.[10] After all, the term originated as a catchall at a time of uncertain need: in the year following the Soviet Union's launch of the satellite Sputnik, Congress authorized the newly established NASA "to enter into and perform such contracts, leases, cooperative agreements, *or other transactions* as may be necessary in the conduct of its work and on such terms as it may deem appropriate."[11] At the time, some voiced concerns this "important and far-reaching grant of power deserve[d] more study" and "appear[ed] too broad."[12] But drastic times called for drastic measures, and Congress pushed forward with a plan that sent Americans to the Moon, reclaimed the balance of power in the Cold War, and, intentionally or not, inspired a revolution in federal contracting several generations later.

Oddly enough, the true giant leap for "other transaction" authority as we know it today came with the

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nation's exit from the Cold War, when, as part of President Clinton's Technology Reinvestment Project, Congress green-lit a three-year pilot program for the Defense Advanced Research Projects Agency (DARPA) to "enter into cooperative agreements and other transactions" not only for research purposes, but also to "carry out prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense."[13] Within a few years, this had transformed into a departmentwide authority to "enter into transactions (other than contracts, cooperative agreements, and grants)" for such prototype projects,[14] which has since been permanently codified (first in 10 U.S.C.A. § 2371b, now in 10 U.S.C.A. § 4022) and expanded to any prototype project for "enhancing the mission effectiveness of personnel of the Department of Defense or improving platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or . . . in use by the armed forces."[15]

In each iteration, these "other transactions" have been defined by what they are not. They are not "contracts," in that they are not "procurement contracts" as the term is defined and used elsewhere in the U.S. Code, even though they are binding and enforceable written promises formed by offer, acceptance, and a mutual exchange of consideration.[16] Nor are they "grants" or "cooperative agreements," despite in many cases transferring federal funding to further a broad public purpose beyond the government's direct benefit.[17] Perhaps most importantly, they are not subject to the many laws and regulations that come with those designations, such as CICA, the FAR, or the Defense FAR Supplement (DFARS) for procurement contracts, or the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 C.F.R. Part 200) and its agency supplements, in the case of grants and cooperative agreements.

Despite this, OTs and OTAs often look and function a lot like one of these other legal instruments. DOD OTs in particular bear a striking resemblance to procurement contracts, especially when they contemplate follow-on production. They are, after all, contracts for prototypes or prototyping services for systems "proposed to be acquired or developed,"[18] and DOD has previously acknowledged this makes them "acquisition instruments" that are "intended to provide DOD a direct benefit."[19] Many are, in essence, legal instruments that would be procurement contracts but for Congress' express permission to call them by another name, thereby exempting them from procurement laws and regulations for the sake of increased flexibility and speed in DOD's acquisition of new technologies.

## Can I Protest An OT Or OTA, And Where?

This Briefing Paper attempts to answer two questions: *Can I protest the award of an OT or OTA? And if so, where?*

Some disclaimers: This Briefing Paper focuses on judicial review of bid protests challenging the results of a source selection decision. The Government Accountability Office (GAO) has firmly denied jurisdiction over OTA bid protests, except those challenging a federal agency's authority to award an OT or OTA in the first place.[20] One recent GAO decision, *ARiA*, potentially opened the door to review where an OT or OTA award operates "similar to a down-select or competitive range process" eliminating offerors from consideration through "successive rounds [that] ultimately may result in a [procurement] contract award."[21] That decision is noteworthy, but outside the scope of this Paper.[22] And agency-level OTA bid protests exist, but whether to hear them is largely a matter of agency discretion.[23]

This Briefing Paper also focuses on judicial review of post-award protests challenging the merits of an award decision, not challenges to an agency's decision to use an OT or OTA rather than a procurement contract,[24] or challenges to the terms of an OT or OTA solicitation. Both interesting topics, but again, more than there is space to cover here.

