

A CAREFUL BALANCE: CREATING JURISDICTION  
WITHOUT HINDERING THE EFFECTIVENESS OF  
OTHER TRANSACTION AGREEMENTS

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## A CAREFUL BALANCE: CREATING JURISDICTION WITHOUT HINDERING THE EFFECTIVENESS OF OTHER TRANSACTION AGREEMENTS

### INTRODUCTION

When the United States Government seeks to obtain property or services or transfer something of value to another party, the government will generally use the traditional federal acquisition process to award a procurement contract,<sup>1</sup> grant agreement,<sup>2</sup> or cooperative agreement,<sup>3</sup> subject to federal acquisition statutes and regulations. For example, in the midst of the COVID-19 pandemic, the U.S. Government issued a solicitation seeking to procure various medical supplies from commercial companies: diagnostic equipment such as sample collection tubes and swab kits; disinfectants such as bleach, soap, and sanitizer; medical equipment such as respirators; and personal protective equipment such as face shields, gowns, and face masks.<sup>4</sup> The solicitation was prepared under the Federal Acquisition Regulation (FAR), and any contracts awarded to procure these supplies are subject to a complicated web of FAR clauses and provisions that these commercial companies will need to abide by in performance.<sup>5</sup>

However, the government has authority in certain types of procurements to use Other Transaction Agreements (OTAs) in place of the traditional acquisition instruments.<sup>6</sup> An OTA is “not required to comply with the Federal Acquisition Regulation (FAR) and its supplements” nor is an OTA subject to other typical procurement statutes and regulations.<sup>7</sup> Thus, the government-contract-specific jurisdictional grants and protest procedures, which are delineated in procurement laws and regulations, do not provide clear guidance related to OTAs.

This Note seeks to evaluate recent decisions at the Government Accountability Office (GAO) and the U.S. Court of Federal Claims (COFC) in which the contours of each forum’s jurisdiction to hear OTA protests were developed. The Note will begin with a brief overview of OTAs as an alternative

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1. 31 U.S.C. § 6303 (2018).

2. 31 U.S.C. § 6304 (2018).

3. 31 U.S.C. § 6305 (2018).

4. *COVID-19 PPE and Medical Supplies*, BETA.SAM.GOV (Mar. 26, 2020, 5:18 PM), <https://beta.sam.gov/opp/3e05e664e606486ca34d1a41b47ff0ff/view>.

5. *Id.*

6. *See* 10 U.S.C. §§ 2371, 2371b (2018); OFF. OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION & SUSTAINMENT, OTHER TRANSACTIONS GUIDE 5 (2018) [hereinafter OT GUIDE]; Nathaniel E. Castellano, “Other Transactions” Are Government Contracts, and Why It Matters, 48 PUB. CONT. L.J. 485, 488 (2019).

7. 32 C.F.R. § 3.2 (2019).

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mode of contracting with the government, as well as a review of the types of protests which may be filed.<sup>8</sup> Next, the Note will analyze the forums in which a party may file an OTA protest and will discuss the current state of the law with respect to each forum, including recent decisions and their impact on the protest process. Lastly, the Note will review the impact of these recent decisions on the purpose and use of OTAs and will make a case for a clear congressional grant of jurisdiction to the GAO and the COFC to hear OTA protests.

## I. OVERVIEW OF OTHER TRANSACTION AGREEMENTS

### A. Definition, Purpose, and Governing Statutes

Unlike other types of federal procurement instruments, an OTA is not defined in positive terms in a statute or regulation.<sup>9</sup> “OTAs are generally defined by what they are not.”<sup>10</sup> A common definition of OTAs states that they are “agreements that are not procurement contracts, cooperative agreements, or grants.”<sup>11</sup> The GAO employs a similar definition and adds that the laws and regulations which govern procurement contracts, grants, and cooperative agreements typically do not apply to OTAs.<sup>12</sup> In order to use an OTA, a federal agency must have been granted statutory authority by Congress.<sup>13</sup> While numerous agencies have received various degrees of authorization to use OTAs,<sup>14</sup> this analysis will specifically focus on the use of OTAs by the Department of Defense (DOD).

The purpose of an OTA is to provide the government with “the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments.”<sup>15</sup> Burdensome federal procurement regulations have historically deterred

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8. This article is limited in scope to OTAs awarded in the context of private parties and the U.S. Government. This article does not address OTAs awarded to companies through a consortium.

