



Other Transactions: Recent Developments and Challenges

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Speaker Bio



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In his counsel to government contractors, Seth Locke protects clients' rights and interests during bid protests, cost accounting claims, contract performance issues and other disputes. He advocates before the Board of Contract Appeals, the Court of Federal Claims and the Government Accountability Office.

Seth has extensive experience with the Federal Acquisition Regulation system. Risk management and litigation prevention in the government contracting process are at the core of Seth's counsel to his clients, who include defense contractors, global aerospace manufacturers, healthcare contractors and several technology companies.

Ranked by Chambers in 2019, Seth teaches at The George Washington University Law School, his alma mater, as a guest seminar lecturer on Board of Contract Appeals litigation, and he has also taught courses for Federal Publications Seminars and provides a range of continuing legal education presentations for clients. Seth's pro bono practice includes working with the National Veterans Legal Services Program to assist veterans in submitting claims for combat-related special compensation to the U.S. Department of Defense.

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Alexander Canizares represents government contractors and other companies in commercial litigation, enforcement, and regulatory matters. As a former trial attorney with the U.S. Department of Justice's (DOJ) Civil Division, Alex draws on his experience serving as lead counsel in commercial disputes involving the federal government to counsel companies in the defense/aerospace, technology, and other industries.

While at DOJ Civil Division's Commercial Litigation Branch, National Courts Section, Alex handled dozens of cases at both the trial and appellate levels involving multiple defense and civilian agencies. He has first-chair experience litigating cases involving the Contract Disputes Act, the False Claims Act, as well as bid protests involving defense, national security, and information technology procurements. In addition to litigation, Alex counsels government contractors in contract performance issues, disclosures, suspension and debarment, M&A due diligence, small business issues, and other areas.

A frequent writer and speaker on government contracts and legal issues, Alex is an Adjunct Professor of Performance of Government Contracts at The George Washington University Law School. He is also a vice chair of the ABA Public Contract Law Section's (PCLS) Contract Claims and Disputes Resolution Committee and a member of the editorial board of the PCLS's quarterly *Procurement Lawyer* publication.

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Sarah Maguire is Senior Counsel for BAE Systems Intelligence & Security. In this capacity, Sarah advises the engineering and flight services businesses, and the majority of her work is government contracts. Prior to this role, she served as Assistant General Counsel for BAE Systems for Litigation and Investigations where she focused on the major matters facing the corporation, including commercial disputes, internal investigations, and government investigations. Sarah was a senior associate in Jenner & Block's government contracts and white collar practice groups before joining BAE Systems.

Agenda



OTS - THE ESSENTIALS



KEY BENEFITS & ATTRIBUTES



BIDDING & AWARDS: KEY CONSIDERATIONS



BID PROTESTS & DISPUTES



QUESTIONS



OTs—The Essentials

History

- 1958 – Space Act gives NASA first “other transaction” authority
- 1989 – DARPA authorized to use OTs for research (10 USC 2371)
- 1991 – Made authority permanent; expanded to other departments
- 1993 – DARPA granted OT authority for prototype projects
- 1996 – Prototype authority expanded to other DoD agencies
- 2001 – Authority for limited follow-on production in prototype OTs
- 2015 – OT authority for prototype and follow-on production made permanent, codified (10 U.S.C. 2371b); redefined “non-traditional defense contractor”
- 2018 – Preference for use of OTs for research and prototype projects



Types and Statutory Authority

- OTs are defined as “other than” contracts, cooperative agreements, or grants.
- **Research (10 U.S.C. 2371)**
 - For basic, applied, and advanced research projects; spur dual-use R&D (TIAs)
- **Prototypes (10 U.S.C. 2371b)**
 - Provides authority for **prototype** projects—“prototype” is **undefined** term
 - Dual-use and defense-specific projects—must enhance mission effectiveness
 - Must have (1) at least 1 Non-Traditional Defense Contractor (NDC) or non-profit; (2) all significant participants are NDCs or small businesses; (3) traditional contractor and at least 1/3 non-USG cost share, **or** (4) waiver by agency.
 - NDC is **broadly** defined: not performed full CAS coverage contract in prior year.
- **Follow-on Production (10 U.S.C. 2371b(f))**
 - Non-competitive follow-on OTs to a prototype OT agreement that was competitively awarded and successfully completed.