### Can I Protest An OT Or OTA Award In Federal Court?

*Short answer: Yes.*

This was confirmed in *Space Exploration Technolo-*

*gies Corp. v. United States*[25] ("*SpaceX*"), the very first OT bid protest attempted at the Court of Federal Claims. For reasons to be explained, the court found it did not have jurisdiction over the OTs at issue and, rather than dismissing, transferred the protest to the U.S. District Court for the Central District of California,[26] where the case proceeded to decision on the merits.[27]

A full answer requires taking a step back. As mentioned, ADRA consolidated jurisdiction for federal procurement protests in the specialized Court of Federal Claims. Before ADRA, disappointed bidders could file protests in federal district courts of general jurisdiction, seeking injunctive relief under the Administrative Procedure Act (APA). This became known as *Scanwell* jurisdiction, named for the D.C. Circuit opinion affirming it, *Scanwell Laboratories, Inc. v. Shaffer*.[28] Under the *Scanwell* line of cases, a disappointed bidder could sue in district court on the basis that an arbitrary, capricious, or illegal contract award had caused it to suffer "legal wrong because of agency action," subject to review under the APA.[29]

*Scanwell* jurisdiction opened the door to bid protests across the country—too many doors, in fact, leading to forum shopping and unpredictable results. As explained by the U.S. senator responsible for the jurisdiction-consolidating provision in ADRA:

> [The legislation] is designed to increase the efficiency of our procurement system by consolidating jurisdiction over bid protest claims in the Court of Federal Claims. The [legislation] would reverse the decision of the D.C. Circuit in *Scanwell*. . .. Providing district courts with jurisdiction to hear bid protest claims has led to forum shopping and the fragmentation of Government contract law. Consolidation of jurisdiction in the Court of Federal Claims is necessary to develop a uniform national law on bid protest issues and end the wasteful practice of shopping for the most hospitable forum. Congress established the Claims Court—now the Court of Federal Claims—for the specific purpose of improving the areas of . . . Government contracts. . .. *Scanwell* jurisdiction frustrates this purpose and deprives litigants of the substantial experience and expertise the Court of Federal Claims has developed in the Government contracting area.[30]

Congress passed ADRA so that "the Court of Federal Claims would exercise exclusive judicial jurisdiction over procurement protests."[31] The court's jurisdictional grant in the Tucker Act, 28 U.S.C.A. § 1491, was amended to include any "action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[32] At the same time, ADRA included a sunset provision terminating district courts' *Scanwell* jurisdiction over the same actions as of January 1, 2001.[33]

But ADRA neither created nor destroyed any right to judicial review of a bid protest; it merely transferred jurisdiction over all "procurement" protests to the Court of Federal Claims. Jurisdiction over APA claims challenging objectionable non-procurement actions still sits properly in the federal district courts.[34] Indeed, when Congress wants to eliminate bid protest jurisdiction altogether, it knows how to do so expressly, as it has done the case of certain task or delivery order bid protests.[35] Congress has not taken any similar action for OTs or OTAs.[36]

So, for post-award OT or OTA bid protests, jurisdiction is not a question of if, but where. And *where* depends on whether the OT falls under umbrella of "procurement" protests captured by the Tucker Act.

### Where Can I Protest An OT Or OTA Award?

*Short Answer: The Court of Federal Claims, if a procurement; a federal court of general jurisdiction if not.*

Return to the text of the Tucker Act. It can be broken into three prongs covering: (1) "an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract," (2) "an action by an interested party objecting . . . to a proposed award or the award of a contract," or (3) "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[37] Based on the legislative history of ADRA discussed above, the Federal Circuit has confirmed that the first two prongs are "exclusively concerned with *procurement* solicitations and contracts."[38] Thus, to find juris-

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diction at the Court of Federal Claims, a protester must be objecting to a "procurement" solicitation or award, or alleging a violation of law or regulation "in connection with" a "procurement or proposed procurement." For our purposes, this means the OT or OTA award at issue must be either itself a "procurement" or violating some law or regulation "in connection with" one.[39]

The Tucker Act does not define "procurement."[40] Historically, the Federal Circuit has turned to the definition provided in the Federal Procurement code, specifically at 41 U.S.C.A. § 111, which defines "procurement" broadly to cover "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout."[41] Read together with the Tucker Act, this definition reflects the court's "broad grant of jurisdiction over objections to the procurement process,"[42] which "does not require an actual procurement" and permits challenges to "pre-procurement decisions."[43]

This definition, although broad, runs into a logical wall with OTs and OTAs. Recall that OTs and OTAs are, by their own definition, not subject to the procurement laws in Title 41 of the U.S. Code[44] or the DOD analogue in Title 10, nor to the FAR or DFARS, all of which apply, by law, based on whether an action falls within the definition of "procurement" in 41 U.S.C.A. § 111.[45] Even though many OTs may operate as acquisition instruments by another name, DOD's OT statute does not expressly exempt them from these laws and regulations. Instead, it relies on an implicit understanding that awards made under DOD's OT authority are something definitionally different from those falling under DOD's "procurement" authority, the scope of which is defined by 41 U.S.C.A. § 111.[46]