9. Nikole R. Snyder, *Jurisdiction Over Federal Procurement Disputes: The Puzzle of Other Transaction Agreements*, 48 PUB. CONT. L.J. 515, 519 (2019).

10. Annejanette Heckman Pickens & Daniel J. Alvarado, *Other Transaction Agreements: An Analysis of the Oracle Decision and Its Potential Impact on the Use of OTAs*, 54 PROCUREMENT LAW., no. 1, 2018, at 18.

11. *Space Expl. Techs. Corp. v. United States*, 144 Fed. Cl. 433, 435 (2019); see also 32 C.F.R. § 3.2; *MorphoTrust USA, LLC*, B-412711, 2016 CPD ¶ 133, at 4 (Comp. Gen. May 16, 2016); OT GUIDE, *supra* note 6, at 5; Castellano, *supra* note 6, at 487; John Krieger & Richard Fowler, *Determining Litigation Fora Under the FAR and Under Other Transaction Authority*, 19-11 BRIEFING PAPERS 1 (Oct. 2019); Pickens & Alvarado, *supra* note 10, at 18; Snyder, *supra* note 9, at 519–20; Armani Vadiée & Todd M. Garland, *The Federal Government’s “Other Transaction” Authority*, 18-5 BRIEFING PAPERS 1 (Apr. 2018); Stuart W. Turner & Nathaniel Castellano, *Other Transactions Authority (OTA): Protests and Disputes*, ARNOLD & PORTER (Jun. 28, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/06/other-transactions-authority-ota-protests>.

12. *Space Expl. Techs. Corp.*, 144 Fed. Cl. at 435; *MorphoTrust USA*, *supra* note 11, at 4.

13. Vadiée & Garland, *supra* note 11.

14. Krieger & Fowler, *supra* note 11.

15. OT GUIDE, *supra* note 6, at 4.

commercial companies from contracting with the government, but OTAs remove those barriers to contracting.<sup>16</sup> Thus, the use of OTAs is attractive to both traditional and nontraditional government contractors and allows the government to acquire the newest and most innovative technologies in a quicker and more cost-effective manner.<sup>17</sup>

The DOD may grant three different types of OTAs via two different statutory authorizations.<sup>18</sup> Under 10 U.S.C. § 2371, the DOD can grant research OTAs for “basic, applied, and advanced research projects.”<sup>19</sup> Research OTAs are intended to encourage both defense contractors and nontraditional defense contractors to work with the government on research and development of new innovations by removing regulatory requirements which would ordinarily deter companies from working with the government.<sup>20</sup> The DOD also has authority under 10 U.S.C. § 2371b to enter into prototype OTAs<sup>21</sup> and production OTAs.<sup>22</sup> A prototype OTA is to be granted for “prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials,” provided that the other statutory conditions have been met.<sup>23</sup> Competitive procedures are to be utilized in granting prototype OTAs whenever it is practical to do so.<sup>24</sup> Where a prototype OTA was awarded using competitive procedures and completed successfully and where the prototype OTA contained notice of a potential follow-on OTA award, the DOD may award “a follow-on production contract or transaction to the participants in the [prototype OTA] transaction” in the form of a production OTA.<sup>25</sup>

### B. *Types of OTA Protests*

In traditional federal government procurements, a contractor may challenge an agency’s decisions throughout the acquisition process.<sup>26</sup> A contractor may employ either a pre-award or a post-award bid protest, depending on which part of the procurement the contractor seeks to challenge.<sup>27</sup> “Pre-award bid protests challenge various aspects of the solicitation

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16. See Snyder, *supra* note 9, at 519; Vadiie & Garland, *supra* note 11.

17. OT GUIDE, *supra* note 6, at 4–5; Snyder, *supra* note 9, at 519; Vadiie & Garland, *supra* note 11.

18. OT GUIDE, *supra* note 6, at 7.

19. 10 U.S.C. § 2371 (2018).

20. OT GUIDE, *supra* note 6, at 7.

21. 10 U.S.C. § 2371b(a)(1).

22. § 2371b(f).

23. § 2371b(a)(1).

24. § 2371b(b)(2).

25. § 2371(b)(f); OT GUIDE, *supra* note 6, at 7.

26. Marcia G. Madsen & Luke Levasseur, *Bid Protests*, 14 BUS. & COM. LITIG. FED. CTS. § 142:7 (2020).

27. Marcia G. Madsen & Luke Levasseur, *Bid Protests—Pre-Award Challenges*, 14 BUS. & COM. LITIG. FED. CTS. § 142:9 (2020).