Key Benefits and Attributes

OTs are Not Procurement Contracts

- Not subject to procurement laws and regulations, e.g.:
 - Competition in Contracting Act
 - Truthful Cost or Pricing Data Act/Truth in Negotiations Act
 - Cost Accounting Standards
 - Bayh-Dole Act
 - Buy American Act
 - Contract Disputes Act
 - FAR supplements
- But subject to other laws and regulations, e.g.:
 - Fiscal law
 - False Claims Act
 - Criminal law

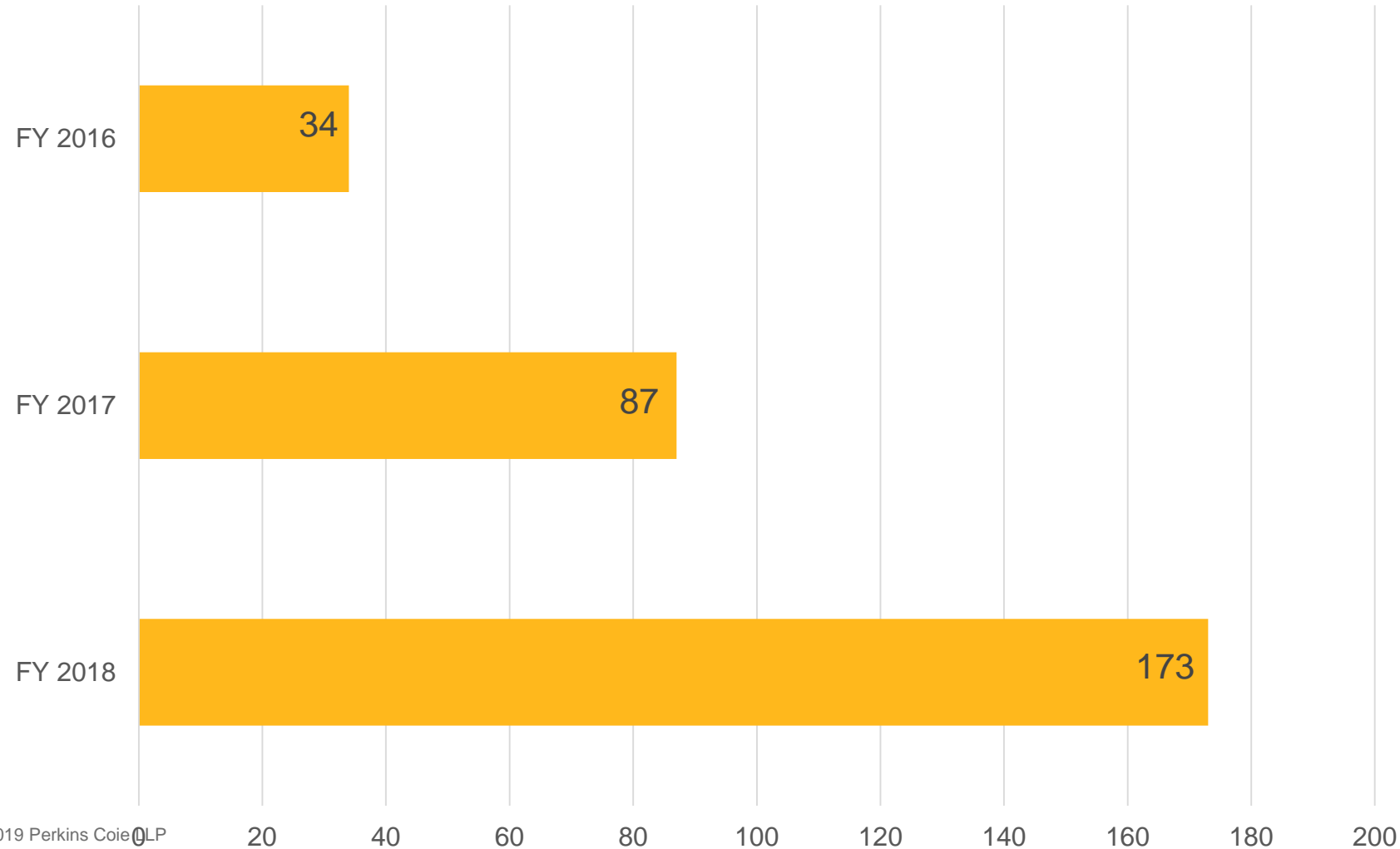


Key Benefits and Attributes

- **Enhance** mission effectiveness of military personnel (10 USC 2371b)
- **Attract** commercial/innovative companies by reducing barriers to entry
- **Accelerate** innovation to transfer new capabilities to the warfighter
 - Recognition that commercial R&D is driving innovation, *e.g.* AI, space
- **Flexibility**—Negotiable terms tailorable to particular objectives
- **Reduce** acquisition timelines/bypass bureaucracy
- **Fewer guard rails** without standard remedy-granting clauses
 - Fewer FAR/DFARS clauses means fewer express remedies
 - But reflexive use of clauses can lead to unintended consequences

Rapid Increase in DoD Use of OTs

Total Number of Prototype OTs:

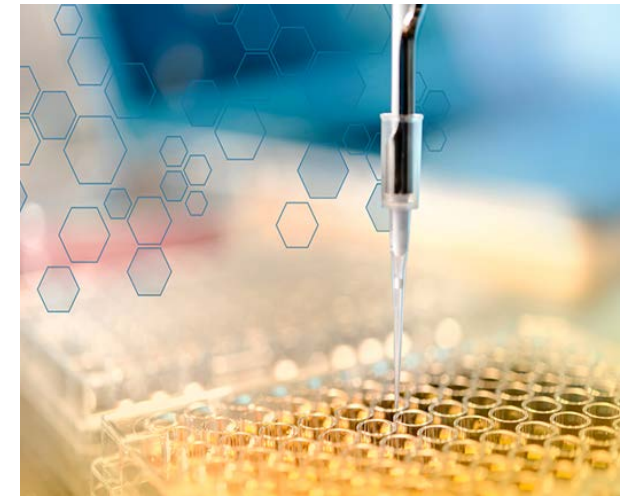


Total Obligations:



Recent Examples

- **March 18, 2020:** Air Force Space Enterprise Consortium (SpEC) solicitation under potentially \$12 billion OT for space prototypes.
- **March 20, 2020:** \$148M OT awarded to Johnson & Johnson entity to develop new antiviral and therapeutic assets to combat COVID-19.
- **March 25, 2020:** Medical Technology Enterprise Consortium RFP to develop prototypes to treat COVID-19 under OT with U.S. Army Medical Command with \$20 million available funds.



OTs and COVID-19

- **CARES Act** (March 27, 2020)
 - Sec. 3301 – Provides expanded OT authority to BARDA for R&D spending on pandemic or epidemic products during emergencies.
