

THE GOVERNMENT CONTRACTOR®



THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 60, No. 23

June 20, 2018

Decisions

¶ 195

GAO Sustains OTA Protest

Oracle Am., Inc., Comp. Gen. Dec. B-416061, 2018 CPD ¶ 180

The U.S. Comptroller General has sustained a protest challenging a Department of Defense other transaction agreement (OTA). The Comp. Gen. found that the initial prototype OTA qualified as a prototype project. But the follow-on production OTA was improper because it did not meet two prerequisites in 10 USCA § 2371b for awarding a follow-on production OTA without competition. First, the prototype OTA did not include a provision for a follow-on OTA. Second, the underlying prototype OTA was not completed, the Comp. Gen. said.

OTAs are legally binding instruments, other than contracts, grants or cooperative agreements, that generally are not subject to statutes and regulations applicable to procurement contracts. Section 2371b gives DOD authority to enter into OTAs for prototype projects.

In June 2016, Defense Innovation Unit (Experimental) (DIUx) published a commercial solutions opening (CSO) to “award[] funding agreements ... to nontraditional and traditional defense contractors to carry out prototype projects that are directly relevant to enhancing ... mission effectiveness.” The CSO is available for five years and creates a multi-step evaluation process consisting of a solution brief, demonstration or both, which are solicited through an area of interest statement (AOI) followed by a request for prototype proposal (RPP). The agency considers this process to be competitive.

The CSO stated that there is “[p]otential follow-on funding for promising technologies ... and pos-

sible follow-on production.” The remainder of the CSO explains the process progressing from solution brief to the possibility of “additional work.” The DOD Other Transaction Guide for Prototype Projects instructs users that the “acquisition approach for a prototype project should address the strategy for any anticipated follow-on activities,” such as “the ability to procure the follow-on activity under a traditional procurement contract.” The guide states that § 2371b “authorizes DoD to structure OTs for prototype projects that may provide for the award of a follow-on production contract or transaction.”

In January 2017, damage to local computer servers prompted the U.S. Transportation Command (TRANSCOM) to explore migration to a cloud-based system. Automated migration was difficult, however, because TRANSCOM’s legacy applications used outdated code.

DIUx helped TRANSCOM search for a solution that would convert and migrate TRANSCOM’s local systems to cloud-based applications. DIUx combined TRANSCOM’s search with similar efforts for other DOD entities. DIUx published an AOI seeking “the prototyping of a robust and scalable software development environment to enable the modernization of ... command and control systems in a cloud infrastructure.”

DIUx received 21 solution briefs, including one from REAN Cloud LLC. After presenting proposed solutions, two companies, including REAN, received an RPP seeking prototyping to modernize systems in a cloud infrastructure.

A contracting activity for DIUx, the Army Contracting Command—New Jersey (ACC-NJ), signed a determination and findings (D&F) to approve the award of a prototype OTA to REAN. On May 23, the Army awarded a prototype OTA to REAN valued at \$2.42 million for the rehosting and refactoring of TRANSCOM applications into an Amazon Web Services environment. The prototype OTA had a six-month period of performance and was modified six times.

On Feb. 1, 2018, an Army D&F concluded that § 2371b requirements had been met and the Army could award a production OTA. The same day,

REAN and the Army signed the production OTA with a not-to-exceed value of \$950 million. This amount was reduced to \$65 million in March.

The Army placed the first order on the production OTA on February 2. And on February 13, the Army posted the notice of the award of the production OTA to REAN but incorrectly listed the value as \$950,000. Soon after, Oracle America Inc. filed a protest at the Government Accountability Office arguing that the award of the production OTA did not comply with § 2371b.

Jurisdiction—Under the Competition in Contracting Act and GAO Bid Protest Regulations, the Comp. Gen. reviews protests alleging 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. 31 USCA §§ 3551(1), 3552; 4 CFR § 21.1(a).

