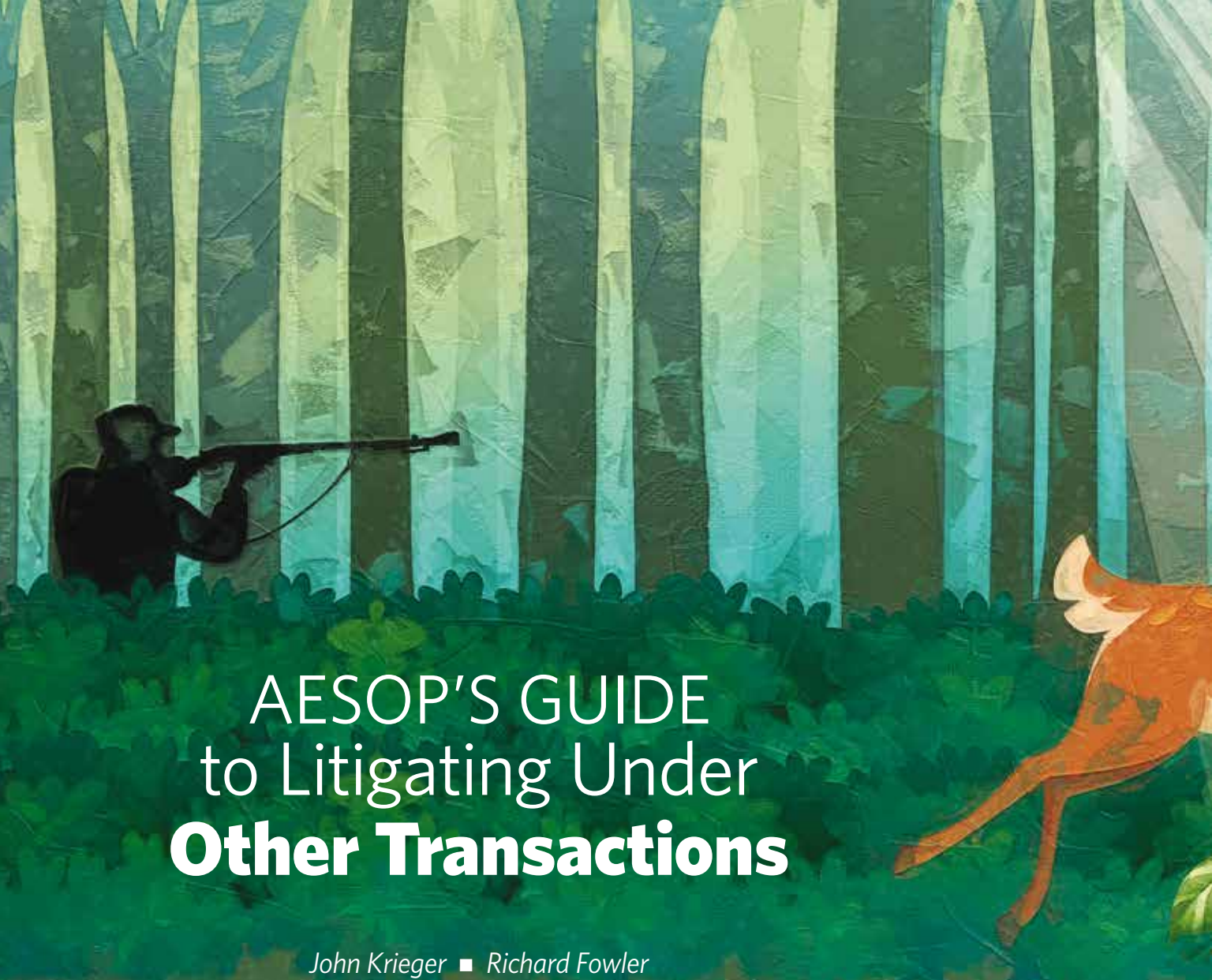


AESOP'S GUIDE to Litigating Under **Other Transactions**

John Krieger ■ *Richard Fowler*

FOR A PARTICULARLY RELEVANT PERSPECTIVE ON THE ACQUISITION TOPIC OF LITIGATION UNDER other transaction (OT) agreements, one need only look to Aesop, the famed Greek storyteller—specifically, his fable, "The Doe and the Lion."

