U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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Comptroller General
of the United States

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Decision

Matter of: Oracle America, Inc.

File: B-416061

Date: May 31, 2018

Marcia G. Madsen, Esq., David F. Dowd, Esq., Luke Levasseur, Esq., Roger V. Abbott, Esq., and Michael J. Word, Esq., Mayer Brown LLP, for the protester.
A. Jeff Ifrah, Esq., and Whitney A. Fore, Ifrah Law, for REAN Cloud LLC, the intervenor.
Rachel E. Woods, Esq., and Wade L. Brown, Esq., Department of the Army, for the agency.
Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is an interested party to protest that the agency improperly used its other transaction authority to enter into a follow-on production transaction, where the protester's interest in a competed solution if the protest is sustained is sufficient for it to be considered an interested party.

2. Protest of the agency's entry into a follow-on production transaction under the agency's other transaction authority is sustained, where the agency did not comply with the requirements of the statute.

DECISION

Oracle America, Inc., of Reston, Virginia, challenges the Department of the Army's entry into an other transaction agreement[1] (OTA) with REAN Cloud LLC (REAN), of Herndon, Virginia, which was awarded as a follow-on production OTA (P-OTA) under 10 U.S.C. § 2371b(f) for cloud migration and cloud operation services. Oracle contends that, in

[1] "Other transactions" are legally-binding instruments, other than contracts, grants, or cooperative agreements, that generally are not subject to federal laws and regulations applicable to procurement contracts. These instruments are used for various purposes by federal agencies that have been granted statutory authority permitting their use. See, e.g., the Aviation and Transportation Security Act (ATSA), 49 U.S.C. § 106(l)(6).

entering into the P-OTA, the Army did not properly exercise the authority granted to it under the statute.

We sustain the protest.

BACKGROUND

Statutory Background

Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. No. 103-160), as amended by section 804 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, granted the Department of Defense (DoD) the authority to enter into OTAs for prototype projects. Section 815 of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, repealed section 845 and codified at 10 U.S.C. § 2371b DoD's authority to use OTAs for prototype projects.[2] Transactions for these prototype projects may be entered into if they are "directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces." 10 U.S.C. § 2371b(a)(1). Section 867 of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, established a preference for use of other transaction authority in circumstances determined appropriate by the Secretary of Defense.

In their current form, the provisions of 10 U.S.C. § 2371b relevant to this protest are as follows:

> (a) Authority.—
>
> (1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of this title, carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.
>
> (2) The authority of this section—
>
> (A) may be exercised for a transaction (for a prototype project) that is expected to cost the Department of Defense in excess of $100,000,000 but not in excess of $500,000,000 (including all options)

[2] This statute is distinguished from 10 U.S.C. § 2371, which addresses other transactions for basic, applied, or advanced research projects.

only upon a written determination by the senior procurement executive for the agency as designated for the purpose of section 1702(c) of title 41, or, for the Defense Advanced Research Projects Agency or the Missile Defense Agency, the director of the agency that—

(i) the requirements of subsection (d) will be met; and

(ii) the use of the authority of this section is essential to promoting the success of the prototype project; and

(B) may be exercised for a transaction (for a prototype project) that is expected to cost the Department of Defense in excess of $500,000,000 (including all options) only if—

(i) the Under Secretary of Defense for Acquisition, Technology, and Logistics determines in writing that—

(I) the requirements of subsection (d) will be met; and

(II) the use of the authority of this section is essential to meet critical national security objectives; and

(ii) the congressional defense committees are notified in writing at least 30 days before such authority is exercised.

(3) The authority of a senior procurement executive or director of the Defense Advanced Research Projects Agency or Missile Defense Agency under paragraph (2)(A), and the authority of the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (2)(B), may not be delegated.

* * * * *

(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 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.

10 U.S.C. § 2371b(a), (f).

History of the Transaction

In August 2015, DoD established the Defense Innovation Unit (Experimental) (DIUx) in Mountain View, California, in order to "accelerate the development, procurement, and integration of commercially-derived disruptive capabilities to regain our nation's technological lead in offensive and defensive capabilities." Agency Report (AR), Tab 3, Commercial Solutions Opening (CSO) Special Notice, at 1; see also Combined Contracting Officer's Statement (COS)/Memorandum of Law (MOL), at 2; AR, Tab 32, DoD Directive 5105.85 (establishing DIUx's mission and internal governance council).