 - Sec. 13006 – Eases restrictions on 30-day advance notification to Congress of an OT exceeding \$500M related to COVID-19. Instead, notification must be as soon as practicable.
- **USD(A&S) [Memo](#)** (Apr. 5, 2020)
 - Delegates OT approval authority for transactions above \$100M to Directors of Defense Agencies/Field Activities, etc.
 - Delegates OT approval authority for transactions above \$500M to Senior Procurement Executives of military departments, etc.



Bidding and Awards: Key Considerations

Where Do You Find OTs?

- No single approach to soliciting and awarding OTs.
- DoD [OT Guide](#): Agencies “free to create their own process” to solicit if fair and transparent, provides for competitive procedures “to the maximum extent practicable” and documents the USG’s rationale.
- Possible solicitation methods:
 - Request for Proposals (see beta.sam.gov, agency’s website, or Grants.gov).
 - Broad Agency Announcements (See DARPA [Opportunities](#) page)
 - Call for White Papers
 - Commercial Solutions Opening
 - Oral presentations
- Multiple awards possible. DARPA example: “The Government reserves the right to select for negotiation all, some, one, or none of the proposals received”

Bidding Strategies

- **Commercial contractor opportunities**
 - 88 percent of DoD's OT business is with companies who typically did not do business previously with the government.
- **Prime-Sub considerations:**
 - *E.g.*, will your subs be able to accept IP terms being negotiated?
- **Consortiums/teaming:**
 - Teaming promotes partnership to address a problem (consortium or JV)
 - Can be with contractors, non-profit entities, academic institutions
 - Consortia-affiliated vendors received 46% of OT obligations from FY 2012 to 2018 (Source: Govini)
 - USG enters into OT with consortium; consortium members have agreements
 - OT consortia can have subject matter focus, *e.g.*, AI, autonomy,
 - Consortium arrangements may require signing up to negotiated IP structure