For those not familiar with the story, a doe, in trying to hide from hunters, ran into a cave for refuge. Unfortunately for the doe, this cave was the home of a hungry lion, who, well, did what you might expect a hungry lion to do in that situation. The moral: "In avoiding one evil, do not fall into another." The "evil" in our case is litigation.

The rules for Federal Acquisition Regulation (FAR) based protests and disputes above the agency level are well established (i.e., the Comptroller General and the U.S. Court of Federal Claims for protests, and the Boards of Contracts

Krieger *is a professor of Contract Management at the Defense Systems Management College at Fort Belvoir, Virginia. He also is an independent consultant for Acquisition Consultation, LLC, and a Leader/Facilitator for The FAR Bootcamp, The Source Selection Bootcamp, and the course Critical Thinking for Acquisition Professionals. He has 40 years of experience in contracting and acquisition.* **Fowler** *currently serves as the Learning Director (Acquisition Law) for the Defense Acquisition University (DAU). Prior to joining DAU, he was a partner in the law firm of Proffitt & Fowler and has been an administrative law judge for the Equal Employment Opportunity Commission. He has been admitted to the Virginia State Bar, the Armed Services Board of Contracts Appeals, the U.S. Court Of Federal Claims, the Federal Districts Courts, and the United States Court of Appeals for the Federal Circuit. He has also represented numerous clients in protest before the Government Accountability Office. The opinions expressed in this article are solely those of the authors and do not represent the views of the U.S. Government.*

Appeals and U.S. Court of Federal Claims for disputes). The litigation fora for OTs are not so well established, and are still evolving. This article explores that particular cave.

Congress has passed specific legislation granting other transaction authority (OTA) to 11 executive agencies. The Department of Defense (DoD) gets its authority through Title 10 of the United States Code (U.S.C.):

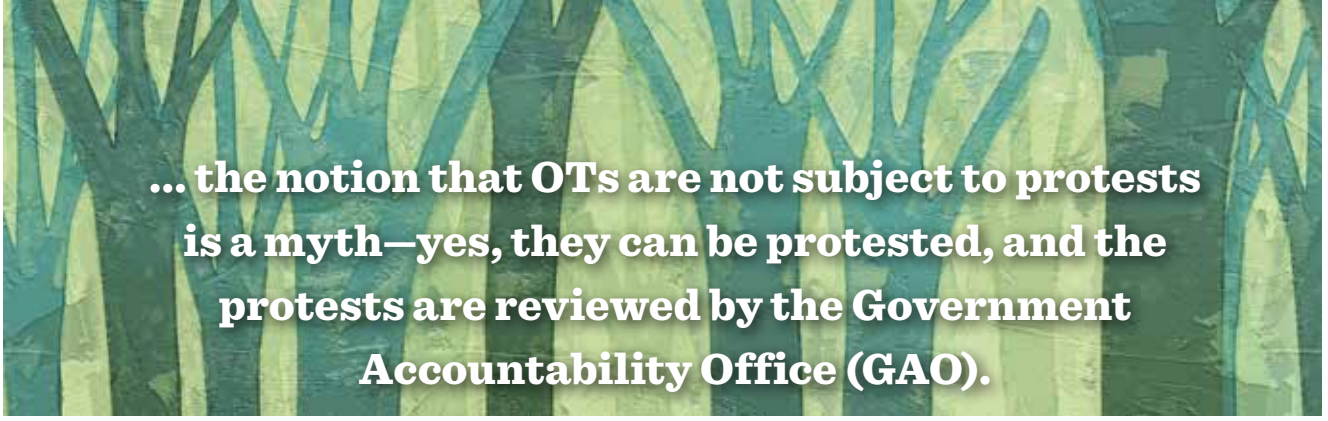
> Additional Forms of Transactions Authorized. The Secretary of Defense and the Secretary of each military department may enter into transactions (other than contracts, cooperative agreements, and grants) under the authority of this subsection in carrying out basic, applied, and advanced research projects. The authority under this subsection is in addition to the authority provided in section 2358 of this title to use contracts, cooperative agreements, and grants in carrying out such projects.