On June 15, 2016, DIUx published a CSO under the authority of 10 U.S.C. § 2371b in order to "award[] funding agreements . . . to nontraditional and traditional defense contractors to carry out prototype projects that are directly relevant to enhancing. . . mission effectiveness. . . ."[3] AR, Tab 2, DIUx CSO at 1. The CSO is available for 5 years and provides for a multi-step evaluation process consisting of a solution brief and/or demonstration, followed by a request for prototype proposal (RPP) and submission of a proposal. Id. The agency considers this process to be competitive. Id. Solution briefs are not evaluated against each other, but instead are compared to the AOI under four factors described in the CSO: relevance, technical merit, viability, and uniqueness. Id.; COS/MOL at 3.

Touting the "[b]enefits of the CSO process and OTAs" to prospective contractors, the CSO states that there is "[p]otential follow-on funding for promising technologies . . . and possible follow-on production." AR, Tab 2, DIUx CSO at 2. The remainder of the CSO explains the process progressing from solution brief to the possibility of "additional work." Id. at 9.

On January 17, 2017, DoD issued an updated Other Transactions (OT) Guide for Prototype Projects in order to "assist Agreements Officers in the negotiation and administration of OTs." AR, Tab 16, OT Prototype Guide, at 1. As relevant to this protest, the OT Prototype Guide instructs users that "[t]he 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." Id. at 10. The OT Prototype Guide advises that "[s]ection 10 U.S.C. 2371b

[3] Although the Army states that the CSO is used to "solicit solution ideas from industry," the CSO does not, in fact, invite the submission of solution briefs. COS/MOL at 18, citing AR, Tab 16, OT Prototype Guide, at 8; AR, Tab 2, DIUx CSO. Instead, the CSO establishes the initial solicitation framework, and solution briefs are solicited through the subsequent issuance of Area of Interest (AOI) statements. COS/MOL at 2-3.

authorizes DoD to structure OTs for prototype projects that may provide for the award of a follow-on production contract or transaction . . . ." Id. at 10-11.

Also in January 2017, a [DELTED] in a building on [DELETED], damaged some of the computer servers housed there that supported the U.S. Transportation Command (TRANSCOM). Hearing Transcript (Tr.) at 344:19-346:8.[4] After the servers were repaired, the TRANSCOM commander created a team to address the risks associated with local server outages, with special consideration of a cloud-based solution. Id. at 346:14-347:5; 481:16-19. In exploring the problem, the team identified that many of TRANSCOM's software applications were legacy applications built with outdated code. As a result, these applications were in a format that did not allow for automatic migration to a cloud-based system. Id. at 358:7-359:1.

The agency asserts that, because the migration of legacy applications is time-intensive and demands significant resources, the TRANSCOM team searched for a "repeatable automated methodology" that could convert and migrate TRANSCOM's local applications to cloud-based applications while maintaining their functionality. Id. at 360:1-14. The TRANSCOM team contacted a range of DoD organizations to assess whether they possessed a solution. Id. at 362:21-363:17. Finding no agency with these capabilities, the TRANSCOM team contacted DIUx. Id. at 363:19-20. DIUx confirmed to the TRANSCOM team that several other DoD entities were searching for similar solutions, which the TRANSCOM team relied on as evidence that similar solutions were not in use elsewhere within DoD. Id. at 363:20-364:5; 366:10-18; see also id. at 408:19-21 ("To the best of my knowledge . . . no one in DoD has been able to implement this.").