In *SpaceX*, this was enough for Judge Griggsby to reject out of hand the argument that OTs could themselves be "procurements" within the court's jurisdiction. The court matter-of-factly stated that "the record evidence makes clear that the [OTs] are not procurement contracts" because the agency "entered into [them] pursuant to the authority that Congress has granted to DoD to enter into other transactions" and they were "not subject to the federal laws and regulations applicable to procurement contracts."[47] Under such reasoning, no OT or OTA could ever be a "procurement" in its own right, and jurisdiction hangs on being "in connection with" one. In subsequent decisions *Kinemetrics, Inc. v. United States*[48] and *Hydraulics International, Inc. v. United States*,[49] Judges Lettow and Holte, respectively, agreed.

According to the Federal Circuit, this "operative phrase 'in connection with' is very sweeping in scope."[50] With ADRA, "Congress sought to channel the entirety of judicial government contract procurement protest jurisdiction to the Court of Federal Claims."[51] So, in *Hydraulics*, Judge Holte held that as long as OTs are "part of [an agency's] 'process for determining a need for acquisition,' then they are in connection with a proposed procurement" and subject to the Court's jurisdiction.[52] On this basis, the court has asserted jurisdiction over OT-related bid protests in both *Kinemetrics* and *Hydraulics*,[53] and another federal district court, in *MD Helicopters Inc. v. United States*, declined jurisdiction over an OT bid protest based on the sunsetting language in ADRA.[54]

So why did the protest in *SpaceX* end up in California? In that case, the U.S. Air Force had awarded OTs for the development of launch system prototypes to Blue Origin, ULA, and Orbital (but not to SpaceX) as part of the National Security Space Launch program.[55] The program adopted a multi-phase procurement strategy building towards sustainable competition between multiple commercial launch services providers.[56] Before achieving that goal, though, the agency needed viable alternative sources, so it invested, through OTs, in the "development of prototypes for launch systems" that could be "used to provide commercial launch services that will also be extended to provide National Security Space launch services."[57] Even though the Air Force intended to procure launch services in the future through a "separate and distinct" FAR-based solicitation, the OTs were simply "to increase the pool of launch vehicles that meet the Air Force's needs" and thus did not fall within the court's "procurement" protest jurisdiction.[58]

Contrast this with *MD Helicopters*. The OTs awarded in *MD Helicopters* were the first phase of the U.S.

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Army's Future Attack Reconnaissance Aircraft (FARA) program.[59] To "act quickly with respect to updating its helicopter fleet," the Army structured the program "as a phased approach with aggressive deadlines" that would "progressively down-select among candidates until potentially only one entity remain[ed]."[60] From an initial round of bidders, the Army would select several for Phase 1 OTs, giving them nine months to develop preliminary designs.[61] After that, the Army would down-select to two or more performers to advance to Phase 2 to "design, build, and test their proposed aircraft before providing them to the Army for further evaluation," after which, the Army contemplated "the potential award of a follow-on production OT" for "entry into subsequent full system integration, qualification, and production efforts."[62] Unlike *SpaceX*, "the entire purpose of the Army's 'prototyping and testing effort' [was] to 'support a decision to enter into a formal program of record for full system integration, qualification and production as a rapid acquisition.' "[63] Further, "only entities that are 'selected for the preceding phase . . . [were] eligible for any subsequent phases,' and thus any eventual procurement."[64] Unlike *SpaceX*, the FARA program "d[id] not involve two distinct solicitations," but rather the solicitation at issue anticipated awarding follow-on production to the successful performers without the use of competitive procedures.[65]

*Hydraulics* similarly involved Army OTs for helicopter upgrades with a phased down-select approach to follow-on production.[66] Like *MD Helicopters*, and unlike *SpaceX*, the solicitation provided for "the award of a follow-on production contract for over 150 [units] without the use of competitive procedures" once the prototype OT had been successfully completed.[67] And even though the Army insisted it may never actually award that production contract, the court found the OTs had "initiated the process for determining a need for acquisition, and they are in connection with the process because they may result in the exclusion of [the protester] for consideration of a follow-on production contract."[68]

These cases can be distilled into the following rule: If an OT or OTA is a step towards future production, either as a sole-source or limited competition between successful awardees, the Court of Federal Claims has jurisdiction. If, however, there is no future procurement or procurement will be conducted through a "separate and distinct" solicitation, the bid protest must be brought in federal district court under the APA.