A federal court, the comptroller general, or a board of contracts appeals will tell you that an OT is a contract, using the term contract in a broad sense. When dealing with U.S. Government acquisitions, the term contract takes on narrow meanings based on the instrument used (e.g., procurement contract, OT, cooperative agreement, grant, or Cooperative Research and Development Agreement).

The preferred approach to resolving issues in the acquisition process is always to do so at the lowest level possible (i.e., the contracting officer). If the parties fail to resolve the issue at the agency level, the next best alternative is to resolve it through Alternate Dispute Resolution (ADR) procedures. Failing that, litigation.

Guidance on Litigating OTs

There is little to go on. The term "Other Transaction" (as in "Other Transaction Authority" and "Other Transaction



Agreement") appears in only 14 federal court cases, 12 comptroller general cases, and 2 boards of contract appeals cases. Let's explore them.

Part 1: Protests

Ten of the 11 agencies currently granted OTA by Congress have issued guidance to implement their authority. The DoD's current OTA guidance was issued in the form of its *Other Transactions Guide*. So, what does the *OT Guide* have to say concerning protests? For one, it states that the notion that OTs are not subject to protests is a myth—yes, they can be protested, and the protests are reviewed by the Government Accountability Office (GAO). Under the Section III heading "Legal Considerations," the *OT Guide* states:

> While bid protests are rare for OTs, agencies should be mindful of the possibility. Agency-level protests are possible if the agency choses [sic] to include language in its solicitation describing the procedures. While not required, agencies may want to include such language to encourage any issues to be handled internally and quickly. GAO has limited jurisdiction to review OT decisions and protests to GAO regarding OT awards are rare. Protests to the U.S. Court of Federal Claims are also possible but are rare occurrence [sic].

Based on this guidance, you may not be too worried about the potential for protests related to OTs, which is probably true. But it is also true of protests under the FAR. Nonetheless, it appears that the discussion in the *OT Guide* does not nearly grasp the complexity of the potential for litigation.

To fully understand the potential for litigation on OTs, you must look into litigation on other kinds of non-FAR-based "contracts" (grants, cooperative agreements, cooperative farming agreements, etc.).

When it comes to protests related to OTs, where can an interested party (e.g., unsuccessful offeror) go?

Comptroller General

GAO has parsed its jurisdiction over protests, claiming jurisdiction in some cases and denying it in others. GAO first expressed the dichotomy in the mid-1990s in a case involving the Advanced Research Projects Agency's (ARPA), now the Defense Research Projects Agency (DARPA), use of an OT:

> We generally do not review protests of the award, or solicitations for the award, of cooperative agreements or other nonprocurement instruments because they do not involve the award of a "contract." We will review, however, a timely protest that an agency improperly is using a cooperative agreement or other nonprocurement instrument, where under the [Federal Grant and Cooperative Agreement Act] a "procurement contract" is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations.

The GAO has used that analysis in a number of cases over the years. Sometimes asserting jurisdiction and sometimes denying it.

U.S. Court of Federal Claims (COFC)

We found one OT protest before the COFC: *Space Exploration Technologies Corp. v. The United States and Blue Origin, LLC, et al*. The United States argued for dismissal for lack of subject-matter jurisdiction. SpaceX argued that its "complaint falls squarely within this court's jurisdiction under the Tucker Act, because SpaceX asserts violations of law 'in connection with a procurement or proposed procurement.' " SpaceX hedged its bets, arguing that if the Court decided it did not have subject-matter jurisdiction, then it would request that the Court transfer venue to the District Court. In August the Court: (1) granted the government's motion to dismiss; (2) granted SpaceX's motion to transfer venue; and (3) dismissed the complaint.