DIUx agreed to facilitate TRANSCOM's search for a solution on the dual conditions that TRANSCOM provide funding and that the competition was broadened to encompass problems identified to DIUx by other DoD entities.[5] Id. at 367:6-10; 369:15-19. TRANSCOM worked with DIUx to draft a problem statement that would serve as a public call for solution briefs. Id. at 368:16-17. DIUx combined the "different requirements" of TRANSCOM and two other DoD entities--one from at Hanscom Air Force Base and the other from the Pentagon in Arlington, Virginia--into a single announcement seeking solution briefs. Id. at 195:7; 369:14-22; AR, Tab 25, AOI, at 2. DIUx published the consolidated announcement, now called an AOI, on March 10, 2017. AR, Tab 25, AOI. The AOI, titled "Agile Systems Development Environment," read as follows:

[4] On April 19-20, 2018, GAO held a hearing in this protest. Four witnesses testified: the agreements officer who signed the P-OTA, the principal assistant responsible for contracting, the TRANSCOM executive officer, and TRANSCOM'S chief engineer on this project. Transcript citations in this decision relate to the transcript for this hearing.

[5] The record does not identify these entities, so they are referred to throughout only by their associated location.

> Seeking the prototyping[6] of a robust and scalable software development environment to enable the modernization of Department of Defense (DoD) command and control systems in a cloud infrastructure. Environment must include a scalable software development and production platform to enable continuous integration, continuous delivery, and operation of new applications, as well as the containerization, rehosting, and refactoring[7] of existing DoD applications. Additionally, ideal solutions will consist of an ecosystem of software and platforms to rapidly deploy advanced commercial capabilities, to include, but not limited to[:] workflow, geospatial services, data analytics and visualization, and data management. Prototype will be deployed to a government cloud and/or an on premise[s] cloud infrastructure,[8] and the effectiveness of the solutions will be demonstrated through the migration and modernization of a collection of DoD applications. Solutions must be commercially viable and ready to support the application migration within 30 days of award.

Id. at 2. The AOI was posted on the DIUx website from March 10 through March 22. Id. at 3. DIUx received 21 solution briefs, including one from REAN. AR, Tab 26, Vendor List. Oracle did not submit a solution brief. Tr. at 399:11-13.

TRANSCOM and the other teams separately evaluated the 21 solution briefs with DIUx to determine if any of the briefs responded to the solution sought by that entity. Tr. at 391:2-3. Although the AOI stated that "ideal solutions will . . . include geospatial services, data analytics and visualization, and data management," TRANSCOM was not seeking a solution related to geospatial services or data analytics and visualization, and thus presumed that solutions in these areas were sought by the Hanscom and/or Pentagon entities. AR, Tab 25, AOI, at 2; tr. at 377:5-13; 379:13-17; 394:5-8. Therefore, a solution that addressed geospatial services would have been considered not relevant from TRANSCOM's perspective, although it could have still been found responsive and selected by either of the other teams. Id. at 393:1-9. The solution briefs

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[6] The CSO describes a prototype as "a physical or virtual model used to evaluate the technical or manufacturing feasibility or military utility of a particular technology or process, concept, end item or system." AR, Tab 2, DIUx CSO at 2.

[7] The Army explained that "rehosting is . . . taking the data as it is today, and migrating it through [an] automated process [to the migration destination, where] it looks exactly the same . . . . Refactoring is . . . changing out some different technologies that that actual application has but . . . for the most part, [the application] stays intact. . . . [Rebuilding] is starting . . . from the ground up, but rebuilding [the application] in a cloud[-]native type of platform." Tr. at 419:15-420:3.

[8] In fact, TRANSCOM was not interested in an on-premises or government cloud solution, and instead sought a solution that would be deployed to the government-approved commercial cloud. Tr. at 343:11-13; 481:20-482:10.

were evaluated only against the AOI and were not compared to each other. Id. at 395:21-396:4.