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procedures or bidding requirements set forth in the contracting agency's request for proposals."<sup>28</sup> A pre-award protest is only timely if filed before the due date for proposal submission.<sup>29</sup>

In contrast, a post-award bid protest is used to "challenge numerous types of errors that agencies can commit during the evaluation and award process."<sup>30</sup> Contractors can, in theory,<sup>31</sup> use the same types of protests to challenge an OTA grant by an agency. For example, a contractor may challenge an agency's decision to procure goods or services using an OTA instead of a traditional procurement instrument via a pre-award protest of the OTA.<sup>32</sup> A contractor can use a post-award OTA protest to challenge the method by which proposals were evaluated or to challenge the agency's award decision.<sup>33</sup> However, while the contracting agency, the GAO, and the Court of Federal Claims all have jurisdiction over bid protests in traditional procurements, the same jurisdictional rules do not apply to OTAs.<sup>34</sup>

## II. FORUMS FOR OTA PROTESTS

### A. Contracting Agency

The contracting agency is a forum that may be available for OTA protests, but that is not always the case.<sup>35</sup> An OTA protest at the contracting agency is only "possible if the agency chos[es] [sic] to include language in its solicitation describing the procedures."<sup>36</sup> An agency is not required to include such language.<sup>37</sup> Protests at the contracting agency are often resolved more quickly and at a lower cost than protests in other forums.<sup>38</sup> When an agency protest is received within the statutory time frame specified, an automatic stay takes effect and the agency cannot proceed with the award or performance absent an urgent and compelling justification, which means that a protestor generally has an opportunity to obtain meaningful relief via a new competition, a reevaluation

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28. *Id.*

29. *Id.*

30. Marcia G. Madsen & Luke Levasseur, *Bid Protests—Post-Award Challenges*, 14 BUS. & COM. LITIG. FED. CTS. § 142:10 (2020).

31. While pre-award and post-award OTA protests are theoretically possible, it is unclear whether a forum exists that has jurisdiction to hear such a protest if filed.

32. *See, e.g.*, MD Helicopters, Inc., B-417379, 2019 CPD ¶ 120 (Comp. Gen. Apr. 4, 2019).

33. *Id.*

34. Madsen & Levasseur, *Bid Protests*, *supra* note 26.

35. OT GUIDE, *supra* note 6, at 26.

36. *Id.*

37. *Id.*

38. *Id.*; CHARLES TIEFER & WILLIAM A. SHOOK, *GOVERNMENT CONTRACT LAW IN THE TWENTY-FIRST CENTURY* 601 (Carolina Acad. Press 2012).

of proposals, or a new award decision.<sup>39</sup> However, “the protest decision is made by an official of the agency alleged to have engaged in improper or illegal activity.”<sup>40</sup> In addition, the lack of discovery available makes it “difficult for the protestor to obtain the necessary government documents it may need to successfully pursue its protest.”<sup>41</sup> Thus, while an agency-level protest of an OTA may be available, it is not an option for a contractor in every case, and even where it is available, it may not be viable as an impartial forum for an OTA protest.

### B. *Government Accountability Office*

The GAO is an agency within the legislative branch of the U.S. Government.<sup>42</sup> The GAO has a division dedicated to procurement law whose purpose is to resolve federal government contract disputes such as bid protests.<sup>43</sup> The GAO has extensive regulations detailing protest procedures and requirements, which makes the GAO a “relatively informal, inexpensive, and quick forum for a protest.”<sup>44</sup> Similar to an agency-level protest, an automatic stay takes effect when a protest is timely, preserving options for meaningful relief if the protestor succeeds.<sup>45</sup> The GAO allows a modified form of discovery during the protest proceeding and a hearing is available if the case warrants it.<sup>46</sup> Further, the GAO is an independent agency that generally has no involvement in the procurement which is the subject of the protest.<sup>47</sup>

Statutes and regulations clearly establish GAO jurisdiction over certain types of bid protests.<sup>48</sup> It is well-established that the GAO has jurisdiction to “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.”<sup>49</sup> However, the GAO’s bid protest jurisdiction does not extend to all types of OTA protests.<sup>50</sup>

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39. TIEFER & SHOOK, *supra* note 38, at 601.

