1011 Arlington Boulevard
Suite 375
Arlington, Virginia 22209

Telephone: 202.342.2550
Facsimile: 202.342.6147
cordatislaw.com

John J. O'Brien
Direct Number: 202.298.5640
jobrien@cordatislaw.com

CORDATIS LLP™
ATTORNEYS AT LAW

Bid Protests Challenging "Other Transaction Agreement" Procurements.

By: John O'Brien
jobrien@cordatislaw.com
(202) 342-2550

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On May 31, 2018, GAO, for the first time, sustained a bid protest in connection with an "Other Transaction Agreement" ("OTA"). *See Oracle America, Inc*. B-416061, May 31, 2018, 2018 CPD ¶ ___. GAO previously dismissed a bid protest challenging OTA awards in *Exploration Partners, LLC*, B-298804, Dec. 19, 2006, 2006 CPD ¶ 201 and denied bid protests challenging the terms of solicitations for OTAs in *MorphoTrust USA, LLC*, B-412711, May 16, 2016, 2016 CPD ¶ 133 and *Rocketplane Kistler*, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22. In the latter two protests, the protesters argued, among other things, that the services must be procured using a procurement contract rather than an OTA. To understand GAO's rulings in these bid protests, an understanding of OTAs is helpful.

Other Transaction Agreements

Currently there are 11 agencies with "other transaction" authority. They are: NASA, the Departments of Defense ("DoD"), Energy, Health and Human Services, Homeland Security, and Transportation, the Federal Aviation Administration, TSA, the Domestic Nuclear Detection Office, the National Institute of Health, and the Advanced Research Projects Agency–Energy. *See* GAO, *Transportation Security Administration: After Oversight Lapses, Compliance with Policy Governing Special Authority Has Been Strengthened*, GAO-18-172 (December 2017) at 5, n.7. The Congressional Research Service has noted that "[t]here is no statutory or regulatory definition of 'other transaction,' though, in practice, it is defined in the negative: an ['other transaction'] is not a [procurement] contract, grant, or cooperative agreement." *See MorphoTrust USA, supra* at 6-7, n.11. Similarly, GAO has described an OTA as:

> a special type of legal instrument used for various purposes by federal agencies that have been granted statutory authority to use "other transactions." GAO's audit reports to the Congress have repeatedly reported that "other transactions" are "other than contracts, grants, or cooperative agreements that generally are not subject to federal laws and regulations applicable to procurement contracts."

Id. at 6.

The types of transactions that can be facilitated using an OTA are governed by the particular enabling statutes, which provide the specific agency the authority to enter into OTAs. For example, GAO has noted that NASA was given "broad authority" to use OTAs. *Exploration Partners*, *supra* at 4. NASA's authority to enter into "other transactions" provides that the agency may:

> 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, with any agency or instrumentality of the United States, or with any State, territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution. To the maximum extent practicable and consistent with the accomplishment of the purpose of this chapter, such contracts, leases, agreements, and other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration.

51 U.S.C. § 20113(e).[1]

Other agencies' authority to enter into OTAs is more limited.

> Most agencies have limitations on their other transaction authorities, although the extent and type of limitations or requirements laid out in the agencies' statutory authorities vary. Seven agencies' authorities include specific limitations or requirements, such as limitations on the types of projects and research for which the other transaction authority may be used. For example, DOT's statutory authority limits the agency's use of other transaction agreements to three types of RD&D projects that focus on public transportation. DOD's statutory authority also lays out several requirements that must be met for RD&D and prototype projects carried out under other transaction agreements. Specifically, to use an other transaction agreement for a RD&D project, entities must, to the extent DOD determines practicable, fund half of the project, and the research being conducted must not duplicate any other ongoing DOD research. The statute also states that DOD can only use other transaction agreements for RD&D

[1] NASA's authority to enter into "other transactions" was previously codified at 42 U.S.C. § 2473(c)(5).

> when traditional contracts, grants, and cooperative agreements are not feasible or appropriate. To use an other transaction agreement for a prototype project, DOD's statute originally required that the project must be directly relevant to weapons or weapon systems. It also generally requires significant participation of a nontraditional contractor for prototype projects and states that if this requirement cannot be met, then an entity other than the federal government must fund at least one-third of a project's total costs, or agency officials must document that exceptional circumstances justify the use of an other transaction agreement and that use of a contract is not feasible or appropriate. In contrast, the statutory authorities for four agencies—NASA, ARPA-E, FAA, and TSA—do not include limitations or requirements specifying the types of projects or research that may be the subject of the agencies' other transaction agreements.

GAO, *Federal Acquisitions: Use of 'Other Transaction' Agreements Limited and Mostly for Research and Development Activities*, GAO-16-2009 (January 2016) at 9-10 (footnotes omitted).

***Oracle America, Inc*. B-416061**

In *Oracle America, Inc*., the protester challenged the Army's decision to enter into a follow-on production OTA ("P-OTA") with REAN Cloud LLC ("REAN") for cloud migration and cloud operation services. The protester, Oracle, argued that by entering into the P-OTA, the Army did not properly exercise the authority granted to it under its enabling statute. However, prior to reaching the merits of the bid protest, GAO first had to determine whether it had jurisdiction and whether Oracle was an interested party for proceeding with the bid protest.

The agency argued that Oracle was not an interested party to challenge the agency's use of its other transaction authority and therefore the bid protest should be dismissed. GAO denied the motion. GAO first determined that it had jurisdiction to hear the bid protest, stating as follows:

> Under the Competition in Contracting Act of 1984 (CICA) and our Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such awards. 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. We will review, however, a timely protest that an agency is improperly using its other transaction authority. . . . In this regard, our Office will review only whether the agency's use of its discretionary authority was proper, *i.e.*, knowing and authorized. Because Oracle argues that the Army did not appropriately use its authority under 10 U.S.C. § 2371b to award the P-OTA to REAN, we conclude that our Office has jurisdiction to review this limited protest issue.

