

COURT OF FEDERAL CLAIMS HAS JURISDICTION OVER PROTESTS IN OTHER TRANSACTION AGREEMENTS (“OTA”)

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There may have been some doubt about whether the Court of Federal Claims (“CFC”) has bid protest jurisdiction over Other Transaction Agreement, which are non-FAR contracts, but the Court recently held that it had jurisdiction under the Tucker Act. *Hydraulics Int’l, Inc. v. United States*, No. 22-364 (Fed. Cl. Aug. 8, 2022). The case was a post-award bid protest of an OTA for Aviation Group Power Units (“AGPU”) used to service military helicopters. Hydraulics asserted that the Army had miscalculated, and waived or relaxed a solicitation requirement. The Army moved to dismiss for lack of subject matter jurisdiction, asserting that the OTA is not “in connection with a procurement or a proposed procurement” as required under 28 USC §1491(b)(1). Hydraulics asserted the CFC had jurisdiction under the Tucker Act because the OTA is “in connection with a procurement.

History of DOD OTA

The court noted that after the Soviet Union successfully launched Sputnik, Congress responded with the Space Act of 1958 and the creation of the National Aeronautics and Space Administration (“NASA”). To allow NASA to move quickly and avoid the slowness of the federal acquisition process, NASA was given broad authority “to enter into and perform such contracts, leases cooperative agreements or *other transactions as may be necessary*” to carry out its mission. Nat’l Aero. and Space Act of 1958, Pub L. No. 85-568, Sec. 203(5) (1958). Based on the success of the NASA model, Congress extended the OTA authority to other agencies, including DOD, in 10 USC §§ 4021-22, giving authority to use OTAs in order to enhance mission effectiveness. These sections are silent on the Tucker Act bid protest judicial review by the CFC.

The Test

The test, according to the CFC, is whether the OTA’s are “in connection with a procurement or proposed procurement.” If connected, CFC has jurisdiction. The Court noted that the Tucker Act does not define procurement or “proposed procurement.” The statute says that “procurement includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.” 41 USC § 111. An actual procurement isn’t necessary—only a procurement process. The Court held that the “Request for Whitepapers” in this case was in connection with a procurement, specifically a proposed procurement. It held that the OTAs here initiated the process for determining a need for acquisition and were in connection with that process because they might result in the exclusion of the plaintiff for consideration of a follow-on procurement. Therefore, the court held it had subject matter jurisdiction and denied the Government motion to dismiss.

The Court went on to deny Hydraulics’ protest, after applying the usual court tests.

Takeaway. The statute creating OTAs is silent on CFC jurisdiction, and the government's argument was based on its reading of the statute. There is no express position of law or a statement of Congress prohibiting Tucker Act jurisdiction over OTAs. OTA's exemption from the FAR doesn't necessitate exemption from the Tucker Act. Pre-procurement decisions are covered by the Tucker Act—such as here, where the OTA initiated the process for determining the need for an acquisition, and was in connection with that process because they could result in exclusion of a plaintiff for consideration of a follow-on production contract.

However, the final word on OTA's may likely be determined by the Federal Circuit, if the Government appeals this case.

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