Bidding Issues: OCIs

- **OCIs**
 - Attention to OCIs is important when involved in early-stage R&D
 - Three types: (1) biased ground rules; (2) unequal access to information; (3) impaired objectivity (FAR 9.504 & 9.505).
- ***Concurrent Technologies Corp.***, B-412795.2 (Jan. 17, 2017)
 - Protester alleged that awardee of IDIQ contract was tainted by OCIs from awardee's prior OT giving it access to information.
 - GAO denied the protest, concluding that agency's OCI waiver was reasonable and no unfair competitive advantage.
- OCI risk mitigation should be assessed before teaming/partnering.
- *E.g.*, NDAs to protect misuse of information (*Concurrent Tech.*)

Negotiation Area: IP and Data Rights

- OTs are not subject to Bayh Dole Act (patents) and other IP statutes and regulations, and data rights FAR/DFARS clauses.
- But standard agreements may include Bayh Dole/DFARS Patent Rights clause
 - DARPA standard OT: DARPA can acquire title to Subject Inventions under certain conditions
- DoD OT guide: “IP rights are **fully negotiable** under all types of OTs.”
 - Government negotiators should “be familiar” with standard IP clauses.
 - Appendix F (Intellectual Property)
 - Suggests USG best practice to have 1-3-5 year plan to establish needs
 - Contractor should consider sustainment business in looking at longer range plans
 - See para. 2 for all clause types USG may require and IP impact



Negotiation Area: IP and Data Rights

- Attention to data rights protections for all technical data and software.
- Look for DFARS-like clauses that assert broad USG rights over data
 - **Example 1:** DARPA std. agreement: “With respect to Data developed or generated under this Agreement related to [prototype], the Government shall receive (*INSERT APPLICABLE DATA RIGHTS*), as defined in Attachment 4.”
 - **Example 2:** “It is anticipated that anything delivered under this proposed effort will be delivered . . . with Government purpose data rights or unlimited data rights unless otherwise asserted in the proposal and agreed to by the Government.”
 - Watch for variations from DFARS data rights clauses, e.g., 252.227-7014.
 - Marking of proprietary data and software
- Issues when importing DFARS clauses into non-DFARS contracts.
 - *The Boeing Co.* ASBCA No. 60373 (2018) (holding that USG had restricted rights to software developed with costs charged to TIAs)
- Consider flow-down issues for subcontractors

Negotiation Area: Price and Cost Issues

- The government must still determine price reasonableness.
 - Emphasis on exhausting other means (adequate competition) before requesting cost information.
- FAR-based cost reimbursement-type clauses do not apply—but government negotiators may seek to include them.
 - Use funds for costs that a reasonable and prudent person would typically incur for the type of work at issue.
 - But contractors should not have to revise or alter their existing accounting systems to comply with the OT agreement.
- Audit rights are negotiated but the Comptroller General can examine a party's records in prototype agreements in excess of \$5 million.



Other Negotiation Areas

- **Terminations**

- DoD Guide: termination clauses circumstance-specific. Suggests awardee may have right to terminate as well if appropriate risk allocation/cost sharing.
- DARPA standard agreement: “Subject to a reasonable determination that the program will not produce beneficial results, **either Party may terminate** this Agreement by written notice to the other Party, provided that such written notice is preceded by consultation between the Parties.”

- **Changes**

- Anticipate REAs. DoD OT Guide: the agreement “should address” changes.
- USG should consider that “unilateral changes may lead to disputes and claims” especially in fixed-price contracts.

- **Cybersecurity**—expect clauses to protect CUI or CDI (CMMC will apply)

- **Delays** – COVID-19 crisis highlights the importance of a delays clause.

Takeaways

- **Obtaining an Award**

- Monitor beta.sam.gov., agency sites for OT opportunities.
- Consider whether a consortium or teaming arrangement makes you more competitive, but clearly delineate roles, IP ownership.