Of the 21 solution briefs received, TRANSCOM, Army Contracting Command – New Jersey (ACC-NJ)[9] and DIUx selected five for a subsequent presentation at which each company would demonstrate its proposed solution. AR, Tab 28, REAN Evaluation (Solution Brief), at 1-2; tr. at 401:15-22. TRANSCOM, ACC-NJ and DIUx next evaluated the four presentations (one company chose not to participate further) and selected two companies, including REAN, to receive an RPP.[10] AR, Tab 28, REAN Evaluation (Presentation), at 3-4; tr. at 410:16-22. DIUx, TRANSCOM and REAN then collaborated on the REAN RPP, No. DIUx-17-R-0037, which was finalized on April 4. COS/MOL at 4; tr. at 42:21-43:2; AR, Tab 4, RPP. The agency sought "the prototyping of a robust and scalable software development environment to enable the modernization of DoD command and control systems in a cloud infrastructure." Agency Req. for Dismissal, Mar. 6, 2018, at 2. Although the RPP response date was April 14, id. at 1, the agency nevertheless accepted REAN's late prototype proposal, submitted on April 17, and REAN's late pricing proposal, submitted on May 8.[11] AR, Tab 29, REAN Technical Proposal; Tab 30, REAN Pricing Proposal. Neither the RPP nor REAN's proposals referred to a possible follow-on production transaction. Id.; see also AR, Tab 4, RPP.

On May 10, ACC-NJ executed a determination and findings (D&F) to approve the use of its other transaction authority under 10 U.S.C. § 2371b for the award of a prototype OTA to REAN. AR, Tab 5a, Prototype OTA D&F, May 10, 2017.

On May 23, REAN and ACC-NJ entered into prototype OTA No. W15QKN-17-9-1012, with a total value of $2,426,799, for the rehosting and refactoring of up to six TRANSCOM applications into an unclassified Amazon Web Services (AWS) environment. AR, Tab 6a, Prototype OTA, at 2, 11. The prototype OTA had a 6-month period of performance from the award date. Id. at 20. The transaction also provided that "[t]his OTA will be available for use for a period of 6 months from the date the OTA is awarded." Id. The prototype OTA was modified six times. Modifications P0001

[9] Although TRANSCOM was purchasing the prototype, ACC-NJ managed the OTA award in its role as a contracting activity for DIUx. Tr. at 17:8-9; 432:11-16.

[10] The REAN demonstration evaluation states that "[t]he ROM [rough order of magnitude] estimated price is acceptable for the proposed prototype" and was "well below expected project constraints. . . ." AR, Tab 28, REAN Evaluation (Demonstration), Apr. 3, 2017, at 4. However, the record does not show that the ROM was finalized prior to the REAN presentation evaluation. AR, Tab 27, REAN Solution Brief; Tab 65, REAN Presentation; see also tr. at 411:19; id. at 159:12-14. At best, the parties discussed a ROM during REAN's presentation. Id. at 159:22.

[11] REAN's prototype and pricing proposals are undated, but the document dates were provided in the Agency Report Index. AR, Index, at 3.

through P0004 made administrative changes. Modification P0004, issued on August 2, 2017, also incorporated DoD form DD-254 in order to initiate the process for REAN to be able to work on classified software applications, the first step in potentially adding the migration of classified applications to the prototype OTA.[12] AR, Tab Amend. P0004; tr. at 66:12-68:22.

On August 25, the Army executed a D&F to approve a modification to the prototype OTA to add "assessment and planning for technical and business benefits of full enclave migration"[13] to the scope of work, which previously called for only the migration of individual applications. AR, Tab 8, Enclave D&F, at 1. On August 29, the Army executed the modification to add the movement of enclaves into the prototype and increased the total value of the prototype OTA by $6,566,283 to $8,993,082. AR, Tab 7e, Amend. P00005, at 1-2, 11-13.

On November 8, TRANSCOM concluded that REAN had "performed the requirements" of the prototype OTA, despite the fact that the enclave work added with modification P0005 was ongoing. AR, Tab 9, TRANSCOM Mem. for Record, Nov. 8, 2017, at 2. AR, Tab 7e, Amend. P00005, at 1, 11-13. On November 14, ACC-NJ notified REAN that it intended to enter into a P-OTA "as a follow-on to the successful completion of the [prototype OTA], for REAN . . . to deploy, implement and sustain migrated application infrastructure into a Government authorized commercial cloud environment." AR, Tab 10, ACC-NJ P-OTA Ltr., Nov. 14, 2017. On November 16-17, TRANSCOM, REAN, DIUx, and ACC-NJ jointly drafted the P-OTA. COS/MOL at 5-6. On December 11, TRANSCOM finalized an independent government cost estimate (IGCE) of $116,765,808 for the P-OTA. AR, Tab 40, IGCE, at 2.