Enter *Independent Rough Terrain Center, LLC v. United States* (*IRTC*),[69] the latest OT bid protest at the court. This time, the court was not asked to review the initial prototype OT award, but the award of an OT for follow-on production.[70] Armed with the rule above, the answer seems almost obvious: if an OT contemplating future production is "in connection with" a procurement, then surely an OT for that follow-on production work is too. And, unsurprisingly, that is exactly what Judge Davis concluded.[71]

More interesting, though, is how the court got there. Yes, Judge Davis acknowledged the court's prior cases and rule; but she also revisited the first path to jurisdiction—whether an OT or OTA itself can be a "procurement," rather than merely "in connection with" one. Unwilling to reject that argument out of hand, Judge Davis instead observed "the relevant inquiry requires the Court to look at what the Government is seeking through the solicitation of proposals."[72] If the purpose is "acquiring property or services," then the solicitation is a "procurement" properly within the court's jurisdiction.[73] Because in *IRTC* "the Solicitation at issue [was] to acquire for the benefit of the Army the goods and services proposed" by the prototype OT performers, the court had exclusive jurisdiction.[74]

Extending this to all OTs or OTAs, not just those for production, would have a great impact on the court's bid protest jurisdiction. Indeed, one might reasonably estimate that most DOD prototype OTs involve the acquisition of property or services in some form or another, whether through the delivery of prototype hardware or software or related design documents, or provision of research and development or prototyping services—a fact DOD has repeatedly admitted by identifying such OTs as "acquisition instruments."[75] This is true whether or not the initial prototype solicitation contemplates future production, even though it almost always does.

What about the issue with using the definition of


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"procurement" in Title 41? Judge Davis acknowledged and side-stepped it: "Here, that the statutory OT provisions describe OT agreements as something other than a procurement contract (or cooperative agreement or grant) does not mean the statute is describing OT agreements as something other than a procurement as defined by 41 U.S.C. § 111."[76] As Judge Holte remarked in *Hydraulics*, "OTA's exemption from the FAR does not necessitate exemption from the Tucker Act."[77] That may well be the right answer, but it leaves open a logical gap: without excluding OTs or OTAs from the definition of "procurement" in 41 U.S.C.A. § 111, there's nothing in statute to exempt them from the FAR, DFARS, or other procurement laws. In *Hydraulics*, the court pointed to U.S. Postal Service (USPS) procurements as evidence that "[t]hough some agency acquisitions receive special treatment under federal procurement laws, that does not inherently remove those acquisitions form the Tucker Act's purview."[78] Fair enough, but USPS' exemption is expressly written into statute.[79] DOD OTs under 10 U.S.C.A. § 4022—and, to this author's knowledge, most other OTAs—do not have the same benefit.

Still, *IRTC* charts a path to broader jurisdiction over OTA bid protests at the Court of Federal Claims. Recall that nothing in statute tethers the Tucker Act to the definition of "procurement" in 41 U.S.C.A. § 111. The Federal Circuit has simply adopted it as a persuasive reference. The point being made by the court in *Hydraulics* and *IRTC* can be rephrased, not to force an overlap between DOD's OT statute and 41 U.S.C.A. § 111 where one cannot exist, but rather to free the Tucker Act from 41 U.S.C.A. § 111 and the laws that stem from it. That is, an OT or OTA may be rightfully classified as a "procurement" for purposes of the Tucker Act, even if it is not a "procurement" for purposes of 41 U.S.C.A. § 111 and the rest of the procurement code, if for no other reason than that Congress says so. The Federal Circuit may be right to look to 41 U.S.C.A. § 111 as a guide for articulating the broad scope of the court's jurisdiction, but there is no reason Congress cannot implicitly exempt OTs and OTAs from 41 U.S.C.A. § 111 without pulling them out from its understanding of "procurement" captured by ADRA and the Tucker Act.

## A Call For Clarity And Consistency

The existing laws are set up to support broad jurisdiction at the Court of Federal Claims over bid protests challenging an OT or OTA acquiring property or services, in any form, for the government's direct benefit or use. This may not capture OTs or OTAs used as assistance agreements, like in *SpaceX*, where the agency invested in but did not purchase or own the prototypes or acquire any services; but it would capture OTs used as acquisition instruments, like those in *IRTC*, *MD Helicopters*, *Hydraulics*, and beyond.