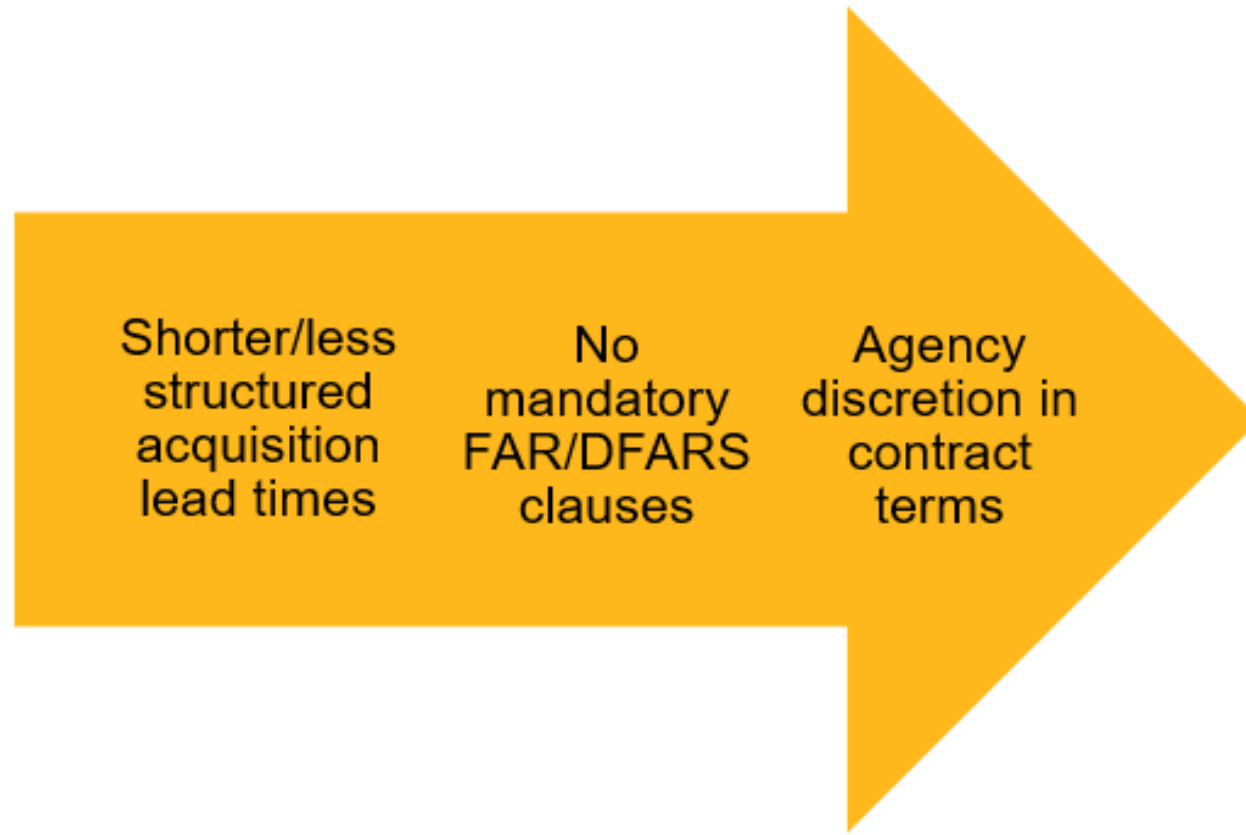
- **Negotiating OTs**

- Negotiations of IP and data rights are critical to protect you.
 - Make sure terms can be flowed down to subcontractors.
 - Attention to data rights tables for all data deliverables.
- Negotiate terms for terminations, changes, delays, disputes.
- Consider how hard to push back on FAR/DFARS clauses; consider whether they help reliability or complicate relationship.
- You do not need to agree to revise or alter your accounting system.