On December 22, ACC-NJ executed modification P0006 to modify the prototype OTA to add funding for the enclave work included in modification P0005.[14] AR, Tab 7f, Amend. P0006, at 1. Although the period of performance of individual contract line item numbers was changed, the prototype OTA still provided for a 6-month period of performance and a 6-month period of use from signature date of May 23, 2017, i.e., through November 23, 2017.

On February 1, 2018, ACC-NJ executed a D&F concluding that the requirements of 10 U.S.C. § 2371b had been met, including the completion of the initial prototype project

[12] At the time the AOI was drafted, TRANSCOM was not seeking the ability to migrate classified software to an approved classified cloud. Tr. at 381:8-388:13.

[13] The agency defines an "enclave" as "a network of interdependent and interpretational applications performing disparate functions, but tied through closely connected entities (e.g., databases, interfaces, etc.)." Agency's Req. for Dismissal, Mar. 6, 2018, at 3 n.3.

[14] Modification P0006 was executed almost 1 month after the end of the OTA's period of performance or availability for use.

for the migration of six applications, and thus ACC-NJ could award the P-OTA.[15] AR, Tab 19, P-OTA D&F. The same day, REAN and ACC-NJ executed the P-OTA, which had a not-to-exceed (NTE) value of $950 million.[16] AR, Tab 7i, P-OTA. The P-OTA was structured to function similar to an indefinite-delivery, indefinite-quantity (IDIQ) ordering agreement that was available to be used by other DoD entities through an order placed by ACC-NJ. COS/MOL at 7.

On February 2, ACC-NJ placed the first order (Order 1) against the P-OTA in the amount of $14,121,976, that provides for REAN to establish foundations, and provide refactoring, redeveloping and managed services for TRANSCOM in classified and unclassified environments.[17] AR, Tab 13, P-OTA Order 1 at 4.

On February 12, the Army posted the notice of award to REAN on FedBizOpps, erroneously providing a value of $950,000 instead of $950 million. AR, Tab 43, FedBizOpps Notice, at 1. Oracle filed this protest on February 20.

On February 22, the DoD Chief Management Officer and the Undersecretary of Defense (USD) (Acquisition & Sustainment) directed DIUx to "coordinate with ACC-NJ to immediately pause the issuance of any additional orders against" the P-OTA. AR, Tab 11a, DoD Mem., Feb. 22, 1018.

On March 1, the DoD Chief Management Officer and the USD (Research & Engineering) directed DIUx "to work with ACC-NJ to promptly reduce the value of the production agreement to a ceiling of $65 [million]" and limit the services to TRANSCOM. AR, Tab 11b, DoD Mem., Mar. 1, 2018. On March 6, ACC-NJ advised REAN that only orders for TRANSCOM projects would be placed on the P-OTA, and that the total value would not exceed $65 million. AR, Tab 11c, ACC-NJ Mem., Mar. 6, 2018.[18]

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[15] As of April 20, the prototype OTA enclave work was not completed. Tr. at 86:18-20. The agency stated that the assessment that the prototype project was completed applied only to the those "parts of the prototype" project described in the prototype OTA prior to its modification. Tr. at 471:18-19.

[16] On January 16, 2018, "[b]ased on the interest received to date [from other DoD agencies interested in placing orders under the P-OTA] coupled with the DoD required acceleration to the cloud," ACC-NJ and DIUx agreed that the NTE value of the P-OTA should be $950 million. AR, Tab 11, P-OTA Ceiling Determination; Tr. at 118:5-7.

[17] As of April 19, REAN was not certified to operate in a classified environment. Tr. at 182:9-10; 182:20-183:2. Nevertheless, Order 1 commits the Army to purchasing AWS's classified and unclassified environments for REAN's anticipated migration of classified and unclassified applications. AR, Tab 13, P-OTA Order 1 at 4-5.

[18] By its terms, with the exception of minor administrative changes, the P-OTA may only be amended by bilateral signature. AR, Tab 7i, P-OTA at 16. As a result, the NTE value remains at $950 million, and the only change was the reduction in the intended use of the instrument. Tr. at 119:22-120:6.