Agency agreements issued under OT authority are not procurement contracts, and the Comp. Gen. generally does not review protests of the award or solicitations for the award of these agreements under GAO's bid protest jurisdiction. *Rocketplane Kistler*, Comp. Gen. Dec. B-310741, 2008 CPD ¶ 22. But the Comp. Gen. will review protests alleging improper agency use of OT authority. 4 CFR § 21.5(m). Because Oracle argued that the Army improperly used its authority under § 2371b to award the production OTA, the Comp. Gen. found that it had jurisdiction to review that protest issue.

In a note to the jurisdiction discussion, the Comp. Gen. addressed the Army's argument that the protest was untimely because Oracle did not protest the prototype OTA award within 10 days of the award. The Comp. Gen. said that the protest addressed the award of the production OTA, and Oracle filed its protest within 10 days of when it knew or should have known of that award. The protest was therefore timely.

Interested Party—The Army and REAN argued that Oracle was not an interested party because it did not submit a solution brief in response to the AOI. The Comp. Gen. rejected this argument, noting that a protester that did not respond to a solicitation may be an interested party if it has a direct economic interest in the competition of the procurement if its protest is sustained. *Helionix Sys., Inc.*, Comp. Gen. Dec. B-404905.2, 2011 CPD ¶ 106.

In awarding the follow-on production OTA without competition, the Army relied on § 2371b(f)(2), which "per-

mits such award if a prototype OTA of similar subject matter was competed," the Comp. Gen. said. The record shows, however, that neither the CSO nor the AOI contemplated the prototype OTA awarded here or a follow-on production OTA. For example, the "ideal solution" described in the AOI included geospatial services and data analytics and visualization geospatial—attributes not sought by TRANSCOM. Similarly, the AOI stated that the Army sought deployment "to a government cloud and/or an on-premise[s] cloud infrastructure," but TRANSCOM sought only a solution proposing an off-premises commercial cloud.

Likewise, when the AOI was formulated, TRANSCOM did not consider using the solution for the migration of classified software applications. But the first production OTA order anticipated the migration of classified applications.

More broadly, potential prototype OTA contractors were not advised that the Army intended to award a follow-on production OTA to a successful vendor. The Army cited the CSO's inclusion of "possible follow-on production" among OTA benefits, but the Comp. Gen. said that this statement was "too vague and attenuated to describe the agency's intended procurement."

The Comp. Gen. concluded that the material differences between the AOI and the solution actually sought by the agency provide a sufficient basis for Oracle to argue that it would have submitted a solution brief had the AOI reasonably described the intended procurement. Thus, although Oracle did not submit a solution brief, the Comp. Gen. found that it was an interested party to challenge the agency's use of its OTA authority.

Prototype—Oracle argued that the agency did not have authority to award the production OTA because, in the protester's view, the initial, prototype OTA was commercial in nature and thus did not qualify as a prototype project under § 2371b(a).

The statute does not define "prototype," and the Comp. Gen. declined to adopt a dictionary definition. Instead, the Comp. Gen. relied on the definition in the DOD OT guide: "A prototype project can generally be described as a preliminary pilot, test, evaluation, demonstration, or agile development activity used to evaluate the technical or manufacturing feasibility or military utility of a particular technology, process, concept, end item, effect, or other discrete feature."

The Comp. Gen. said that the original effort procured under the prototype OTA involved a prototype project. Migrating TRANSCOM's applications is fairly

called a pilot or test program, as well as a demonstration of REAN's capabilities.

The agency procured an "agile systems development enterprise" that included "the demonstration of a repeatable framework consisting of tools, processes and methodologies for securing, migrating (re-hosting) and refactoring, existing applications into a government-approved commercial cloud environment." The initial award consisted of a proof of concept, the Comp. Gen. said, concluding that the prototype OTA consisted of a prototype project.

Follow-on Production OTA—Prototype OTA Provision on Follow-on: Oracle argued that the Army lacked the authority to award a follow-on production OTA because the prototype OTA did not provide for a follow-on production OTA, as required by subsection (f)(1). Oracle also alleged that the production OTA award was improper because the prototype project is not complete, a prerequisite to award under subsection (f)(2)(B).