40. *Id.*

41. *Id.*

42. U.S. Gov’t Accountability Off., *About GAO*, GAO.GOV, <https://www.gao.gov/about> (last visited Feb. 3, 2021).

43. U.S. Gov’t Accountability Off., *Bid Protests*, GAO.GOV, <https://www.gao.gov/legal/bid-protests> (last visited Mar. 3, 2021).

44. TIEFER & SHOOK, *supra* note 38, at 601.

45. *Id.* at 604.

46. *Id.*

47. *See* U.S. Gov’t Accountability Off., *supra* note 42.

48. *See* 31 U.S.C. § 3552(a) (2018); 4 C.F.R. § 21.1(a) (2019).

49. MorphoTrust USA, *supra* note 11, at 7.

50. *See, e.g.*, Rocketplane Kistler, B-310741, 2008 CPD ¶ 22, at 3 (Comp. Gen. Jan. 28, 2008).

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In recent decisions, the GAO has made clear that it will only review certain types of OTA protests.<sup>51</sup> In *Matter of: MD Helicopters, Inc.*, a protest was filed by MD Helicopters at the GAO related to an OTA for the “development of a future attack reconnaissance aircraft competitive prototype.”<sup>52</sup> The protestor alleged that the contracting agency “unreasonably evaluated its proposal.”<sup>53</sup> The GAO dismissed the protest.<sup>54</sup> The GAO’s decision turned on the fact that OTAs are not procurement contracts.<sup>55</sup> The GAO held that, because an OTA is not a procurement contract, its bid protest jurisdiction does not apply, and it will “not review protests of the award or solicitations for the award of these agreements.”<sup>56</sup> “[W]ith respect to OTAs, [the GAO] will [only] review whether an agency has failed to comply with its statutory OTA authority, and therefore is improperly using an OTA to acquire goods or services in lieu of acquiring the goods or services using a procurement contract.”<sup>57</sup> Thus, MD Helicopters’s protest was dismissed because it “concern[ed] the agency’s evaluation of proposals and award decision, which are not within [the GAO’s] bid protest jurisdiction.”<sup>58</sup>

In *MD Helicopters*, the GAO made strong statements to clarify and reaffirm the types of OTA protests that it may review.<sup>59</sup> The holding in *MD Helicopters* comports with GAO regulations, which state that the “GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts . . . . GAO does, however, review protests alleging that an agency is improperly using a non-procurement instrument to procure goods or services.”<sup>60</sup> *MD Helicopters* is one of several recent GAO decisions in this vein, showing that the GAO has limited jurisdiction to review only particular types of OTA protests.<sup>61</sup>

### C. U.S. Court of Federal Claims

The COFC is authorized to hear bid protests via the Tucker Act, which states:

[The COFC has] jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a federal agency for bids or proposals for a

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51. MD Helicopters, *supra* note 32, at 5.

52. *Id.*

53. *Id.*

54. *Id.* at 2.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.* at 2–3.

60. 4 C.F.R. § 21.5(m) (2019).

61. *See, e.g.*, ACI Technologies, Inc., B-417011, 2019 CPD ¶ 24 (Comp. Gen. Jan. 17, 2019); Blade Strategies, LLC, B-416752, 2018 CPD ¶ 327 (Comp. Gen. Sept. 24, 2018).

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.<sup>62</sup>

The COFC has jurisdiction over both pre-award and post-award bid protests of this nature.<sup>63</sup>

The COFC “is the only federal judicial forum” currently available for bid protest disputes, although it is not necessarily available for OTA protests.<sup>64</sup> Because the COFC is a judicial forum, it is entirely independent of the procurement process and can be more favorable to the protestor.<sup>65</sup> Theoretically, protest procedures at the COFC provide for a broader form of discovery than is available at the GAO.<sup>66</sup> Additionally, “[a] protest may proceed to a trial or final hearing on the merits.”<sup>67</sup> However, a COFC protest is much more expensive and takes much longer to resolve than a protest in any other forum.<sup>68</sup> Importantly, an automatic stay is not available in a COFC protest, and if the protestor wishes the award or performance of the contract to be delayed while the protest is resolved, the protestor must seek a preliminary injunction.<sup>69</sup>

Until recently, the COFC had not addressed the scope of its jurisdiction over an OTA protest.<sup>70</sup> This changed in August 2019 when the court issued a decision in *Space Exploration Technologies Corp. v. United States (SpaceX)*. In *SpaceX*, the protestor filed a post-award protest of the OTA, challenging the agency’s “evaluation and portfolio award decisions for a request for proposals to provide space launch services for national security missions.”<sup>71</sup> The overarching procurement program was a multi-phase program spanning fourteen years.<sup>72</sup> One phase of the program was implemented by using OTAs to fund prototype development.<sup>73</sup> Another phase of the program involved a follow-on procurement of launch services after completion of the prototype development.<sup>74</sup> However, the follow-on phase of the procurement was in fact a separate FAR-based procurement using full and open competition, not a follow-on OTA award.<sup>75</sup> The government filed a motion to dismiss the protest,

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62. 28 U.S.C. § 1491(b)(1) (2018).

