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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

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Understanding Why GAO Sustained Protest of OT Production Contract

By Eric S. Crusius and David S. Black*

The authors of this article discuss the use of Other Transaction ("OT") Agreements and a recent Government Accountability Office decision that considered a protest of an OT production contract.

REAN Cloud LLC ("REAN") entered into an Other Transaction ("OT") Agreement with the Army (facilitated by DIUx) to provide prototype cloud migration services.[1] While the prototype work was still being performed, the Army and REAN agreed (using a sole-source award) that REAN would provide follow-on production work valued up to $950 million. Oracle America, Inc. ("Oracle") protested the follow-on production award to REAN.

The Government Accountability Office ("GAO") sustained the protest[2] filed by Oracle because the Army: (1) did not provide that there could be follow-on production work in the agreement between REAN and the Army as required when the production work is awarded sole-source and (2) the prototype work under the initial agreement had not been completed. While this decision is not insignificant, the rush towards the use of OT Agreements should continue unabated[3] because the decision was based upon the Army's purported failure to follow its own requirements and not based on an underlying issue with the use of OT Agreements or follow-on production contracts.

OT AGREEMENTS

For the uninitiated, OT Agreements are contracts between the federal government and private entities (including educational, research, and non-

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* Eric S. Crusius is a partner at Holland & Knight LLP who focuses his practice on a wide range of government contract matters, including bid protests, claims and disputes, compliance and sub-prime issues. David S. Black, a partner at the firm and co-chair of its National Government Contracts Practice, concentrates his practice in the area of government contracts counseling and dispute resolution. The authors may be contacted at eric.crusius@hklaw.com and david.black@hklaw.com, respectively.

1 According to its website, DIUx (short for Defense Innovation Unit Experimental) provides "non-dilutive capital in the form of pilot contracts for commercial innovation that solves Dept. of Defense (DoD) problems. And we do so quickly, usually in under 90 days."

2 GAO Decision *available at* https://www.gao.gov/assets/700/692327.pdf.

3 Nextgov.com just released data that showed agencies spent $10.4 Billion on OT Agreements over the past 10 years. There has been a remarkable jump from $714 million in 2014 to more than $2 billion in 2017. *See* https://www.nextgov.com/insights/cards/other-transaction-authority/1/?oref=ng-cards-prev-nav.

profit institutions) that forego the shackles of the Federal Acquisition Regulation ("FAR") and the Defense Federal Acquisition Regulation Supplement ("DFARS") requirements and instead allow the parties to craft contracts from scratch. There are a few restrictions, however. First, the authority to enter into OT Agreements is limited by statute. Only certain agencies have been granted this authority by Congress. Second, the scope of the OT Authority is limited by Congressional grant; meaning that only certain categories of products and/or services may be procured utilizing an OT Agreement. Third, certain processes have to be met when utilizing OT Agreements. Sometimes those processes are spelled out in the statute granting OT Authority, sometimes the agencies with OT Authority create their own guidelines, and sometimes both have occurred.

Despite the overall simplification of contracts issued under an agency's OT Authority, navigating OT Agreements is not necessarily simple because the scope of authority and the rules pertaining to OT Agreements and follow-on production work varies significantly between agencies. Besides that, entering into OT Agreements could be fraught with peril because the baseline FAR and DFARS clauses (such as those pertaining to intellectual property rights) are gone and the entity entering into an OT Agreement must negotiate each point with an agency.

Following an OT Agreement and execution of a successful project, companies may negotiate for follow-on work. With respect to the Department of Defense ("DOD"), that award can be sole-sourced so long as the initial OT Agreement was entered into use "competitive procedures" and other requirements are met.

