

CLIENT ALERTS

COFC Further Carves Out its Bid Protest Jurisdiction Over OTAs

Client Alert

8.13.2024

Last month, the U.S. Court of Federal Claims (“COFC” or the “Court”) issued an important decision regarding the Court’s jurisdiction to hear a protest to a follow-on production contract issued pursuant to the Army’s Other Transaction (“OT”) authority. *Independent Rough Terrain Center, LLC v. United States*, No. 24-160 (Fed. Cl. July 1, 2024) involved a pre-award protest challenging the scope of corrective action taken by the United States Army Materiel Command relating to an RFP for a follow-on production contract for Rough Terrain Container Handler (“RTCH”) modernization. The RFP was issued under the Army’s OT authority pursuant to 10 U.S.C. §§ 4021 and 4022 and called for the issuance of a follow-on production contract to one of the two vendors that submitted, under the preceding OT awards, successful prototypes of modernized RTCH vehicles.

After Independent Rough Terrain Center, LLC (IRTC) filed its pre-award protest with the Court, the Government (along with the Intervenor) moved to dismiss, as is relevant here, on jurisdictional grounds, teeing up the following question for the Court: whether, notwithstanding the Army’s use of its OT authority (instead of Federal Acquisition Regulation (FAR) procedures), the follow-on competition was a “procurement” for purposes of COFC’s bid protest jurisdiction. In that regard, the Tucker Act confers COFC with “jurisdiction to render judgment on an action by an interested party objecting to . . . the award of a contract or any alleged violation of statute or regulation in connection with a procurement.” 28 U.S.C. § 1491(b)(1) (emphasis added).

Under the Department of Defense’s (DoD) OT authority, DoD agencies are permitted to enter into Other Transaction Agreements (OTA), which are legal instruments, other than procurement contracts, cooperative agreements, or grants, pursuant to the authority delegated to the Secretary of Defense

Related People

Derek Mullins
Shareholder

Related Services

Aerospace & Defense Industry
Team

Aerospace and Defense

CLIENT ALERTS

and the Secretaries of each military department under 10 U.S.C. § 4021. OTAs are issued to carry out “basic, applied, and advanced research projects” (10 U.S.C. § 4021(a)), and are not required to comply with the federal regulations, such as the FAR, that typically apply to procurement contracts.

As a result, there has been the perception in the procurement community that OTAs are more immune from bid protests than traditional FAR-based procurement contracts. However, recent decisions had cast doubt on this proposition where follow-on contracts were contemplated after the initial OT awards.^[1] Notably, following completion of an OT prototype agreement pursuant to 10 U.S.C. § 4022(a), the statute allows for an optional “follow-on production” phase whereby a DoD agency may award a contract to a prototype phase participant for the production or supply of goods or services; and it may use the same OT authority or FAR procedures to award follow-on production contracts. *Id.* § 4022(f)(1), (5).

In moving to dismiss IRTC’s protest, the Government argued that the plain language of 10 U.S.C. §§ 4021 and 4022 establishes that both prototype OTs and follow-on production OTs are not procurements. The COFC began its analysis by citing the Supreme Court for the proposition that there is a strong, albeit rebuttable, presumption of judicial review of agency action. See *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015). While the Court (correctly) acknowledged that most federal procurement contracts fall under the FAR’s authority, it noted that the Court’s bid protest jurisdiction is not limited to FAR-based contracts. Rather, as the Federal Circuit noted, COFC’s jurisdiction to hear “objections to the procurement process is broad.” COFC then explained that since the Tucker Act does not define the term “procurement,” the Federal Circuit has adopted the definition of that term in 41 U.S.C. § 111 (not the FAR) for the purpose of ascertaining COFC’s jurisdiction. Pursuant to 41 § U.S.C. 111, a procurement “includes all states of the process of acquiring property or services and ending with contract completion and closeout.” Thus, according to the Court, the fact that the statutory OT provisions themselves describe OT agreements as other than procurement contracts does not mean that the statute is describing OT agreements as something other than a “procurement” as defined by 41 U.S.C. § 111. As the Court further noted, this reasoning was consistent with other decisions examining whether a follow-on production contract (or the potential for one) under 10 U.S.C. § 4022(f) provided a sufficient “connection with a procurement” to satisfy the Court’s jurisdiction over a protest related to the OT prototype phase. Indeed, it is this “sufficient connection” inquiry that the Court appears to have deemed to be the operative framework for assessing COFC’s jurisdiction to hear protests regarding follow-on competitions to OT prototype phases.

Using the above framework, the Court concluded that the RFP at issue involves an OT follow-on production for goods and services, that nothing in the OT statute expressly removes OT follow-on contracts from the Court’s jurisdiction, and thus the Court indeed had subject matter jurisdiction over the protest (which was ultimately dismissed on interested party grounds because IRTC’s System for Award Management registration had lapsed).

Notably, however, the Federal Circuit has not addressed OT protest jurisdiction pursuant to the Tucker Act. As a result, the aforementioned analysis, while persuasive, may only settle the matter until the Federal Circuit weighs in. In any event, while not paradigm shifting, *IRTC* follows the trend of holding

CLIENT ALERTS

that Tucker Act bid protest jurisdiction applies to OT awards. As mentioned earlier, this could have significant implications for potential OT recipients (who probably still largely adhere to the consensus that OT awards are basically protest-resistant) and DoD agencies, who may look to non FAR-based vehicles to, among other things, avoid the litany of requirements and issues (including frequent protests) that come along with traditional procurement vehicles.

We will continue to monitor developments on this issue. Please contact the author of this Client Alert or your Butzel attorney for further guidance.

Derek Mullins

313.983.6944

mullins@butzel.com

[1] See, e.g., *Hydraulics Int'l, Inc. v. United States*, 161 Fed. Cl. 167 (2002).