Good. Consider the alternative, keeping in mind it is not a world without OT or OTA bid protests. An act of Congress would be needed to remove OT or OTA awards from judicial review, and there is no reason to think lawmakers want to leave federal agencies to police themselves when doling out so many billions from the public fisc.[80] The more realistic alternative is a *Scanwell* jurisdiction revival, a world where OT and OTA bid protests are treated differently than all other bid protests and relegated to federal district courts across the country. And coming with it the once familiar issues of forum shopping and fragmentation of the law.

There are many important questions about OT and OTA bid protests that need clear and consistent answers. Should such agreements be subject to the same precedent as protests involving procurement contracts, cases that are inevitably founded in CICA and the principles of the FAR? Or does the more lenient charge to "use competitive procedures" to "the maximum extent practicable," in the case of DOD OTs, afford a more deferential standard of review? What does that standard require in the context of an OT consortium? Do the organizational conflicts of interest principles in FAR Subpart 9.5 apply to OTs or OTAs, even absent a statutory prohibition?

To be sure, the Court of Federal Claims is hardly a model of consistency, nor does it always speak with one unified voice. Its 23 judges and senior judges represent a diversity of backgrounds and approaches to federal bid protest law, and they are not bound to each other's opinions as precedent. But they are each beholden to review by the same appellate court, creating

at least some precedential common ground between them. Cynical or frustrated practitioners may scoff at the suggestion, but the Court of Federal Claims and Federal Circuit are more likely to create consistency within themselves than would exist across courts in California, Maryland, and Alabama, among others. The judges in those courts are no doubt competent and capable of thoughtfully addressing the relevant legal issues; Judge Wright demonstrated that in *SpaceX*. But they do not benefit from the same specialized experience and expertise offered by judges at the Court of Federal Claims.

On balance, the Court of Federal Claims and, in turn, the Federal Circuit are best situated to decide bid protests relating to the Government's acquisition of goods and services for its direct benefit or use, whether through a procurement contract or an OT or OTA. Federal law, read properly, gives them exclusive jurisdiction to do so. They should exercise it.

## Guidelines

Consider the following *Guidelines* when contemplating a bid protest challenging an OT or OTA award decision. Bear in mind they are not, however, a substitute for professional representation in any specific situation.

**1.** OT and OTA award decisions *can* be protested. But there are fewer options available to a would-be protester than when challenging a procurement contract award. As a general rule, for now, GAO will not hear protests challenging OT or OTA award decisions, except where an agency is accused of improperly exceeding its statutory authority. There also is no guarantee of an agency-level protest as exists in the FAR. This leaves jurisdiction solely in federal courts.

**2.** District courts are still working to sort out jurisdiction between themselves, with no guidance yet from any appellate courts. Yet a rule has emerged: If an OT or OTA is a "procurement" of goods or services, or is "in connection with" one, the U.S. Court of Federal Claims has exclusive jurisdiction. If not, any bid protest must be brought in a federal district court of general jurisdiction.

**3.** In all events, the question is not *whether* you can file an OT or OTA bid protest, but *where* to file it. If there is any doubt, you will almost always want to file first at the Court of Federal Claims. At worst, if the court finds it does not have jurisdiction, it should transfer the case to another federal district court for further adjudication, a path charted before in the *SpaceX* protest. The reverse is possible, too, but it has not yet been attempted and may face additional procedural hurdles, such as the bar in 28 U.S.C.A. § 1500 on the Court of Federal Claims hearing any case currently pending in another court. Plus, at least for most bid protest practitioners, the Court of Federal Claims is more likely to be where you want to end up anyways, as a familiar and (perhaps) more predicable forum.

**4.** If the Government moves to dismiss for lack of jurisdiction, respond by explaining why jurisdiction in your chosen forum is appropriate, and, in the alternative, request transfer instead of dismissal, as demonstrated in *SpaceX*.

**5.** Keep in mind securing jurisdiction is just the preliminary battle. As with any bid protest, obtaining relief often requires overcoming the deference afforded federal agencies in making their award decisions. For OTs, DOD is required only to use "competitive procedures" to the "maximum extent practicable," and it is not bound by the CICA rules for full-and-open competition that form the basis for much bid protest law. Whether this means DOD benefits from broader discretion when awarding OTs is yet to be seen, although early cases have shown a tendency to scrutinize agency actions under existing bid protest precedent.