DISCUSSION

Oracle contends that the Army's use of its other transaction authority in 10 U.S.C. § 2371b to award the P-OTA did not comply with the statutory provisions. The agency and intervenor argue that Oracle is not an interested party under our Bid Protest Regulations to challenge the agency's use of its other transaction authority and thus the protest should be dismissed. As discussed below, we conclude that the protester is an interested party to pursue its protest of the award of the production OTA. As to the merits of the protest, for the reasons discussed below we conclude that the agency did not properly use its authority under 10 U.S.C. § 2371b in awarding the production OTA, and we sustain the protest.[19]

Jurisdiction

As a preliminary matter, we review our jurisdiction to hear the challenge to the Army's exercise of its other transaction authority. Oracle contends that "GAO has jurisdiction to review whether an agency properly exercised Other Transaction authority in lieu of using a procurement contract." Protest at 13, citing Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22. The Army agrees that Rocketplane Kistler provides for

[19] Oracle also argues that the Army did not comply with the requirements of subsection 2371b(a) because the agency failed to obtain the internal approvals or provide the Congressional notifications described therein. Protest at 37. Although the authority to award a follow-on production transaction in subsection (f)(3) rests upon subsection (a), the agency reads the internal approval and Congressional notification provisions as applicable only to prototype projects. Tr. at 251:7-9. Accordingly, the agency views P-OTAs as exempt from these provisions, regardless of value. COS/MOL at 27; tr. at 108:5-6; 251:10-13. Although we do not agree with the Army's statutory interpretation, resolution of this protest does not require that we determine whether the lack of internal approval or Congressional notification resulted in the award of the P-OTA without proper authority.

In addition, Oracle contends that the award of the P-OTA was improper because it did not "include a clause that provides for the Comptroller General, in the discretion of the Comptroller General, to examine the records of any party to the agreement or any entity that participates in the performance of the agreement," unless that party has already provided the government with similar audit access, as required by 10 U.S.C. § 2371b(c) for transactions with a value in excess of $5 million. 10 U.S.C. § 2371b(c)(1), (2); Oracle Post-Hearing Comments at 2. While the agreements officer characterized this omission as an "oversight," the agency later argued that a clause requiring REAN to "maintain adequate records to account for Federal funds received" for inspection by the agreements officer or designee for up to 3 years after the expiration of the prototype satisfied the intent of the statute. Tr. at 115:20; COS/MOL at 8; Agency Post-Hearing Brief at 13. As above, resolution of this protest does not require that we determine whether the absence of this provision resulted in the award of the P-OTA without proper authority.

limited GAO jurisdiction to review whether "the agency is improperly using [a] non-procurement instrument . . . ." Agency Req. for Dismissal, Mar. 6, at 5.[20]

Under the Competition in Contracting Act of 1984 (CICA) and our Bid Protest Regulations, we review protests concerning alleged 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. See 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). In circumstances where an agency has statutory authorization to enter into "contracts . . . [or] other transactions," we have concluded that agreements issued by the agency under its "other transaction" authority "are not procurement contracts," and therefore we generally do not review protests of the award or solicitations for the award of these agreements under our bid protest jurisdiction. Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22 at 3; see also MorphoTrust USA, LLC, B-412711, May 16, 2016, 2016 CPD ¶ 133 at 7-8. We will review, however, a timely protest that an agency is improperly using its other transaction authority. 4 C.F.R. § 21.5(m) (Although "GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts, with the exception of awards or agreements as described in § 21.13[,] GAO does, however, review protests alleging that an agency is improperly using a non-procurement instrument to procure goods or services."); see also Rocketplane Kistler, supra; MorphoTrust USA, supra. In this regard, our Office will review only whether the agency's use of its discretionary authority was proper, i.e., knowing and authorized. MorphoTrust USA, supra, at 8. Because Oracle argues that the Army did not appropriately use its authority under 10 U.S.C. § 2371b to award the P-OTA to REAN, we conclude that our Office has jurisdiction to review this limited protest issue.[21]

[20] The Army also argues that the protest is untimely because Oracle did not challenge the March 23, 2017, award of the prototype OTA within 10 days of award. Agency Req. for Dismissal, Mar. 6, 2018, at 9. The protester contends that, since it challenges the award of the P-OTA, and since the P-OTA was published by ACC-NJ on February 12, 2018, its February 20 protest of the P-OTA award was timely filed. Protester's Opp'n to Agency's Req. for Dismissal, Mar. 12, 2018, at 19. Because the protest is limited to the agency's authority to award the P-OTA, and because Oracle filed its protest within 10 days of when it knew or should have known of the award, we conclude that the protest is timely under our Bid Protest Regulations. 4 C.F.R. § 21. 2(a)(2).

