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New Contractor Insights On 'Other Transaction' Bid Protests

By **Locke Bell and Krista Nunez** (October 15, 2021, 1:52 PM EDT)

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As federal agencies, and the U.S. Department of Defense in particular, increasingly allocate greater amounts of their annual budgets to nontraditional contracting arrangements generally known as other transaction agreements, or OTAs, a common question continues to come up: We just lost a significant OTA competition; can we file a bid protest?

The answer to this question is far from settled, and opinions vary within both industry and the government. But a few federal courts have taken on the task and the early answer, in short, is yes. In fact, the better question is not if it can be done, but where.

Based on the small handful of cases to date — namely Space Exploration Technologies Corp. v. United States, which was first filed at the U.S. Court of Federal Claims before being transferred to and decided by the U.S. District Court for the Central District of California in October 2020; MD Helicopters Inc. v. United States decided by the U.S. District Court for the District of Arizona in January 2020; and most recently, Kinemetrics Inc. v. United States, decided by the Court of Federal Claims last month.

The more detailed answer is this: Yes, you can file a protest at the Court of Federal Claims if the OTA has a direct effect on the award of a future procurement contract, or you can file in a federal district court of general jurisdiction if it does not.

This line in the sand is, for now, more like a beach volleyball net, across which the Court of Federal Claims and federal district courts may continue to lob or spike OTA bid protests for some time.

In the first such case — SpaceX — the Court of Federal Claims refused to exercise its specialized bid protest jurisdiction over an OTA award because the OTAs at issue were separate and distinct from any future procurement contracts. The court decided that a federal court of general jurisdiction — in that case, the Central District of California — was the more appropriate forum to challenge an OTA award that is not sufficiently "in connection with a procurement or a proposed procurement."

On transfer, the Central District of California accepted jurisdiction without question and became the first — and still, to date, only — court to adjudicate a post-award OTA bid protest on its merits.

While SpaceX was pending in California, the District of Arizona dismissed an OTA bid protest in MD Helicopters. The distinction between that OTA award and the one in SpaceX, the District of Arizona reasoned, was that the OTA awarded in MD Helicopters provided for the award of a follow-on procurement contract without further competition, pursuant to the DOD's unique other transactions statutory authority in Title 10 of the U.S. Code, Section 2371b(f).

Although the solicitation in MD Helicopters did not guarantee that future procurement would ultimately occur, the district court found it "clear that the [agency's] decision to issue the Solicitation, to reject the Proposal, and to award [OTAs] to other Performers, all took place within the procurement process," and thus only the Court of Federal Claims could exercise jurisdiction.

Most recently, the Court of Federal Claims issued a public decision in Kinemetrics Inc. v. United States that more or less adopted this distinction, albeit without definitively affirming the court's jurisdiction over certain OTA bid protests.

Importantly, in distinguishing SpaceX, the Court of Federal Claims held that it has bid protest jurisdiction wherever a solicitation "ha[s] a direct effect on the award of a contract," including nonstandard solicitations outside the classic, FAR-based procurement process.

It is equally important, however, not to overstate the holding in Kinemetrics, as the court's opinion appears to base its jurisdictional holding, in large part, on its finding that the award at issue was, in fact, a procurement contract and not an OTA.

To provide some clarity, let's dive into the specific facts of the case a little further.

The U.S. Department of the Air Force issued the solicitation and award pursuant to the DOD's specific authority to award OTAs to "carry out prototype projects" in Title 10 of the U.S. Code, Section 2371b. The solicitation was issued as a commercial solutions opening, an acquisition methodology utilized by the DOD "to acquire innovative commercial items, technologies or services that directly meet program requirements" as permitted by the authority enumerated in Section 879 of the National Defense Authorization Act for Fiscal Year 2017.[1]

The solicitation contemplated a two-phase evaluation process for proposals submitted under eight different specified capability areas; potential offerors were to submit white papers for an initial evaluation, after which selected offerers would be invited to submit full proposals. The Air Force subsequently amended the commercial solutions opening to incorporate a ninth topic — the topic at issue in Kinemetrics — that deviated from the two-phase proposal process and sought complete technical and cost proposals from all offerers at the outset.

Key to the court's finding of jurisdiction, the solicitation stated that any award made pursuant to the commercial solutions opening would be in the form of contracts or other transactions. In both documenting its finding that the protester's proposal was technically unacceptable and in notifying the protester of its rejection, the agency stated that it does not recommend a contract award.

