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Other transaction agreements: Where does an unsuccessful bidder go?

Recent federal district court decision highlights the complexity of jurisdictional issues in challenging government awards of other transaction agreements

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Growth of other transaction agreements

A recent decision by the U.S. District Court for the District of Arizona highlights the complexity of jurisdictional issues faced by unsuccessful offerors that challenge government awards of "other transaction" (OT) agreements. Over the past few years, OT agreements have grown significantly in popularity due to their immunity from the regulatory provisions that typically govern government procurement contracts, including those that address intellectual property rights, cost accounting, and other key terms. By some reports, Department of Defense (DoD) spending on OT agreements has grown from US$2.3 billion in Fiscal Year (FY) 2017 to, by some accounts, more than US$7 billion in FY 2019. It is no wonder that companies not selected for an OT agreement have at times attempted to challenge their exclusion in various judicial fora.

New ruling that federal district court lacked jurisdiction over challenge to OT agreement (after GAO said it, too, lacked jurisdiction)

Recently, the U.S. District Court for the District of Arizona dismissed, for lack of jurisdiction, an Administrative Procedure Act (APA) action brought by MD Helicopters, Inc. (MDHI) challenging the U.S. Army's decision not to award MDHI an OT agreement for participation in Phase 1 of the Future Attack Reconnaissance Aircraft Competitive Prototype (FARA CP) Program. *MD Helicopters Inc. v. United States*, No. CV-19-02236-PHX-JAT, 2020 WL 516469 (D. Ariz. Jan. 24, 2020). MDHI argued that the Army's evaluation of MDHI's proposal was arbitrary and capricious and sought an order compelling the Army to either reevaluate MDHI's proposal or advance MDHI's proposal to Phase 1 of the Program (i.e., to enter into an OT agreement with MDHI). Before bringing its claim before the District Court, MDHI had filed a bid protest with the Government Accountability Office (GAO), which GAO dismissed for lack of jurisdiction, noting that it was not authorized to review OT protests (except for the limited purpose of considering whether an agency has improperly exercised its OT authority to procure goods or services).

The District Court held that it did not have jurisdiction over MDHI's protest for two reasons. First, the court determined that the Tucker Act implicitly barred MDHI's claim for injunctive relief (i.e., for an order directing the Army to advance MDHI to Phase 1 of the FARA CP Program) because MDHI's claim was based in contract. The court acknowledged that OTs are defined by

statute as transactions that are "other than contracts." 10 U.S.C. § 2371(a). But citing DoD guidance and a Congressional Research Service publication for support, the court concluded that the word "contracts," in that statute, means "procurement contracts" – thus, OTs may in fact be "contracts," if not "procurement contracts." (The court expressly declined to determine whether ***all*** OTs are contracts.) Rejecting MDHI's argument that its claim was not based on the Tucker Act or any express or implied contract with the Government, the court noted that, pursuant to the Army's solicitation, an entity had to receive an OT agreement in order to be included in Phase 1 of the Program. The court then examined the terms of the OT agreement at issue (which was included as an attachment to the Army's solicitation) and held that it contained all the features of a contract. Thus, the court found that by asking the court to direct the Army to include it in Phase 1, MDHI was really asking the court to "force the Army to award [MDHI] a contract" and to obtain the benefits flowing from that contract. Given that MDHI's source of rights stemmed from this potential contract with the Army, and that the Ninth Circuit has held that "potential contracts" fall within the scope of the Tucker Act, the court held that MDHI's request fell squarely within the preclusive reach of the Tucker Act and that the court therefore did not have jurisdiction to grant MDHI injunctive relief.

Second, the District Court held that it lacked jurisdiction because the Army's solicitation process for the FARA CP Program was connected to a procurement, such that pursuant to the Administrative Dispute Resolution Act of 1996 (ADRA) (28 U.S.C. § 1491(b)(1)), the court did not have jurisdiction. In this regard, the court noted that ADRA once provided COFC and the district courts with concurrent jurisdiction over challenges "in connection with a procurement or a proposed procurement." But the district courts' jurisdiction over such claims expired on January 1, 2001, pursuant to ADRA's sunset provision. Thus, today, COFC alone has jurisdiction over these protests. In finding the ADRA's sunset provision deprived the District Court of jurisdiction to hear MDHI's challenge, the court leaned heavily on the Court of Federal Claims' (COFC) analysis in a recent decision reviewing COFC's own jurisdiction over OT-related bid protests, *Space Exploration Technologies Corp. v. United States*, 144 Fed. Cl. 433 (2019) (*SpaceX*). In that case, the protester argued COFC had jurisdiction over its protest challenging an OT award because the protest was sufficiently related to a procurement action to fall within COFC's § 1491(b)(1) protest jurisdiction. COFC disagreed, holding that the particular facts regarding the solicitation and competition were too far removed from a procurement action to provide COFC with jurisdiction; however, COFC transferred the case to a district court.

Applying *SpaceX*'s reasoning, the District Court concluded that, unlike the situation COFC faced in SpaceX, MDHI's challenge to the Army's OT agreement related directly enough to an eventual procurement that it was "in connection with a procurement" and therefore subject to COFC's exclusive jurisdiction under § 1491(b)(1). The court based its conclusion (and distinguished the outcome from that in SpaceX) on a number of factors, including that a competitor's exclusion from any phase of the FARA CP Program meant that it would also be excluded from any eventual procurement and that the FARA CP Program did not involve two distinct solicitations (instead, it contemplated award of a future follow-on contract without the use of competitive procedures). The court concluded that it lacked jurisdiction because ADRA's "applicability does not depend on the present existence of an actual procurement contract so long as the challenged action bears a sufficient connection to a procurement" and "the Army's decision to issue the Solicitation, to reject [MDHI's] Proposal, and to award OTs to other [competitors], all took place within the procurement process." Notably, in reaching this conclusion, the District Court disagreed with the Army, which had argued that ADRA did not preclude the court's jurisdiction because MDHI's claim did not challenge a procurement contract. MDHI has until March 24, 2020 to file notice of an appeal of the dismissal.

What this means for government contractors

The District Court's decision highlights the complexity surrounding contractors' potential avenues of relief in challenging agencies' OT award decisions. There is no real question that GAO lacks jurisdiction to hear substantive challenges to evaluations and award decisions associated with OTs and will only entertain protests alleging that an agency improperly bypassed procurement procedures in opting to exercise its OT authority. And, after *SpaceX* and *MD Helicopters*, there is now considerable difficulty in ascertaining with certainty when jurisdiction lies in COFC or the district courts. *SpaceX* had left open the possibility that, given the "right" set of facts, an OT award could be sufficiently connected to a procurement such that COFC would entertain a protest. But there is no guarantee that all COFC judges would adopt the *SpaceX* court's analytical framework or agree with the notion that OT awards may, in some cases, fall within COFC's protest jurisdiction under § 1491(b)(1). And although the *MD Helicopters* court's decision is not binding in other district courts, in finding that OT agreements may be "contracts" at least under some circumstances, the *MD Helicopters* court has opened the door to denying contractors APA-based relief at the district court level, while at the same time finding that OTs can be too akin to a procurement to allow the district courts' review of the agreement as a "non-procurement contract." Until a clear rule is adopted uniformly in this developing area (whether congressionally or by the appellate courts), a disappointed OT competitor faces the less-than-ideal prospect of trying to predict whether its particular challenge relates sufficiently to a procurement such that COFC ***might*** find it has jurisdiction or whether, should the company file its challenge at a district court, its claim might be dismissed outright as "contractually based" or too "connected" to a procurement.

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