[21] Oracle argues that the Army must employ a Federal Acquisition Regulation-based procurement unless this option is not "feasible or suitable." See, e.g., Protest at 4. Where, as here, an agency's use of its "other transaction" authority is authorized by statute or regulation, our Office will not review the agency's decision to exercise such authority. MorphoTrust USA, supra, at 9. On this basis, these protest arguments are dismissed.

Interested Party

We next consider the Army's argument that Oracle is not an interested party to pursue its protest. Agency Req. for Dismissal, Mar. 6, 2018, at 9-11. Specifically, the agency contends that Oracle's failure to submit a solution brief in response to the June 2016 CSO precludes it from being an interested party, because "Oracle is not an actual or prospective offeror whose direct economic interest would be affected by the award of a contract (or OTA in this case) or by the failure to award a contract (OTA)." Id. at 11 citing 4 C.F.R. § 21.0(a)(1); Agency Post-Hearing Brief, Apr. 27, 2018, at 16, citing Made in Space, Inc., B-414490, June 22, 2017, 2017 CPD ¶ 195.[22] The intervenor similarly argues that Oracle's failure to submit a solution brief deprives it of standing to challenge the award of the P-OTA. Intervenor Req. for Dismissal, Mar. 7, 2018, at 6-7.

Oracle asserts that the CSO and the AOI, whether considered collectively or separately, did not provide adequate notice of the agency's intent to award a production OTA, as compared to only a prototype OTA. Protester Post-Hearing Brief at 10-11. The protester also alleges that the AOI did not reasonably advise potential contractors of the solution sought by the agency nor the intended scope of the P-OTA. Protester Opp'n to Req. for Dismissal at 15-21. Oracle contends that if the AOI and/or the CSO had accurately described the prototype competition, or had advised parties that the Army contemplated the award of a P-OTA, it would have submitted a solution brief. Protester Post-Hearing Brief at 10-13.

Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. See, e.g., Helionix Sys., Inc., B-404905.2, May 26, 2011, 2011 CPD ¶ 106 at 3. Thus, even a protester who 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. Id. (protester who did not submit proposal was interested party to challenge solicitation terms that deterred it from competing); Courtney Contracting Corp., B-242945, June 24, 1991, 91-1 CPD ¶ 593 at 4 (protester was interested party, despite not submitting bid or offer, where remedy sought was the opportunity to compete); Afghan Carpet Servs., Inc., B-230638, June 24, 1988, 88-1 CPD ¶ 607 at 3 (protester is an interested party if it is a potential competitor if the protest is sustained, even though it did not submit bid under the protested solicitation); MCI Telecomm. Corp., B-239932, Oct. 10, 1990, 90-2 CPD ¶ 280 at 4-5 (protester was interested party to challenge order as out of scope of the underlying contract, even where protester did not participate in the competition of the contract); Coulson Aviation (USA) Inc. et al., B-409356.2 et al., Mar. 31, 2014, 2014

[22] The Army also argues that Oracle is not an interested party because it is "not in line for award even if it prevails in its protest." Agency Req. for Dismissal, Mar. 6, 2018, at 11. However, since solution briefs were not competed against one another, there are no offerors in "line for award" and thus Oracle cannot be uninterested under this test. AR, Tab 2, CSO, at 1.

CPD ¶ 106 at 16 (protesters were interested parties to challenge sole-source award because if agency decided to meet its needs using a competitive procurement, the protester would be eligible to compete).