63. *Id.*

64. TIEFER & SHOOK, *supra* note 38, at 615–16.

65. *Id.* at 616.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Turner & Castellano, *supra* note 11.

71. *Space Expl. Techs. Corp. v. United States*, 144 Fed. Cl. 433, 434–35 (2019).

72. *Id.* at 436.

73. *Id.* at 437.

74. *Id.* at 437–38.

75. *Id.*



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arguing that the COFC lacked subject-matter jurisdiction over the protest.<sup>76</sup> As stated by the court: “[R]elief in bid protest matters pursuant to the Tucker Act is unavailable outside the context of a procurement or proposed procurement.”<sup>77</sup> Thus, the availability of the COFC as an OTA protest forum turned on whether the OTA was a procurement, a proposed procurement, or in connection with a procurement or proposed procurement.<sup>78</sup> The court held that it lacked jurisdiction under the Tucker Act to review this OTA protest.<sup>79</sup>

First, the court noted that, because the award at issue was an OTA, the dispute did not concern a “procurement solicitation or contract.”<sup>80</sup> A protest which does not “concern a procurement solicitation or contract [does not] fall within the boundaries of the Tucker Act.”<sup>81</sup> Therefore, at the outset, the “Court may not exercise its bid protest jurisdiction under the Tucker Act to consider a challenge to the [agency’s] evaluation and portfolio award decision[.]”<sup>82</sup> Next, the court considered whether the OTA in this case was “in connection with a procurement or proposed procurement,” even though the agreement itself was not a procurement contract.<sup>83</sup> Importantly, the court stated that “not every decision *related* to a procurement is ‘in connection with a procurement or proposed procurement’ as contemplated by the Tucker Act.”<sup>84</sup> The court found that the agreement at issue was not in connection with a later phase of the procurement program because each phase had its own solicitation,<sup>85</sup> involved different procurement strategies,<sup>86</sup> targeted specific goals,<sup>87</sup> and procured something different.<sup>88</sup> Thus, while the OTA was one phase in a multi-phase procurement, the COFC held that the OTA was separate and distinct, lacking connection to the rest of the procurement.<sup>89</sup> While the court clearly established that an OTA is not a procurement solicitation or contract subject to Tucker Act jurisdiction, the court left open the issue of whether an OTA could ever fall within Tucker Act jurisdiction as being “in connection with a procurement or proposed procurement.”<sup>90</sup>

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76. *Id.* at 438.

77. *Id.* at 439.

78. *Id.*

79. *Id.* at 441.

80. *Id.* at 442.

81. *Id.*

82. *Id.*

83. *Id.* at 441–43.

84. *Id.* at 443.

85. *Id.*

86. *Id.* at 443–44.

87. *Id.* at 444.

88. *Id.* at 444–45.

89. *Id.*

90. *Id.* at 442–43, 442 n.4.

In *SpaceX*, the COFC began to define the boundaries of its jurisdiction over OTA protests, but there remain ambiguities about whether the COFC will ever find jurisdiction in an OTA protest.<sup>91</sup> The court has set forth that an OTA, by itself, does not fall within the court's Tucker Act jurisdiction.<sup>92</sup> While the court did not foreclose the possibility that an OTA could be sufficiently related to a procurement to satisfy Tucker Act jurisdiction, the court did not provide any guidance as to what might constitute a sufficient relationship.<sup>93</sup> Thus, the COFC is not an available forum for a protest of a stand-alone OTA, and while, in theory, a contractor may be able to protest an OTA connected to a larger procurement, it remains to be seen whether this is a viable option in practice.<sup>94</sup>

### III. ANALYSIS OF THE IMPACTS OF RECENT OTA PROTEST CASES

An agency-level protest is not routinely available to protestors, and even if available, it may not be a viable option because a review of an agency's decision by an individual within that same agency will likely not result in a truly impartial review and decision.<sup>95</sup> Thus, a contractor wishing to protest an OTA has only two remaining viable options: to protest at the GAO or to protest at the COFC. However, recent decisions at the GAO<sup>96</sup> and the COFC<sup>97</sup> have shaped the contours of each forum's jurisdiction over OTA protests and have left government contractors with few, if any, viable options for challenging an agency's OTA award decisions.