Section 2371b(f) provides in part:

(1) A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction. A transaction includes all individual prototype subprojects awarded under the transaction to a consortium of United States industry and academic institutions.

(2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of section 2304 of this title, if—

(A) competitive procedures were used for the selection of parties for participation in the transaction; and

(B) the participants in the transaction successfully completed the prototype project provided for in the transaction.

The Comp. Gen. concluded that an agency may award a follow-on OTA to the prototype-transaction participants without using competitive procedures only if the "transaction entered into under this section for a prototype project"—i.e., the prototype OTA itself—"provide[d] for the award of a follow-on production contract or transaction to the participants in the transaction." § 2371b(f)(1), (2). Because the prototype OTA included no provision for a follow-on production

OTA, the Army lacked the authority to award the production OTA, the Comp. Gen. said in sustaining the protest on that ground.

Completed Prototype Project: Another prerequisite to award of a production OTA without competition in subsection (f)(2) is that "the participants in the transaction [must have] successfully completed the prototype project provided for in the transaction." § 2371b(f)(2)(B).

The prototype OTA contemplated the migration of six applications, with the option for six more. The prototype OTA was modified to include enclave migration, which was not completed on Feb. 1, 2018, when the Army awarded the production OTA. The Army acknowledged that the enclave work was not complete but argued that the production OTA award complied with the statute because REAN completed the "parts of the prototype" project that were included in the production OTA.

The Comp. Gen. rejected the Army's argument. The plain meaning of the phrase "completed the prototype project provided for in the transaction" is the entire prototype project described in the transaction, i.e., the instrument itself. Here, the transaction included enclaves. Moreover, if the enclaves were not properly part of the "prototype project," they would not be included in the Army's award authority under § 2371b(a).

Because the prototype project provided for in the transaction was not completed, the Army did not comply with the statutory requirements in awarding the production OTA, the Comp. Gen. said in sustaining this protest ground.

The Comp. Gen. recommended that the Army terminate the production OTA. The Comp. Gen. also recommended that the Army conduct a new procurement using competitive procedures, prepare a justification to award a contract without competition or review its OT authority to determine whether an award is possible under that authority.

◆ **Practitioner's Comment**—GAO's decision sustaining the Oracle protest of the award of a production follow-on OT to REAN is clearly misguided. The award of a \$950 million, wide-ranging follow-on OT after a competitively awarded prototype project made news because of its monetary value and scope. Very little experience in follow-on production OTs has been accumulated. Clearly DIUx/Army believed they had legal authority to make the award. GAO's flawed decision fails to make the case that they did not.

GAO's decision is wrong on all major points: timeliness, interested party status and whether a follow-on production contract was authorized. All these errors relate in some fashion to GAO's approach to statutory construction and interpretation of the relevant OT statute, 10 USCA § 2371b. As GAO's prior decisions establish and the instant decision points out, its statutory bid protest authority gives it a role, though a limited one, in reviewing the award of non-procurement agreements such as OTs. GAO's statutory mandate does not confer on it any expertise in interpreting statutes unrelated to the procurement system. That lack of expertise is clearly seen in its decision.

Initially, GAO's discussion of its approach to statutory interpretation should be noted. On page 16, GAO emphasized that its primary approach is based on the "plain meaning" rule of statutory construction as well as giving effect to all words of a statute. A review of the decision shows that GAO violated both rules. Because GAO failed to see that its interpretation injects ambiguity into key terms, GAO never discussed the rule relating to ambiguity, namely deference to agency interpretation. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Despite this, GAO commented on and gave weight to executive branch interpretations that are not controlling while dismissing the interpretation of the agency that has a statutory mandate to interpret and administer the statute.