Bid Protests and Disputes

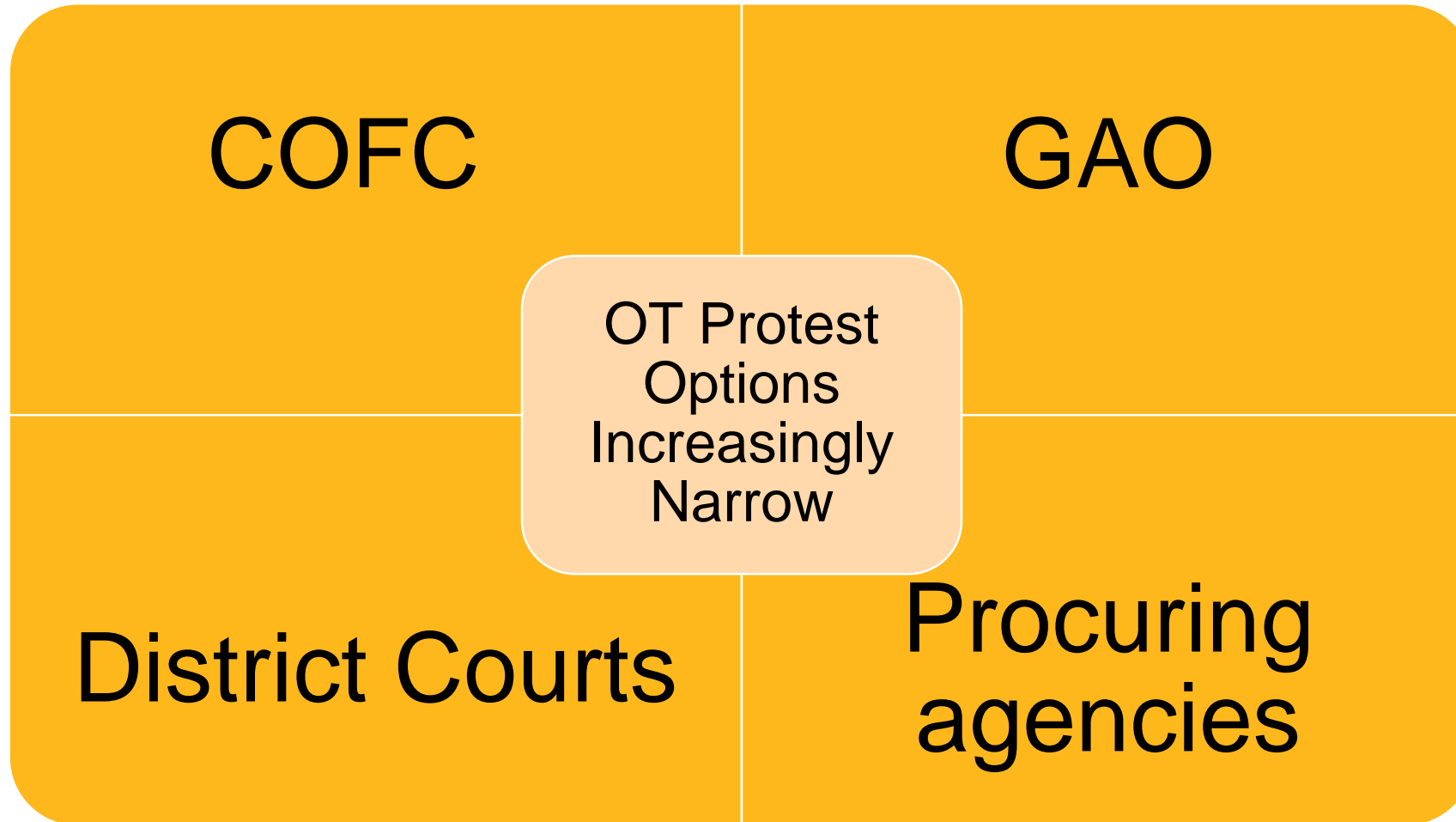
The Downside of Increased Flexibility



Greater Risks of Litigation

Less Predictable Outcomes

Bid Protests



COFC and Bid Protests

- COFC jurisdiction under the Tucker Act (28 U.S.C. 1491(b)(1))
 - Limits review to protests brought by an “interested party objecting to a solicitation by a Federal agency for bids or proposals for a 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.**”
- Federal Circuit: Tucker Act’s bid protest language is “exclusively concerned with procurement solicitations and contracts.” *Res. Conservation Grp., LLC v. United States*, 597 F. 3d 1238, 1245 (Fed. Cir. 2010).

COFC and Bid Protests

SPACE EXPLORATION TECHNOLOGIES, CORP. V. UNITED STATES, 144 FED. CL. 433 (AUG. 28, 2019)

- Air Force proposed multiple phases. Phase 1 was to develop prototypes using Launch Service Agreements. Phase 2 was to procure a “follow-on activity” open to interested offerors.
- Parties agreed that LSAs are not procurement contracts but disagreed as to judicial review of evaluation and award decisions.
- **Held:** no jurisdiction over OT because it was not in “connection with a procurement or a proposed procurement” under the Tucker Act.
 - The LSAs are not procurement contracts and not in connection with a procurement. They involve separate and distinct solicitations, different acquisition strategies, distinct goals.
 - In a footnote, the court purported to limit its holding and leave open whether OTs generally fall outside of Tucker Act jurisdiction.