After *MD Helicopters*, it is clear that the GAO will not review OTA protests with the exception of protests alleging that the agency violated its statutory authority to use an OTA and should have instead used a traditional procurement instrument.<sup>98</sup> If the agency is authorized to use an OTA, then a protestor cannot challenge the merits of an award—such as whether the successful bidder was the most technically capable, most cost-effective, or the overall best choice to further the agency's objectives—at the GAO.<sup>99</sup> Thus, the only remaining viable forum for such a protest would be the COFC.

While the *SpaceX* case did not fully define the extent of the COFC's jurisdiction over OTA protests, it did begin to shape the law and clear up some ambiguities. It is clear that, under the Tucker Act as currently written, the COFC has no jurisdiction to review any type of protest of a stand-alone

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91. *See id.* at 442 n.4.

92. *Id.*

93. *See id.*

94. *Id.* at 442.

95. *See* TIEFER & SHOOK, *supra* note 38, at 601.

96. *See, e.g.,* MD Helicopters, Inc., *supra* note 32.

97. *See Space Expl. Techs. Corp.*, 144 Fed. Cl. at 433.

98. *See* 4 C.F.R. § 21.5(m) (2019); MD Helicopters, Inc., *supra* note 32.

99. MD Helicopters, Inc., *supra* note 32.

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OTA.<sup>100</sup> An exception to the lack of jurisdiction might be present where a protestor can show that the OTA is in connection with a procurement.<sup>101</sup> However, without any clear indication of what might constitute a “connection” sufficient to establish jurisdiction, it is not possible to affirmatively conclude that the COFC is a viable forum at which a protestor can challenge an OTA award.

Due to the current lack of a forum in which the merits of an OTA can be protested, federal agencies have unfettered discretion to award OTAs<sup>102</sup> without an independent judicial or administrative check to ensure that there is no impropriety, illegality, or suppression of competition in the evaluation and award process.<sup>103</sup> The absence of a neutral body with jurisdiction to review award decisions can, and likely will, deter competition and prevent the potential of the OTA vehicle from being fully realized. Integrity in the procurement process, even if the process is nontraditional, as is the case for OTAs, is essential in order for the government to procure the best products and services for the best price possible. If the OTA award process is fraught with impropriety, competition will be diminished because companies will not waste resources competing for an OTA if the award will go to a company with a lesser product or service to offer but which has managed to simply curry favor with the awarding agency. Further, diminished competition tends to result in elevated prices. Suppression of competition and impropriety in the OTA evaluation and award process will allow prices to creep upward unnecessarily, wasting valuable taxpayer dollars.

Suppression of competition and improper evaluation and award of OTAs with no recourse in the form of a protest will lead to a result contrary to the entire purpose of the OTA contract vehicle: nontraditional contractors will not participate in federal government contracting, and the government will be unable to acquire the newest and most innovative technologies in an expedient and cost-effective manner. While the OTA process is intended to diminish the regulatory burdens of a traditional procurement and provide a more efficient and cost-effective way for the government to remain at the forefront of innovation, there still must be some process in place which acts as a check on agency discretion and prevents what will be an inevitable abuse of agency discretion in OTA awards.

The current dilemma faced in the world of OTAs is similar to the problems initially faced in indefinite-delivery, indefinite-quantity (IDIQ) contracting.

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100. *See Space Expl. Techs. Corp.*, 144 Fed. Cl. at 433.

101. *Id.*

102. Agencies possess this discretion subject to the condition that the agency must be properly using an OTA as the procurement vehicle.

103. *See TIEFER & SHOOK*, *supra* note 38, at 599. This unchecked discretion is exactly what the protest process is designed to prevent. The protest process is designed to ensure that, when an agency spends government funds, the process is fair, competitive, and beneficial to federal procurement as a whole.