**ENDNOTES:**

[1]142 Cong. Rec. S6155, S6156 (daily ed. June 12, 1996) (statement of Sen. Cohen), 1996 WL 315422.

[2]Pub. L. No. 104–320, § 12, 110 Stat. 3870, 3875 (1996) (codified as amended at 28 U.S.C.A. § 1491(b)); see Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1079–80 (Fed. Cir. 2001). This refers to exclusive judicial jurisdiction, and is in addition to the Government Accountability Office's (GAO) administrative review of bid protests under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551 et seq. See GAO Bid Protest Regulations, 4 C.F.R. pt

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21; see also "Protests to the agency," FAR 33.101.

[3]142 Cong. Rec. S6155, S6156 (daily ed. June 12, 1996) (statement of Sen. Cohen), 1996 WL 315422.

[4]See 10 U.S.C.A. § 4022.

[5]U.S. Gov't Accountability Off., GAO-22-105357, Other Transaction Agreements: DOD Can Improve Planning for Consortia Awards 11 (Sept. 20, 2022).

[6]Validata Chem. Servs. v. U.S. Dep't of Energy, 169 F. Supp. 3d 69, 84 (D.D.C. 2016).

[7]31 U.S.C.A. § 6303.

[8]31 U.S.C.A. § 6304.

[9]31 U.S.C.A. § 6305.

[10]As GAO put it: "An 'other transaction' agreement is a special type of legal instrument used for various purposes by federal agencies that have been granted statutory authority to use 'other transactions.' " MorphoTrust USA, LLC, B-412711, May 16, 2016, 2016 CPD ¶ 133, at 6.

[11]National Aeronautics and Space Act of 1958, Pub. L. 85-568, § 203(b)(5), 72 Stat. 426, 430 (emphasis added).

[12]The National Space Program, Report of the Select Committee on Astronautics and Space Exploration, H.R. Rep. No. 85-1758, 2d Sess., at 50 (1958) (Appendix I, Analysis of the President's Bill To Establish a National Aeronautics and Space Agency).

[13]National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845, 107 Stat. 1547, 1721 (1994) (cross-referencing 10 U.S.C.A. § 2371 (1993), since revised and recodified at 10 U.S.C.A. § 4021). Interestingly enough, when the pilot program was introduced, it focused more on DOD's authority to enter into cooperative agreements than OTs. See 139 Cong. Rec. 20,727 (1993) (statement of Sen. Jeff Bingaman (D-N.M.), introducing the pilot as an "experiment with use of cooperating agreements in carrying out [the agency's] purely military research and development projects, to which we should not expect industry to contribute its own resources").

[14]Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, § 1301, 108 Stat. 3243, 3284 (1994); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 804, 110 Stat. 2422, 2605 (1996).

[15]10 U.S.C.A. § 4022(a).

[16]See 89 Fed. Reg. 71,865, 71,866 (Sept. 4, 2024).

[17]See, for example, NASA's Space Act Agreements for its Commercial Crew and Cargo program to develop commercial space transportation capabilities, as discussed in Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22, at 1–2.

[18]10 U.S.C.A. § 4022(a).

[19]Dep't of Def., Other Transactions Guide for Prototype Projects, Version 1.2.0, at 1–2 (Jan. 2017); see also Under Sec'y of Def. for Acquisition, Technology & Logistics, "Other Transactions" (OT) Guide for Prototype Projects § C1.6 (Dec. 21, 2000) ("OT prototype authority may be used only to carry out prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department. As such, any resulting OT awards are acquisition instruments since the government is acquiring something for its direct benefit."). See generally Off. of the Under Sec'y of Def. for Acquisition & Sustainment, Other Transactions Guide, Version 2.0 (July 2023).

