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ALERT

OTAs Out at COFC: No Tucker Act Jurisdiction Over Post-Award OTA Protest

September 3, 2019

WHAT: In *Space Exploration Technologies Corporation v. United States*, 19-742C, the United States Court of Federal Claims (COFC) found that COFC lacks subject matter jurisdiction over a protest of the Air Force's evaluation and award of Other Transactions Agreements (OTAs) for launch services. Because the OTAs are not procurement contracts and there was insufficient connection between the OTAs and the Air Force's plan to award a related procurement contract in the future, COFC found no jurisdiction under the Tucker Act. COFC transferred the protest to the United States District Court for the Central District of California, where, presumably, the district court may exercise *Scanwell* jurisdiction to adjudicate the protest.

WHEN: August 2019.

WHAT DOES IT MEAN FOR INDUSTRY: This decision limits industry's ability to challenge OTA awards. Although a different COFC judge could find jurisdiction in another case, the decision likely means that industry must bring any OTA award protest in Federal district court.

The Tucker Act supplies COFC with jurisdiction to adjudicate protests brought 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." 28 U.S.C. § 1491(b)(1). Although the Tucker Act is concerned exclusively with procurement solicitations and contracts, courts have interpreted the phrase "in connection with a procurement or proposed procurement" broadly because Congress intended for COFC to hear procurement protests. *Id.* But, as this case

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demonstrates, there are limits to COFC's jurisdiction under the Tucker Act.

Congress authorized the Department of Defense (DOD) to use OTAs under certain conditions to carry out prototype projects that enhance or improve the mission effectiveness of military platforms. See 10 U.S.C. 2731b. Congress explicitly stated that OTAs are not procurement contracts, cooperative agreements, or grants. *See id.* at § 2371(a).

Here, the Air Force issued a solicitation to award OTAs to fund the development of space launch vehicles as part of its multi-phase strategy to effect the National Security Space Launch program. Although the Air Force will fund the development of prototypes through these OTAs, it will not buy the prototypes or any services related to the prototypes. Instead, the next step in the Air Force's multi-phase strategy is to issue a separate solicitation, with full and open competition, to procure launch vehicles through a procurement contract (Phase 2).

The Air Force awarded three OTAs. It did not award an OTA to SpaceX. After the Air Force denied SpaceX's "objection" to the awards that SpaceX filed directly with the Air Force, Space X filed a bid protest at COFC.

The Government moved to dismiss, arguing that the Tucker Act did not supply COFC with jurisdiction to hear a protest arising under an OTA. All parties agreed that OTAs are not procurement contracts. The only issue remaining was whether these OTAs were "in connection with" the Phase 2 procurement, such that COFC had jurisdiction. SpaceX argued they were because the OTAs were just one step in the Air Force's multi-stage procurement process, and the Air Force could later buy the launch vehicle prototypes its competitors develop using OTA funds.

Although it considered the issue a close call, COFC disagreed with SpaceX. COFC found important differences between the OTA and Phase 2 procurement. The OTA and Phase 2 procurement, for example, had different goals and acquisition strategies. Importantly, the Agency planned to issue different solicitations for the OTA and Phase 2 procurements. COFC explained that even though SpaceX might be at a disadvantage in the Phase 2 procurement because of its failure to secure prototype development funding through the OTA, the appropriate time for SpaceX to challenge this alleged disadvantage would be at the Phase 2 solicitation stage. Because COFC found that the OTA was not a procurement contract and the OTAs were not issued "in connection with" the Phase 2 procurement, it had no jurisdiction to hear the protest.

COFC did find, however, that SpaceX was entitled to have its day in court—just in a much different court. COFC granted SpaceX's request in the alternative to transfer the matter to the District Court for the Central District of California under 28 U.S.C. § 1631, Transfer to Cure Want of Jurisdiction. (The Government did "not take a position on SpaceX's request"). Although COFC did not opine on whether the Central District of California would have subject matter jurisdiction to hear what COFC identified as "non-frivolous claims in this matter that the Air Force's evaluation and portfolio award decisions were unreasonable and in violation of federal law," it is likely that the District Court can hear the protest under *Scanwell* jurisdiction. *See Scanwell Laboratories, Inc.*

v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) (finding that district courts had concurrent jurisdiction with COFC to hear pre- and post-award protests under the Administrative Procedure Act; Congress eliminated district court *Scanwell* jurisdiction over procurement contracts effective January 2001 with the Administrative Dispute Resolution Act). Indeed, *MD Helicopters Inc. v. United States of America*, 19-cv-2236, a protest of the Army's Future Attack Reconnaissance Air Craft Competitive Prototype OTAs, is currently pending in the United States District Court for the District of Arizona. The Government in that protest has specifically advised the court that because the OTA is not a procurement contract, there is no statutory bar to *Scanwell* jurisdiction.