IDIQ contracting involves a two-step process.<sup>104</sup> First, an overarching contract is awarded through competitive procedures for a general type of goods or services.<sup>105</sup> Then, as the agency's specific needs arise, the agency will award a delivery or task order via a simple and quick process to one of the awardees of the overarching contract.<sup>106</sup> IDIQ contracting originally shared similar characteristics with OTAs. Task and delivery order competitions were not constrained by traditional procedural requirements,<sup>107</sup> similar to the way that OTA awards are not burdened by traditional procurement regulations.<sup>108</sup> Further, protests to the GAO and the COFC were originally barred under IDIQ contracts.<sup>109</sup> In response to contracting "excesses" and rapidly declining competition levels in IDIQ procurements, the IDIQ statutory authorization was amended to, among other things, allow protests of task and delivery order awards at the GAO.<sup>110</sup> As OTAs continue to grow in popularity, OTA contractors will likely face a problem similar to that which IDIQ contractors once faced: an abuse of discretion and a lack of competition stemming from a grant of near-absolute discretion to agencies and no available forum to protest an award.

In response, Congress should take action with respect to OTAs similar to the action taken with respect to IDIQ contracts. Congressional action should follow two paths. First, Congress should choose to amend the Tucker Act to expand the COFC's jurisdiction over protests so that it may hear pre-award and post-award protests of OTAs. Such an amendment should add the term "other transaction" to the COFC jurisdictional grant to ensure that all types of OTAs, and OTAs from all agencies with authority to employ them, may be protested at the COFC.<sup>111</sup> A jurisdictional grant to the COFC is essential because of its unique characteristics as a judicial forum. The COFC is entirely independent from the procurement process and allows for greater discovery and a trial or final hearing. Depending on the type of OTA at issue, broader discovery and a trial or hearing can be essential to a protestor's success on the merits.

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104. *Id.* at 147.

105. *Id.*

106. *Id.*

107. *Id.*

108. 32 C.F.R. § 3.2 (2019).

109. TIEFER & SHOOK, *supra* note 38, at 147.

110. *Id.* at 147–48.

111. The proposed amendment to the COFC jurisdictional grant should be made to 28 U.S.C. § 1491(b)(1), and the relevant part of the amended subsection should read as follows (changes emphasized):

Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract *or other transaction* or to a proposed award or the award of a contract *or other transaction* or any alleged violation of a statute or regulation in connection with a procurement or a proposed procurement, *including other transactions . . .*

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In conjunction with the first proposed action, Congress should grant the GAO jurisdiction to hear all types of OTA protests via an amendment to the GAO's authorizing statute for protests of procurements.<sup>112</sup> Such an amendment would expand the definition of protest to include an "other transaction" and would also grant the Comptroller General the authority to decide a protest concerning the award of an OTA.<sup>113</sup> GAO jurisdiction over all types of OTA protests remains essential, even if the COFC is also granted jurisdiction. Protests before the GAO are quicker and less expensive, and an automatic stay takes effect for timely protests. The automatic stay may be essential for some types of OTAs in order to preserve an effective remedy for the protestor in the event of a successful protest. Further, the GAO may be the only viable forum for a protest of an OTA with a smaller dollar value due to the expense of protesting in the COFC. Thus, granting jurisdiction in the COFC but not the GAO may still effectively bar protests of lower-value OTAs. An amendment granting both the COFC and the GAO jurisdiction to hear pre-award and post-award OTA protests would allow disappointed bidders a true opportunity to challenge the merits of an OTA award and would provide an essential independent judicial and administrative check on the currently unfettered discretion of agencies to award OTAs.

#### CONCLUSION

OTAs are used by federal agencies to avoid the burdensome process of federal government procurement and encourage nontraditional defense contractors to do business with the government. These agreements are not subject to the rules and regulations which ordinarily govern the procurement process, nor are they subject to the same bid protest procedures. No forum has clear jurisdiction over a protest of an OTA award, which leaves federal agencies with near-absolute discretion to award such agreements without the risk of challenges by disappointed bidders. Thus, Congress should enact statutory amendments to provide the GAO and the COFC jurisdiction to hear challenges to the merits of OTA awards and to act as an independent check on the power of federal agencies.

*Gabby Sprio*

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112. 31 U.S.C. §§ 3551–3552 (2018).

113. The proposed amendment to the GAO's authorizing statute for protests of procurements should be made to 31 U.S.C. § 3552. The amended language should be inserted as a new subsection (c)) and should read as follows: A protest concerning or arising from an other transaction agreement shall be decided by the Comptroller General if filed in accordance with this subchapter.