[20]4 C.F.R. § 21.5(m) ("GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts . . .; GAO does, however, review protests alleging that an agency is improperly using a non-procurement instrument to procure goods or services."); MD Helicopters, Inc., B-417379, Apr. 4, 2019, 2019 CPD ¶ 120, at 2, 61 GC ¶ 126 ("With respect to a procurement involving an OTA, our review is limited to a timely pre-award protest that an agency is improperly using its other transaction authority to procure goods or services."). For some agencies, GAO will review whether an agency is improperly using an OTA (or other non-procurement instrument) instead of a procurement contract to acquire goods or services for the government's direct benefit or use, in violation of the Federal Grant and Cooperative Agreement Act of 1977. See Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22 (examining whether NASA had proven an OTA was "to encourage, support and stimulate the development of a commercial market for space transportation, from which NASA could potentially acquire orbital transportation services," rather than "principally provide for the acquisition of goods and services for the direct benefit and use of NASA," in which case the FGCAA would require a procurement contract). But see MorphoTrust USA, LLC, B-412711, May 16, 2016, 2016 CPD ¶ 133, at 9–10 (disregarding the FGCAA and examining only whether an agency's award of an OTA was "knowing and authorized"). But see Blade Strategies, LLC, B-416752, Sept. 24, 2018, 2018 CPD ¶ 327, at 2, 60 GC ¶ 324 (subsequently holding GAO will review "a timely protest that an agency is improperly using its other transaction authority to procure goods or services"). For other agencies, like DOD, that have been specifically authorized to award OTs as acquisition instruments for the government's direct benefit, such protests may include allegations that the agency failed to meet certain statutory conditions to award. See, e.g., Oracle Am., Inc., B-416061, May 31, 2018, 2018 CPD ¶ 180, at 17–19, 60 GC ¶ 195 (sustaining protest of production OT award where agency failed to provide for follow-on production in the origi-

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nal solicitation and the awardee had not successfully completed its underlying prototype project).

[21]ARiA, B-422365 et al., May 28, 2024, 2024 CPD ¶ 104, at 5, 66 GC ¶ 156.

[22]For more discussion, see Locke Bell, "Has the GAO Opened the Door to Certain Other Transaction (OT) Bid Protests?," Morrison & Foerster Government Contracts Insights (June 6, 2024), https://govcon.mofo.com/topics/gao-opens-the-door-to-certain-other-transaction-bid-protests.

[23]See, e.g., Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 438 (2019), 61 GC ¶ 262.

[24]See Hymas v. United States, 810 F.3d 1312, 1324 (Fed. Cir. 2016).

[25]Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433.

[26]144 Fed. Cl. at 445–46.

[27]Space Expl. Techs. Corp. v. United States, 2020 WL 7344615 (C.D. Cal. Sept. 24, 2020).

[28]Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

[29]See 424 F.2d at 865–73.

[30]142 Cong. Rec. S6155, S6156 (daily ed. June 12, 1996) (statement of Sen. Cohen), 1996 WL 315422.

[31]142 Cong. Rec. S11848, S11849–50 (daily ed. Sept. 30, 1996) (statement of Sen. Levin), 1996 WL 553817.

[32]28 U.S.C.A. § 1491(b)(1).

[33]Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (1996) (codified at 28 U.S.C.A. § 1491 note).

[34]Cf. Validata Chem. Servs. v. U.S. Dep't of Energy, 169 F. Supp. 3d 69, 84 (D.D.C. 2016).

[35]See 10 U.S.C.A. § 3406(f)(1); 41 U.S.C.A. § 4106(f)(1).

[36]See Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 176 (2022), 64 GC ¶ 265, (noting DOD's OT statutes are "silent on the Tucker Act, bid protests, judicial review, and the Court of Federal Claims").

[37]28 U.S.C.A. § 1491(b)(1); see also Percipient.ai, Inc. v. United States, 104 F.4th 839, 846 (Fed. Cir. 2024), 66 GC ¶ 171.

[38]Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010), 52 GC ¶ 95 (emphasis added).

[39]See Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 442–45 (2019), 61 GC ¶ 262.

[40]See generally 28 U.S.C.A. § 1491.

[41]See Distributed Sols., Inc. v. United States, 539 F.3d 1340, 1345 (Fed. Cir. 2008), 50 GC ¶ 332.

[42]Sys. Application & Techs., Inc. v. United States, 691 F.3d 1374, 1381 (Fed. Cir. 2012), 54 GC ¶ 308.

[43]Distributed Sols., Inc. v. United States, 539 F.3d at 1346.

[44]Except where Congress has expressly stated otherwise, see 10 U.S.C.A. § 4022(h).

[45]See 41 U.S.C.A. § 1121(b), (c)(1); 10 U.S.C.A. § 3011.