Oracle America, Inc., *supra* at 11 (citations omitted).

GAO next determined that Oracle was an interested party for the purposes of challenging the P-OTA. GAO held that, even though Oracle had not participated in the original OTA process and therefore could not compete for the follow-on P-OTA, "[w]here, as here, a protest involves an award which is allegedly defective because it was not made with appropriate authority, a protester's economic interest in a competed solicitation if the protest is sustained is sufficient for it to be considered an interested party even if the protester has not competed under the allegedly defective solicitation." *Id*. at 13.

On the merits, the issue before GAO was whether the agency properly proceeded with the P-OTA, pursuant to the authority it was granted under its enabling statute. As noted above, DoD's authority to enter into OTAs and P-OTAs is limited. The agency's ability to enter into P-OTAs is governed by 10 U.S.C. § 2371b(f), which provides as follows:

> (f) Follow-on Production Contracts or Transactions.—
>
> (1) A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction. A transaction includes all individual prototype subprojects awarded under the transaction to a consortium of United States industry and academic institutions.
>
> (2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of section 2304 of this title, if—
>
> (A) competitive procedures were used for the selection of parties for participation in the transaction; and

> (B) the participants in the transaction successfully completed the prototype project provided for in the transaction.
>
> (3) Contracts and transactions entered into pursuant to this subsection may be awarded using the authority in subsection (a), under the authority of chapter 137 of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

10 U.S.C. § 2371b(f).

In its bid protest, Oracle argued that the Army lacked the authority to award a follow-on P-OTA because the prototype OTA did not provide for a follow-on P-OTA, as required by subsection (f)(1) above. Oracle also protested that the P-OTA award was improper because the prototype project is not complete, which it claimed was a prerequisite to award under subsection (f)(2)(B).

The Army acknowledged that the prototype OTA did not in any way "provide for" a follow-on P-OTA. However, the agency argued that the solicitation for the OTA referenced a possible follow-on P-OTA and that that reference satisfied the statutory requirement to "provide for" a P-OTA. GAO disagreed, stating:

> This position, however, fails to consider that such award is only permitted if there is a provision for follow-on production included in "[a] transaction entered into under this section." 10 U.S.C. § 2371b(f)(1). In this regard, the CSO (and for that matter, the AOI) cannot be a "transaction [that is] entered into," because it is a standalone announcement. *Id.* The "transaction" is the legal instrument itself, and not the solicitation documents.
>
> * * *
>
> Thus, because the plain and unambiguous meaning of the statute provides that the Army only has the authority to award a follow-on P-OTA if it was provided for in the prototype OTA, and because the prototype OTA here included no provision for a follow-on P-OTA, we conclude that the Army lacked the statutory authority to award the P-OTA and sustain the protest on this basis.

Oracle America, Inc., *supra* at 17.

The agency also sustained the bid protest on the ground that the prototype project was not complete, which, under the statute, is a prerequisite to award of the P-OTA. In this respect, the OTA had been modified to include "enclave migration" into the proto-type effort, which was not completed at the time the Army approved the award of the P-OTA. "The Army acknowledge[d] that the enclave work is not complete, but contends that its award of the P-OTA was nevertheless in compliance with the statute because REAN had completed those 'parts of the prototype' project that were included in the P-OTA." *Id*. at 18. GAO rejected the Army's position:

> The Army argues, on one hand, that the enclaves were properly added to the prototype OTA as an in-scope modification, and that the prototype OTA has not expired. On the other hand, the Army asserts that the prototype project has been completed. These inconsistent positions are not persuasive, because it is unreasonable to simultaneously conclude that the modifications were effective to change the scope of work and extend the period of performance, but did not form part of the prototype effort. We agree with the Army that the prototype OTA was modified to include enclave migration. As a result, enclave migration now forms part of the prototype project. It is undisputed that this work is not complete. As a prerequisite to award of a P-OTA, the statute requires successful completion of "the prototype project provided for in the transaction." 10 U.S.C. § 2371b(a). Because the prototype project provided for in the transaction has not been successfully completed, we conclude that the Army did not comply with the statutory requirements in awarding the P-OTA, and we sustain the protest.

Id. at 19 (citations to record omitted).

Conclusion

OTAs are attractive contract vehicles for use by agencies that have been granted other transaction authority, both because of the flexibility they provide and the fact that they generally are not subject to federal procurement laws and regulations, such as the Federal Acquisition Regulation, which is applicable to procurement contracts. Additionally, at least with respect to protests at GAO, the grounds upon which an OTA may be challenged are limited. GAO will consider a timely protest that an agency is improperly using its other transaction authority. For example, GAO will consider whether the subject of the OTA is within the agency's grant of authority as stated in the applicable enabling statute. Typically, such a challenge would be to the terms of the OTA solicitation and would have to be brought prior to the time that OTA proposals are required to be submitted. 4 C.F.R. § 21.2(a)(1). However, protests beyond this limited issue are likely to be dismissed by GAO. *See Exploration Partners, supra* where GAO dismissed a protest concerning the selection of the OTA's recipients rather than the propriety of the OTA's

use. While such a case could not be brought at GAO, there is at least the potential that, in a proper case, such a challenge could be brought before a United States District Court. In *Orbital ATK, Inc. v. Walker*, Slip Opinion (2017 WL 2982010), based on the particular facts of that case, a challenge to an OTA was dismissed by the court for lack of subject matter jurisdiction. However, the court did not preclude the possibility that, in a proper case, the court could consider a challenge to the award of an OTA. Given the increasing use of OTAs by federal agencies, we may not have to wait long before another such challenge is made.