We found other nonprocurement contracts cases that shed light on how the authority of the COFC to hear OT protests might be treated. *HYMAS v. The United States* was first heard in the COFC, which determined that it had subject-matter jurisdiction under the Tucker Act. The government appealed the decision to the U.S. Court of Appeals, Federal Circuit, which vacated and remanded the decision of the COFC.

In the case, the Court distinguished between a "cooperative agreement" and a "procurement contract" to resolve the issue at hand:

> Whether a contract between a federal agency and another entity is a procurement contract or a cooperative agreement is a question of law.

It continues:

> [T]he Claims Court's bid protest jurisdiction under 28 U.S.C. 1491(b)(1) speaks "exclusively" to "procurement solicitations and contracts." Because the Tucker Act does not define the term "procurement" . . . , the court has relied upon the definition of "procurement" in 41 U.S.C. 111 "to determine whether a 'procurement' has occurred . . ." The definition of "procurement" in 41 U.S.C. 111 is not the only provision relevant to our inquiry, nor does a "procurement contract" encompass the entire universe of instruments at executive agencies' disposal. In 1978, Congress passed the [Federal Grant and Cooperative Agreement Act] in light of its findings that there was "a need to distinguish [f] ederal assistance relationships from [f]ederal procurement relationships," as well as "uncertainty as to the meaning of... 'cooperative agreement.'

What we have here is a possible division in the Court's OT bid protest jurisdiction. If the protest is for a "traditional" OT—i.e., one for only research and development, where the government does not receive anything outright—the COFC will not have the jurisdiction; however, if the OT is for a limited production or would lead to limited production, the COFC would have jurisdiction.

District Courts

In the District Courts, we have *ORBITAL ATK, INC., Space Logistics LLC*. In only this case did a District Court hold that it did not have jurisdiction, but it was because the Court concluded that the Orbital ATK lawsuit was addressing a "program," not an individual "action."

In early 2019, MD Helicopters filed an OT protest at the District Court (Arizona) of the Army's decision not to advance its proposal for Phase 1 of an attack reconnaissance aircraft competition. The Court had one initial question (i.e., "Does the District Court have jurisdiction to hear the case?"). The Court ordered the government to submit a supplemental brief to address the issue.

In response, the government submitted a 13-page document addressing the issue. The following is part of the introduction to the more detailed discussion:

> The sunset provision under [the Administrative Dispute Resolution Act (ADRA)] only terminated district court jurisdiction over bid protests relating to procurements; it did not terminate district court jurisdiction over bid protests relating to non-procurements. . . . Significantly, and directly on point to the Court's inquiry, the solicitation for the OTA at issue is not a "procurement" for purposes of ADRA, and, accordingly, ADRA does not bar district court jurisdiction over this action.

On Jan. 24 the Court ruled that it lacked jurisdiction and dismissed the case without prejudice. The Court noted: "Despite the broad language used in these sources, this Court need not determine whether all OTs are contracts. Instead, this Court must look to the OT agreement at issue in this case." Now the question is whether MD Helicopters or the United States will appeal.

Part 2 : Disputes

What does the *OT Guide* have to say concerning disputes?

> Although OTs are not subject to the Contract Disputes [statute], an OT dispute can potentially be the subject of a claim in the Court of Federal Claims. The government team should ensure each OT addresses the basis and procedures for resolving disputes. The government team should seek to reduce the risk of costly litigation by negotiating disputes clauses which maximize the use of Alternate Dispute Resolution (ADR) procedures when possible and appropriate. The government team should consult with legal counsel for assistance in crafting ADR clauses. Incorporating language that allows disputes to be handled at the lowest level possible is generally a best practice.

Based on what the *OT Guide* says, you may not be too worried about the potential for disputes related to OTs. The truth of the matter is that even under a FAR-governed contract, where people live in fear of claims and disputes, there isn't much potential for litigation.

Boards of Contract Appeals

The Armed Services Board of Contract Appeals has published two decisions involving OTs (i.e., United Launch Services, LLC [2013 and 2016]), neither of which is enlightening. The contract mixed work under OTA and under an FAR-governed contract. The disputed portion was under the FAR-based portion, where jurisdiction is unquestioned. We found no dispute cases before the Civilian Board of Contract Appeals.

