How Claims Court Ruling May Expand Bid Protest Avenues

By **Andrew Shipley, Philip Beshara and Jessica Aldrich** (August 29, 2022)

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The U.S. Court of Federal Claims' willingness to accept jurisdiction over what are ostensibly Other Transaction Authorities, or OTAs, surfaced again this month in Hydraulics International Inc. v. U.S., where the court found jurisdiction based on a nexus between the OTA and the potential award of a follow-on production contract.[1]

In doing so, the court signaled that it will accept jurisdiction at an earlier stage in the OTA process than it has previously done — at the stage where an agency is using an OTA to determine its needs.

The baseline rule with respect to protesting OTAs is that they cannot be protested because they are not procurement contracts. Would-be protesters have repeatedly tested just how absolute and all-encompassing that rule actually is, but until recently they have met with limited success.

The U.S. Government Accountability Office has consistently dismissed OTA protests for lack of jurisdiction, with limited exceptions directed at an agency's improper use of the OTA authority — reasoning, for example, that the transaction at issue should have been conducted as a procurement.

The claims court enjoys more flexibility because its protest jurisdiction, unlike GAO's, is not limited to procurement contracts. Claims court jurisdiction also includes protests brought in connection with procurements. But in the past, this expanded jurisdictional scope often proved to be a distinction without a practical difference, with the court analyzing the meaning of the phrase "in connection with" only to conclude that it lacked jurisdiction.

Recently, however, the claims court has been investing that phrase with meaning, finding jurisdiction over what are ostensibly OTAs. For example, in its 2021 Kinemetrics Inc. v. U.S. decision, the claims court concluded that it had jurisdiction because the OTA at issue would result in an indefinite-quanitity, indefinite-delivery contract with task orders issuing under it, and the claims court has jurisdiction over protests challenging indefinite-quanitity, indefinite-delivery contracts.[2]

Hydraulics International further suggests that the claims court will be the forum of choice for future protests challenging OTAs.

Background

Hydraulics International involved a U.S. Army upgrade to military helicopter aviation ground power units. The Army issued a request for enhanced white papers pursuant to its OTA authority.

Like many OTA solicitations, the request provided that, upon "a determination that this competitively awarded prototype project has been successfully completed, this project may result in the award of a follow-on production contract for over 150 [aviation ground power

units] without use of competitive procedures."

After the Army selected another bidder, Hydraulics International protested at the Court of Federal Claims.

The government moved to dismiss for lack of subject-matter jurisdiction, arguing that the solicitation's statement that the OTAs "may result in the award of a follow-on production contract" meant that the follow-on production contract was not mandatory and, therefore, that a procurement contract did not exist and may never exist. Thus, the government argued, the OTAs in question could not be "in connection with a procurement or proposed procurement."

The claims court disagreed and concluded it had jurisdiction over the protest because the OTAs "initiated the process for determining a need for acquisition, and they are in connection with that process because they may result in the exclusion of plaintiff for consideration of a follow-on production contract."[3]

Judge Ryan Holte compared the Army's OTA request for white papers to the request for information process in Distributed Solutions Inc. v. U.S. where the claims court rejected jurisdiction over a request for information but the U.S. Court of Appeals for the Federal Circuit, in a 2008 opinion, reversed, "finding the phrase, in connection with a procurement or proposed procurement, by definition involves a connection with any stage of the federal contracting acquisition process, including the process for determining a need for property or services."[4]

In reaching its conclusion, the court in Hydraulics International also relied on the small but growing body of OTA jurisdiction case law. Judge Holte pointed favorably to the 2020 U.S. District Court for the District of Arizona decision in MD Helicopters Inc. v. U.S.,[5] explaining that "where an OTA can result in the exclusion of a bidder for consideration of a follow-on production contract, the OTA is in connection with a procurement or a proposed procurement."[6]

Neither Hydraulics International nor the MD Helicopters decision to which it cites puts much stock in the fact that the statutory authority for prototype OTAs expressly allows for follow-on production in Title 10 of the U.S. Code, Section 4022(f), which one could argue suggests they should not be subject to protest even if future production is contemplated. Indeed, an important reason for prototyping is to determine whether future production is feasible.

One possible explanation, not explicitly stated, is that courts may be skeptical of government efforts to move significant dollars away from Federal Acquisition Regulation-covered procurements — and all the policies, procedures and protections the FAR provides — and into a protest-proof OTA landscape.

