



***Overview of Other Transaction (OT) Bid Protest  
Jurisdiction: GAO, COFC, and the District Court***

October 12, 2022

*The presentations today reflect the personal opinions of the speakers, and do not necessarily represent their respective agency's views. These employees have not been authorized by the appropriate agency authority to present material as the agency's position.*

# Agenda

- Brief background on types of OTs at issue in *Hydraulics*
- Overview of the potential paths to protest an OT award
- Discussion of OT bid protests before GAO
- Explanation of Federal Court Jurisdiction over OT Bid Protests
  - District Courts
  - Court of Federal Claims (COFC)

# Background

## The OT Statute

- Prototype OTs 10 U.S.C. § 4022 (formerly 10 U.S.C. § 2371b)
- Production OTs 10 U.S.C. § 4022(f)

*For purposes of the regulations governing acquisition, OTs are not “procurement contracts”*

## Protest Venues for OT Awards

- Government Accountability Office (GAO)



- U.S. District Courts?



- U.S. Court of Federal Claims (COFC)



- ~~Agency level protests~~



*Government Accountability  
Office (GAO)*

- GAO Protest Decisions are the Comptroller General's ***Recommendation(s)*** to the Agency Head
- 31 U.S.C. § 3554(e)(1) Mandatory Reporting to Congress for Implementation Failures

# GAO OT Bid Protests



## Sources of Authority

- Statutory: (31 U.S.C. §§ 3553 *et seq.*)
  - Competition in Contracting Act (CICA) of 1984
  - Provides authority for GAO to hear bid protests
  - Requires Comp. Gen. to issue decision within 100 days
- Regulatory:
  - GAO rules set forth at 4 C.F.R. Part 21
  - FAR Subpart 33
    - GAO and Agency Protests
    - CICA Override Procedures

Note: 10 U.S.C. § 4021 states that CICA does not apply to OTs

Further, since OTs are not procurement contracts, the FAR does not apply unless an agency chooses to award a production OT as a “FAR-based” contract

# GAO OT Bid Protests



- GAO generally will not take jurisdiction over a bid protest of an OT
- Decision of note in *Oracle America, Inc.*, B-416061 (May 31, 2018)
  - GAO exercised limited jurisdiction to review whether the agency was improperly using a non-procurement instrument where the agency awarded a follow-on production agreement (P-OTA) relying upon the OT Statute
  - The solicitation did not inform OT vendors that there was the possibility of a follow-on production award, and GAO found that was a pre-requisite.
    - *We conclude that a follow-on P-OTA may only be awarded to the prototype transaction participants without the use of competitive procedures if the “transaction entered into under this section for a prototype project”-i.e., the prototype OTA itself-“provide[d] for the award of a follow-on production contract or transaction to the participants in the transaction.” 10 U.S.C. §2371b(f)*
  - GAO also scrutinized the agency’s interpretation of the statutory prerequisite that, in order to award a follow-on P-OTA without competition, the participants in the transaction must have successfully completed the prototype project.
    - The agency awarded a contract to migrate six applications, with an option to migrate an additional six, that was subsequently modified to include enclave migration.
    - GAO pointed to the incomplete enclave migration as evidence that the prototype had not been determined successful at the time the P-OTA was awarded.



# GAO OT Bid Protests



- Rule described in *Spartan Medical* B-419503 (Feb. 26, 2021)

*In circumstances where an agency has statutory authorization to enter into “contracts . . . [or] other transactions,” we have concluded that agreements issued by the agency under its “other transaction” authority “are not procurement contracts,” and **therefore we generally do not review protests of the award or solicitations for the award of these agreements under our bid protest jurisdiction.***

*The only **exception to this general rule** pertains to situations where an agency is exercising its OTA authority, and the protester files a timely, pre-closing date **protest alleging that the agency is improperly exercising that authority.** [citations omitted]*



## SUMMARY



- ✓ GAO not the most likely forum for a bid protest of an OT
- ✓ Timeliness rules apply in the same manner to OT bid protests as they do to FAR-based contract awards
- ✓ GAO will exercise jurisdiction for an argument that an agency has inappropriately used its OT statutory authority

# Federal Court Jurisdiction over OT Bid Protests

- The Department of Justice (not the agency attorney) represents the Government before the U.S. Court of Federal Claims and/or a U.S. District Court
- No limitation on time to issue a decision comparable to GAO's statutory 100 days
- The record for review enables the protest to access a broader scope of documents that the contract file GAO reviews
- There is no automatic stay
  - DOJ may voluntarily agree to stay the award pending the outcome of the litigation
  - Potential for protester to file a motion for preliminary injunction



# Federal Court Jurisdiction over OT Bid Protests

- A court must have “jurisdiction” to hear a case – meaning, it must have the authority to hear a case
- Federal courts are courts of limited jurisdiction, that is, they only possess the power to hear cases authorized by the Constitution or statute
- In addition, the U.S. Government has sovereign immunity, which means it cannot be sued without its consent





# Federal Court Jurisdiction over OT Bid Protests

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- Two paths to sue U.S. Government
  - (1) Suit under the Administrative Procedure Act in a U.S. District Court for claims that are not for money damages, do not seek relief expressly or impliedly forbidden by another statute, and for which no adequate remedy is otherwise available.
    - The U.S. District Court for the District of Arizona found in *MD Helicopters, Inc. v. United States*, 435 F. Supp. 3d 1003 (D. Ariz. 2020) that it lacked jurisdiction because the specific OT before it was a contract governed by the Tucker Act

# Federal Court Jurisdiction over OT Bid Protests



## (2) Tucker Act Bid Protest Jurisdiction

28 U.S.C. § 1491(b)(1):

..an 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.



# Federal Court Jurisdiction over OT Bid Protests



“In connection with a procurement” is broadly defined. See, for example *Distributed Solutions v. U.S.*, 539 F.3d 1340 (Fed. Cir. 2008)

- Pre-solicitation decisions
- CICA stay overrides
- Pre- and Post- Award
- Corrective Action

# Federal Court Jurisdiction over OT Bid Protests



## COFC

- Article 1 Court
- One judge – no juries and only civil cases
  - Each judge is an “island”
- Defendant = “United States”
  - Representative = DOJ (very few delegations)
  - DOJ & agency work as a defense team
- Agreements officer loses settlement authority and the authority to issue new decisions concerning matter in litigation



# Conclusion

## GAO

- Generally will dismiss an OT bid protest unless an allegation that the agency improperly used its authority

## COFC

- Consider whether OT satisfies requirement of “in connection with a procurement” and satisfies the Tucker Act
- But every judge is an “island”, decisions aren’t binding on other COFC judges

## District Court

- May have jurisdiction if APA standard met and the OT is not a procurement contract



## Reference Slide: GAO OT Bid Protest Decisions



- *MD Helicopters*, B- 417379 (Apr. 4, 2019) Protest of the agency's evaluation of proposals for the award of other transaction agreements pursuant to the authority of 10 U.S.C. § 2371b is dismissed because our Office generally does not review protests of awards, or solicitations for awards, of other transaction agreements
- *ACI Technologies, Inc.*, B- 417011 (Jan. 17, 2019) Agency successfully defended challenge that the solicitation anticipates performance of work that is not related to prototype projects and is therefore outside the agency's statutory authority for OTAs.
- *MacAulay–Brown, Inc.*, B- 417205 (Mar. 27, 2019) Protest of solicitation to award FAR-based OT follow-on production award.
- *Blade Strategies, LLC*, B- 416752 (Sept. 24, 2018) GAO dismissed protest as untimely where filed after due date for receipt of OT proposals.