Both of these results are expected because the authority of the agency boards established under 41 USC 7105(a) and (b) are limited to "procurements" of various kinds and the disposal of personal property.

U.S. Court of Federal Claims

Based on the "outs" and "ins," it would appear that the appropriate forum for disputes of OTs is the COFC. The court specifically addressed the subject of jurisdiction in *Spectre Corporation v. United States*:

> This Court's jurisdictional grant is found primarily in the Tucker Act, which provides the U.S. Court of Federal Claims the power "to render judgment upon any claim against the United States founded either upon the Constitution, or any

> Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States ... in cases not sounding in tort.
>
> Other significant non-[Contract Disputes statute] Tucker Act contract-related actions include cases where the government has a contract with a party for other than the procurement of goods or services, such as uranium enrichment cases, spent nuclear fuel cases, the Patient Protection and Affordable Care Act (ACA) cases, contract disputes arising out of grants or cooperative agreements, and "other transaction authority" agreements. ... The boards do not have jurisdiction over these non-[Contract Disputes statute] cases, so they must be brought in the [COFC].

In *Thermalon Industries, Ltd. v. U.S.*, the Court provided an extensive discussion of its Tucker Act jurisdiction as it applies to contracts other than procurement contracts. Although not specifically addressing OTs, it can reasonably be assumed it would apply to them.

> This action is before the court on defendant's motion to dismiss the complaint. ... Defendant contends that the grant in issue is properly characterized as an agreement intended to effectuate the sovereign obligations of the United States and that all such agreements necessarily fall outside the scope of this court's jurisdiction under the Tucker Act.... [T]he court concludes that the instant grant agreement satisfies the criteria for an express or implied contract with the United States and, thus, falls within the scope of this court's Tucker Act jurisdiction.

District Courts

The MD Helicopters Inc. protest case was not the first time a district court had taken on an OT claim case. Neither of the two cases we found are of concern here, neither hitting directly as to jurisdiction. In G & T Conveyor Company, Inc., the OT was awarded by the Transportation Security Administration (TSA), but the defendant actually was the Allegheny County Airport Authority. In *United States of America, ex rel. Leo Danielides*, and *Leo Danielides, individually, v. Northrop Grumman Systems Corporation* it was a False Claims Act case, not a dispute over an OT claim.

The limited decisions at the District Courts and the Courts of Appeals indicate little or no concern over jurisdiction. Neither of the two previously discussed "claims" cases at the District Court get to that particular issue. However, keep in mind the analysis discussed in Part 1 of this article regarding protests (HYMAS). That said, we did not find a case where the district court had taken on the issue of jurisdiction.

Forum Shopping

Forum shopping is a time-honored tradition among attorneys. One of the coauthors has done his fair share. The truly sad thing is that forum shopping shouldn't be necessary. It occurs because of the tendency of some judges to "legislate from the bench" rather than limit themselves to interpreting laws and regulations.

For OTs, with 94 district courts spread across nine regions, forum shopping becomes more of an issue than in FAR-based procurements. While arbitrary "forum shopping" is frowned on by many state bar associations, it is a perfectly ethical litigation tool. Any Court selected must not only have subject-matter jurisdiction and the right to hear the type of case, but it must also carry jurisdiction as to the parties involved. However, when considering the parties involved, there is often more than one Court that could legitimately have both subject matter jurisdiction and jurisdiction over the parties involved.

More in Store?

While it may not be an axiom in federal procurement, the phrase "follow the money" is certainly something every acquisition professional understands. As agencies with OTA seek greater use of OTs, they need to accept that the number of protests and claims will increase proportionally. It must be recognized that as the DoD spends more of its budget under OTA, especially with authority for limited production, the numbers will climb.

Stand by—this is an evolving issue. We may yet see Congress enter the discussion. As such, it is important to keep the moral of "The Doe and the Lion" in mind—"in avoiding one evil, do not fall in another."

The authors can be contacted at **John.Krieger@dau.edu** *and* **Richard.Fowler@dau.edu**.