[46]See 10 U.S.C.A. § 4022(f)(5) (distinguishing between transactions "awarded using the authority in subsection (a)" to award OTs, from contracts awarded "under the authority of chapter 137 of this title," i.e., DOD's procurement authority).

[47]Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 442 (2019), 61 GC ¶ 262.

[48]Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 784–85 (2021), 63 GC ¶ 284.

[49]Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 176 (2022), 64 GC ¶ 265.

[50]RAMCOR Servs. Grp., Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999), 41 GC ¶ 361.

[51]Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1079 (Fed. Cir. 2001), 43 GC ¶ 351.

[52]Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. at 176 (quoting AgustaWestland N. Am., Inc. v. United States, 880 F.3d 1326, 1330 (Fed. Cir. 2018), 60 GC ¶ 40).

[53]To be fair, the decision in Kinemetrics suggests the award in dispute was, in fact, a procurement contract. See Kinemetrics, Inc. v. United States, 155 Fed. Cl. at 785 (noting the solicitation included a delivery order for the purchase of equipment and "resulted in a standard indefinite delivery, indefinite quantity contract").

[54]MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003, 1011–13 (D. Ariz. 2020).

[55]See Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 436–38 (2019), 61 GC ¶ 262. Continuing on a theme, the program's core missions included assuring the United States' access to space and eliminating reliance on Russian-made rocket engines. See 144 Fed. Cl. at 443.

[56]144 Fed. Cl. at 436–37.

[57]144 Fed. Cl. at 437. Compare this with NASA's OTAs for the Commercial Crew and Cargo program, which GAO found a decade earlier were principally "to encourage, support and stimulate the development of a commercial market for space transportation, from which NASA could potentially acquire orbital transportation services," rather than for the agency's direct benefit. Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22, at 5.


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[58]144 Fed. Cl. at 443–44.

[59]MD Helicopters Inc. v. United States, 435 F. Supp. 3d at 1006.

[60]435 F. Supp. 3d at 1006.

[61]435 F. Supp. 3d at 1006.

[62]435 F. Supp. 3d at 1006.

[63]435 F. Supp. 3d at 1013.

[64]435 F. Supp. 3d at 1013. Compare this with GAO's recent decision in ARiA, B-422365 et al., May 28, 2024, 2024 CPD ¶ 104, 66 GC ¶ 156.

[65]MD Helicopters Inc. v. United States, 435 F. Supp. 3d at 1013.

[66]Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 172 (2022), 64 GC ¶ 265.

[67]161 Fed. Cl. at 172.

[68]161 Fed. Cl. at 179 (cleaned up) (quoting AgustaWestland N. Am., Inc. v. United States, 880 F.3d 1326, 1330 (Fed. Cir. 2018), 60 GC ¶ 40, and Distributed Sols., Inc. v. United States, 539 F.3d 1340, 1346 (Fed. Cir. 2008), 50 GC ¶ 332).

[69]Indep. Rough Terrain Ctr., LLC v. United States, 172 Fed. Cl. 250 (2024), 66 GC ¶ 237.

[70]172 Fed. Cl. at 253–54.

[71]172 Fed. Cl. at 257–60.

[72]172 Fed. Cl. at 258.

[73]172 Fed. Cl. at 258.

[74]172 Fed. Cl. at 258.

[75]89 Fed. Reg. 71,865, 71,868 (Sept. 4, 2024); Dep't of Def., Other Transactions Guide for Prototype Projects, Version 1.2.0, at 1–2 (Jan. 2017); Under Sec'y of Def. for Acquisition, Technology & Logistics, "Other Transactions" (OT) Guide for Prototype Projects § C1.6 (Dec. 21, 2000).

[76]Indep. Rough Terrain Ctr., LLC v. United States, 172 Fed. Cl. at 258.

[77]Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 178 (2022), 64 GC ¶ 265.

[78]161 Fed. Cl. at 178 (citing Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1079 n.7 (Fed. Cir. 2001), 43 GC ¶ 351).

[79]39 U.S.C.A. § 410(a) (stating that, with some enumerated exceptions, "no Federal law dealing with public or Federal contracts . . . shall apply to the exercise of the powers of the Postal Service").

[80]See Salinas v. U.S. R.R. Retirement Bd., 592 U.S. 188, 197 (2021) (noting the "well-settled" and "strong presumption favoring judicial review of administrative action," which imposes on federal agencies a "heavy burden" of showing Congress intended to foreclose judicial review when drafting a statute).

# BRIEFING PAPERS