Moreover, when pressed at the hearing, the U.S. Department of Justice conceded that the court had jurisdiction to review whether the Air Force adhered to its commercial solutions opening, specifically admitting: "This is a procurement. The Commercial Solutions Opening authority was specifically designed to create a procurement methodology, so it is within the general jurisdiction of the court."[2]

Based on these facts, the court concluded that the solicitation, in effect, "resulted in a standard indefinite delivery, indefinite quantity contract," over which the court has bid protest jurisdiction.

Although the essence of that holding — that the Court of Federal Claims has bid protest jurisdiction over a standard indefinite delivery/indefinite quantity contract for the procurement of equipment — is unremarkable, the court's discussion of OTA bid protest jurisdiction generally, and its distinction from the court's prior decision in SpaceX, are noteworthy.

In making that distinction, the court concluded that the solicitation in Kinemetrics "had a direct effect on the award of a contract," unlike SpaceX, "where no procurement contract was contemplated."

Conversely, the court in SpaceX determined that it lacked jurisdiction over the OTA bid protest because it found neither the decision making process nor the resulting awards were "in connection with a procurement or proposed procurement." In addition to finding that the awards were not themselves procurement contracts, the court focused on the temporal disconnect between the OTA solicitation and the future procurement contract solicitations contemplated by the agency as part of its acquisition strategy.

The court found that the former was not in connection with a procurement because any future contract awards would be made during a later phase of the overall acquisition strategy under a solicitation that was separate and distinct from the OTA evaluation and awards at issue. The opportunity to compete for those prospective procurement contracts was open to all interested offerers and not limited to those firms that had been awarded OTAs.

On the other hand, had the OTAs themselves provided for future follow-on procurement contracts, or established a competitive range for a future down-select procurement — as was the case in MDHelicopters — the OTAs might have been sufficiently in connection with those later procurements and thus within the court's jurisdiction. Kinemetrics, and its interpretation of the court's holding in SpaceX, further supports that distinction and conclusion.

In addition to the issue of jurisdiction, many have wondered whether federal courts will apply a more deferential standard of review in OTA bid protests than in standard procurement bid protests. The Central District of California, although certainly deferential to the agency, did not articulate any such heightened standard for protesters.

Instead, it applied the same arbitrary and capricious standard of review found in both the Administrative Procedure Act and incorporated by reference in the Court of Federal Claims' bid protest jurisdiction in the Tucker Act; the district court even cited past bid protest decisions by the Court of Federal Claims and the U.S. Government Accountability Office.

To the extent Kinemetrics is indicative of the Court of Federal Claims' review in future OTA bid protests, its follows suit. Although some procedural oddities left the court in Kinemetrics to resolve a motion to dismiss, rather than judgment on the administrative record, resulting in some ambiguous language about the applicable standard, the court's analysis on the merits cites and follows standard Court of Federal Claims bid protest precedent.

Kinemetrics does not resolve many open questions about OTA bid protests, but its discussion of the court's jurisdiction etches a little deeper the guiding line that has gradually formed between the decisions in SpaceX and MD Helicopters. And again, this is a guiding line, not a wall; SpaceX proves a

forum for OTA bid protests exists, even if some questions remain about which is appropriate in any given case.

This outcome, endorsed by Kinemetrics, therefore provides protesters with some hope, as the Government Accountability Office has made clear that it will not hear post-award bid protests challenging the outcome of an OTA competition, leaving that oversight to the federal courts alone. For now, it appears the courts are willing to exercise that responsibility.

To summarize, disappointed OTA competitors seeking to file a bid protest must decide the question of where to file, which turns on selecting which federal court is appropriate. For now, the answer appears to hinge on whether one can draw a direct line from the OTA awarded to eligibility for a future procurement contract.

If so, the Court of Federal Claims should review the protest just like it would any other bid protest; if not, relief may be found in a federal court of general jurisdiction.

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[1] See 10 U.S.C. § 2371b; Defense Commercial Solutions Opening (CSO) Pilot Program, Def. Acquisition Univ., https://aaf.dau.edu/aaf/contracting-cone/defense-cso/ (last visited Sept. 28, 2021).

[2] Quotation edited and cleaned up.