The statute contains and juxtaposes the words "agreement," "transaction" and "project." Two of those terms, transaction and project, are in the key provision relating to follow-on production, § 2371b(f)(2)(B), on which in large measure the decision rests. The GAO decision conflates these to mean the same thing. Plain meaning and give effect to all words, indeed! Agreement, transaction and project do not all mean the same thing. GAO added more confusion by using its own terminology interchangeably with three statutory terms.

Instead of depriving key terms of content by conflating them, GAO might have explored their possible independent meanings. Agreement may mean the written document memorializing the undertakings of the parties. Transaction may mean the entire process of initial interaction with potential performers (presumably but not necessarily by some form of solicitation) leading to negotiation, agreement, award and performance. Project may mean the actions taken

by industry and Government, primarily technical in nature, that lead to the creation or demonstration of a prototype.

Although GAO did not see ambiguity in the statute, it gave some weight (a kind of deference) to executive branch interpretation when that seems to support its results-oriented position. In several instances, the decision cites the DOD OT guide issued by the director for Defense Procurement and Acquisition Policy in January 2017. The guide generally does not purport to be mandatory, including provisions cited by GAO, but merely guidance. Moreover, as pointed out in Dunn, Practitioner's Comment, "DOD Guide for Other Transactions for Prototypes—Fundamentally Flawed," 59 GC ¶ 19, the author of the guide had no authority to control how the military departments exercise their direct statutory authority. GAO chose to cite non-binding guidance rather than to give deference to the secretary of the Army, acting through ACC-NJ, who has explicit statutory authority to enter into prototype OTs.

Another failing of the decision is the absence of any reference to previous follow-on production authority under the predecessor statute, § 845, P.L. 103-160. That production authority was never exercised because it was too rigid and complicated. One of the purposes of § 2371b(f) was to create a simplified method of follow-on production. GAO attorneys, schooled as they are in the highly regulated purchasing system under the Federal Acquisition Regulation, fail to see the importance of streamlined processes. Instead, what they seem to require is notice in a solicitation (based on their understanding of what a solicitation is) and a firm option in the agreement. This is the approach Congress abandoned when it rewrote the OT follow-on provision in § 2371b compared to the old § 845.

Although, as acknowledged in the decision, the CSO solicitation in 2016 mentioned the possibility of follow-on production, GAO's decision is largely based on its finding that there was not adequate notice to Oracle of the possibility of a follow-on production award. Hence it found Oracle's failure to submit a response to the AOI or file a protest in 2017 neither to be untimely nor to disqualify it as not an "interested party." The statute itself provides notice of a possible follow-on production OT or contract. Oracle is presumed to know the law. Again, GAO's thinking, as its discussion of these issues shows, is encrusted with its own immersion in the traditional procurement

system. It cites numerous examples from standard procurement cases to support its views.

GAO rejected the Army's interpretation of the key operative phrase "successfully completed the prototype project provided for in the transaction." Instead, it overlays GAO's prejudice of how things should have been done more like the traditional system. The Army was able to distinguish project, transaction and agreement. GAO was not. Instead, its discussion adds the additional conflated terms "instrument" and "OTA," illustrative of their confused reasoning.

We already have a procurement system that takes too long and costs too much to field needed capabilities. GAO's decision starts down the path toward a more "business as usual" approach for OTs. Its decision is clearly wrong and harmful to reforming our overly regulated acquisition process. Standardization, regulation and "old think" will kill OTs. The key to their effective use is education, not regulation.



This Practitioner's Comment was written for THE GOVERNMENT CONTRACTOR by Richard L. Dunn. Mr. Dunn was the first general counsel of the Defense Advanced Research Projects Agency. He was instrumental in creating DOD's other transactions authority. Currently Mr. Dunn acts as a consultant providing advice and engaging in research and analysis related to the deployment and implementation of technology in the military and civil sectors through partnering and other innovative means; he conducts research in national security operations, technology and their interactions; and analyzes laws, policies and practices that impact the effective implementation of technology. He is the founder of the Strategic Institute for Innovation in Government Contracting, strategicinstitute.org.