Summary of Federal Claims Court and U.S. District Court OTA Jurisdiction Jurisprudence

The small but growing body of OTA jurisdiction case law started with the 2019 Space Exploration Technologies Corp. v. U.S. decision, in which the claims court determined that a launch service agreement to develop launch vehicle prototypes entered into under the U.S. Air Force's Other Transaction Authority was not made "in connection with" a procurement since the follow-on contract was going to be full and open competition — not limited to OTA awardees.[7]
Then, in its 2020 MD Helicopters decision, the U.S. district court in Arizona declined

jurisdiction over a challenge to the government's use of an OTA to update its helicopter fleet, reasoning that the OTA included a down-select process that would eliminate vendors at the various stages, possibly resulting in the award of "a 'follow-on production contract or transaction without the use of competitive procedures ... to [p]erformers who successfully complete the prototype project."[8]

The Arizona district court held that the down-select process meant the action was in connection with a procurement, and that it therefore lacked jurisdiction since the federal claims court was the only court that could hear such matters. Notably, the plaintiff had originally filed at the GAO, only to have the GAO dismiss the protest for lack of jurisdiction.[9]

Hydraulics International further confirms that at least some claims court judges are willing to accept OTA protest jurisdiction under the Tucker Act as long as a nexus can be established between the OTA and a future acquisition.

Key Takeaways

For Protesters

While the GAO is usually the preferred forum for bid protests for a number of reasons — as demonstrated by the fact that many more protests are brought at the GAO than claims court each year — the Hydraulics International decision may very well shift that preference with respect to OTAs.

Importantly, however, the decisions of one claims court judge are not binding on the other judges. Thus, protesters cannot count on every claims court judge adopting Judge Holte's reasoning.

For Government Agencies

By statute, if a U.S. Department of Defense agency contemplates awarding a follow-on production OTA without competition, it must say so in the prototype OTA.

Although there is no statutory requirement that such disclosure be included in the solicitation for the prototype OTA, agencies typically include the notice in the solicitation to ensure all offerors are aware of the possibility.[10]

The standard language used in many such solicitations — i.e., "this project may result in the award of a follow-on production contract" — may increase the likelihood of a protest gaining jurisdictional purchase.

For Future Litigation

Judge Holte's jurisdictional analysis drew heavily on non-OTA decisions from the Federal Circuit in determining whether the OTA was in connection with a procurement. Future litigation may explore the extent to which analogous precedent could be used in the OTA context.

Also, now that Judge Holte's has held that the federal claims court will likely accept jurisdiction over a prototype OTA to determine an agency's need for a future procurement, future litigation may attempt to solidify the claims court as the forum for OTA bid protests

and explore the reach of Judge Holte's reasoning for jurisdiction at the earliest stages of an OTA.

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[1] Hydraulics Int'l Inc. v. U.S., No. 22-364, 2022 WL 3150517 (Fed. Cl. Aug. 8, 2022).

[2] Kinemetrics Inc. v. U.S., 155 Fed. Cl. 777 (2021).

[3] Hydraulics International, Inc. at 8 (internal citations and quotations omitted).

[4] Distributed Sols. Inc. v. U.S., 539 F.3d 1340 (Fed. Cir. 2008).

[5] MD Helicopters Inc. v. U.S., 435 F. Supp. 3d 1003 (D. Ariz. Jan. 24, 2020).

[6] Hydraulics International Inc., WL 3150517 at 7 (internal quotations omitted).

[7] Space Exploration Technologies Corp. v. U.S., 144 Fed.Cl. 433, 439 (2019).

[8] MD Helicopters Inc., v. U.S., 435 F. Supp. 3d 1003 at 1013 (D. Ariz. Jan. 24, 2020).

[9] MD Helicopters, Inc., B-417379, Apr. 4, 2019, 2019 CPD ¶ 120 ("Absent any allegation by MD Helicopters that the Army is improperly using its statutory OTA authority to acquire goods or services that should be acquired via a procurement contract, we have no jurisdiction over its protest.").

[10] See Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations ("Section 809 Panel"), Vol. 3, Recommendation 81 at 6 ("Including the follow-on production option in the prototype OT does not ensure notice to potential awardees, as its inclusion is only required in the actual agreement and not the solicitation.").