ORACLE'S PROTEST

Oracle's complaint was not about the initial OT Agreement, but instead about the follow-on production award. The statute authorizing OT Agreements in DOD has plainly provided that follow-on production work can be awarded without using competitive procedures so long as the initial OT transaction provided that there could be a follow-on production contract, that competitive procedures were used in the initial OT transaction, and the participants to the prototype project completed the project. See 10 U.S.C. § 2371b which provides, in relevant part, that:[4]

> (f) Follow-on Production Contracts or Transactions.—
>
> (1) A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or

[4] 10 U.S.C. § 2371b.

> 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.
>
> (3) Contracts and transactions entered into pursuant to this subsection may be awarded using the authority in subsection (a), under the authority of chapter 137 of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

As mentioned above, Oracle complained (and GAO agreed) that the Army failed to note the possibility that a follow-on production contract would be used or that that initial prototype project was completed in the transaction documents. With respect to the first point, the Army argued that the possibility that there would be follow-on work was mentioned in the announcement issued by DIUx, and that was sufficient to put the parties on notice. GAO disagreed, holding that

> DOD's position fails to consider that such award is only permitted if there is a provision for follow-on production included in "[a] transaction entered into under this section." 10 U.S.C. § 2371b(f)(1). In this regard, the CSO (and for that matter, the AOI) cannot be a "transaction [that is] entered into," because it is a standalone announcement. *Id.* The "transaction" is the legal instrument itself, and not the solicitation documents.[5]

Oracle also argued that the follow-on production contract was improper because work on the initial prototype was ongoing. The Army countered that even though that was the case, the prototype work that was ongoing was not included in the follow-on production contract. GAO did not find that argument convincing and held that "the plain meaning of the phrase 'completed the prototype project provided for in the transaction.' is the entire prototype

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[5] *See* GAO Decision at page 17.

project described in the transaction, i.e., the instrument itself."[6] Because GAO had already found two independent bases to sustain the protest, it did not evaluate other arguments made by Oracle.

GAO DECISION

Prior to addressing the substance of Oracle's claims, GAO addressed whether it had jurisdiction over the protest and whether Oracle was an interested party. With respect to jurisdiction, GAO held that while it cannot evaluate the efficacy of how various offerors were evaluated, it can evaluate whether an agency's use of OT authority was proper.

In evaluating whether Oracle had standing to bring the protest, GAO balanced the fact that Oracle did not submit a brief to compete for the OT award with Oracle's claims that it would have submitted a brief had it known the true scope of the project and the fact that a follow-on award was possible. GAO credited Oracle with its claims and relied on a long line of decisions in which GAO has held interested parties include offerors that do not actually submit offers due to different conditions.

While OT Agreements simplify the acquisition process, agencies still have to follow the statutes and regulations that guide the award of OT Agreements and follow-on work. The decision issued by GAO confirmed that.

GAO's decision also raises questions about whether OT Agreements previously issued through DIUx can justify sole source awards for production. GAO held that, because the OT transaction documents executed by REAN did not expressly reference follow-on production work, a production OT award could not qualify as a follow-on production contract "provided for in a transaction under [10 USC 2371b(f)(1)]" for purposes of 10 USC 2371b(f)(2). It could be that other OT Agreements awarded through DIUx for prototype work prior to GAO's decision suffer from the same omission as the transaction documents with REAN. Going forward, when new prototype OT Agreements are awarded, both DOD activities and contractors should exercise care to ensure that transaction documents for the prototype work expressly provide for the possibility of follow-on production work. As GAO noted, a reference to possible follow-on production work set forth in the Commercial Solutions Opening or Areas of Interest documentation is legally insufficient to authorize follow-on production work.

GAO's decision also heightens the importance of understanding the extent of prototype work that must be "successfully completed" before a follow-on

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[6] *See id.* at page 19.

production contract may be awarded under 10 U.S.C. § 2371b(2). Even where an existing prototype OT Agreement contemplated follow-on production work, both agencies and contractors should confirm that all prototype work covered by the initial OT Agreement—include new work that may have been added through a modification—has been successfully completed prior to award of any follow-on production OT Agreement.