GAO and District Court

- **GAO jurisdiction** is limited to reviewing procurement of goods and services.
 - OT awards are not the same as procurement contracts.
 - ***Exploration Partners LLC*** (B-298804) (declining to review Space Act OT because OT and a procurement contract are not the same).
- GAO will not review agency awards under OTs but it will review protests of agency's use/misuse of OT statutory authority.
 - ***Oracle America, Inc.*** (B-416061) May 2018 (sustaining protest challenging follow-on contract that failed to comply with statute)
- **U.S. District Courts**
 - *Scanwell* jurisdiction and challenges under the APA

GAO and District Court

MD HELICOPTERS (B-417379, APR. 4, 2019 & 2020 WL 516469 (D. ARIZ. JAN. 2020)).

- **First to GAO:** argued that the Army unreasonably evaluated its proposal for the development of reconnaissance aircraft prototype OT under 10 U.S.C. 2371b.
- GAO dismissed, holding that its review is limited to a pre-award protest alleging that the agency improperly used its OT authority.
- **Then to District Court:** protester filed suit in Arizona under APA.
- Court dismissed for lack of jurisdiction, finding that MD Helicopter's suit was "improperly forbidden" by the Tucker Act.
- Distinguishing *SpaceX*, the court determined that this award was sufficiently related to a procurement that the Court of Federal Claims could exercise jurisdiction over it.

Protests of Follow-On Production

AIR TRACTOR, INC., B-418244 (2020)

- Air Force initially used OT authority to develop prototype attack aircraft.
- For phase III, it used sole-source contract under 10 U.S.C. 2373.
- Protester: RFP improperly “evades” follow-on production requirements in 2371b and that using separate statute would “nullify” 2371b.
- **Held:** Dismissed as untimely but still found that the protest lacked merit.
- Nothing in 10 USC § 2371b “limits an agency from using another statute to purchase an item if the purchase is consistent with that separate statutory authority.”
- 2371b “does not proscribe agencies from using different statutory bases to enter into contracts for other purposes.”

Where Can Post-Award Disputes Be Brought?

- **Court of Federal Claims**

- Contract Disputes Act of 1978 applies to *procurement* contract claims
 - No statutory right to present an OT-related claim to a contracting officer
- Tucker Act waives U.S. sovereign immunity over contract claims
 - Best reading: OTs are “contracts” within Tucker Act jurisdiction
 - Federal Circuit has yet to resolve the issue
 - *Rick’s Mushroom* and the “money-mandating” requirement

- **District Court**

- COFC has exclusive jurisdiction over K claims over \$10K

- **ADR** – DoD OT Guide encourages use of ADR



Litigation and Risk Mitigation

- Most procurement contract best practices apply equally to OTs
 - Attention to authority of Agreements Officer to bind the USG
- Traditional tools of contract interpretation still will apply
- Not clear whether the *Christian* doctrine applies to OTs
 - What is a mandatory contract clause for an OT agreement?
 - *Marketing and Management Information, Inc. v. United States*, 57 Fed. Cl. 665, 674 (2003). COFC refused to apply the *Christian* doctrine to a contract that was not governed by the FAR. Absent the FAR, the Termination for Convenience clause was not “mandatory.”

Takeaways

- **Case law leaves little room to protest OT awards.** That said:
 - Agency decisions to use/not use OTs are reviewable (*Oracle*).
 - Federal Circuit has yet to rule on COFC jurisdiction (*SpaceX*).
 - Role of U.S. district courts remains unclear (*MD Helicopters*).
 - Boundaries of agency discretion are not clearly defined.
 - OT post-award disputes should be reviewable by COFC.
- **Big question is the impact of these developments on use of OTs.**
 - Makes administration of OTs less predictable.
 - Impact on attractiveness of OTs for commercial contractors.
 - Less accountability in government's handling of OTs.
 - Clear and well-negotiated disputes clause is key.

Questions?



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