In awarding the follow-on P-OTA without competition, the Army relied on the exception under 10 U.S.C. § 2371b(f)(2) that permits such award if a prototype OTA of similar subject matter was competed. Agency Post-Hearing Brief at 9; tr. at 171:17-22. However, the record shows that neither the CSO nor the AOI contemplated the prototype OTA awarded here nor any follow-on P-OTA. For example, the "ideal solution" described in the AOI included geospatial services and data analytics and visualization geospatial, i.e., attributes not sought by TRANSCOM. Compare AR, Tab 25, AOI, at 2 with tr. at 377:5-13; 379:13-17; 394:5-8. Similarly, the AOI stated that DIUx sought deployment "to a government cloud and/or an on-premise[s] cloud infrastructure," while TRANSCOM personnel testified that, in fact, it sought only a solution proposing an off-premise commercial cloud. Compare AR, Tab 25, AOI, with tr. at 345:5-13; 423;13-14; 481:20-482:10; 543:3-14.

Likewise, at the time the AOI was formulated, TRANSCOM did not consider using the solution for the migration of classified software applications. Id. at 382:9-12. Nevertheless, the first order placed on the P-OTA anticipates the migration of classified applications. AR, Tab 13, P-OTA Order 1. More broadly, potential prototype OTA contractors were not advised that the agency intended to award a follow-on P-OTA to a successful vendor. Although the agency argues that the CSO's inclusion of "possible follow-on production" among OTA benefits provided adequate notice, we find this statement too vague and attenuated to describe the agency's intended procurement.

Therefore, the material differences between the AOI and the actual solution sought by the agency provide a sufficient basis for the protester 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, we conclude that it is an interested party to challenge the agency's use of its OTA authority because it has a direct economic interest in the agency's award here. See Space Exploration Techs. Corp., B-402186, Feb. 1, 2010, 2010 CPD ¶ 42 at 4 n.2 (finding protester to be interested party to challenge order under IDIQ contract, even where protester was not a vendor under the IDIQ contract, where protester challenged the order as outside the scope of the IDIQ contract). Where, as here, a protest involves an award which is allegedly defective because it was not made with appropriate authority, a protester's economic interest in a competed solicitation if the protest is sustained is sufficient for it to be considered an interested party even if the protester has not competed under the allegedly defective solicitation.[23] See Afghan Carpet Servs., supra, at 3.

[23] The Army also asserts that Oracle is not an interested party because the protester allegedly does not have a certain certification, which the Army alleges was a necessary qualification for selection during the prototype evaluation. Agency Post-Hearing Brief at 17-18. However, neither the CSO nor the AOI refers to this certification (continued...)

Prototype

Oracle contends that the agency did not have the authority to award the P-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 10 U.S.C. § 2371b(a). Protest at 5, 20-24. The Army argues the prototype OTA properly qualified as a prototype project because it complied with internal guidance. COS/MOL at 14. The agency sought a "repeatable process that highly automates the installation of these applications and the op[eration]s and maintenance of these applications down the road into a commercial cloud environment," which, it argues, meets the definition of a prototype project. Tr. at 421:8-12. In this regard, the agency contends that a commercial program could still qualify as a prototype project if it had not been previously deployed within the DoD, in part due to the DoD's stringent security requirements. Id. at 408:12-15, 415:17-22. In this regard, neither the agency nor the protester could identify any DoD entity that had successfully implemented a similar automated migration program. Id. at 408:19-21.

The statute itself does not define the term "prototype," but the DoD OT Guide for Prototype Projects defines a prototype project as follows:

> 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. Prototype projects may include systems, subsystems, components, materials, methodology, technology, or processes. By way of illustration, a prototype project may involve: a proof of concept; a pilot; a novel application of commercial technologies for defense purposes; a creation, design, development, demonstration of technical or operational utility; or combinations of the foregoing, related to a prototype.

AR, Tab 16, OT Prototype Guide, at 4.

We find that the original effort procured under the prototype OTA properly consisted of a prototype project. In this regard, the migration of TRANSCOM's applications can fairly be 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." AR, Tab 6a, Prototype

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(...continued)
as a requirement or as part of the evaluation criteria. AR, Tab 2, CSO; Tab 25, AOI. As such, this argument provides no basis to dismiss the protest.

OTA, at 12. The initial award consisted of a proof of concept. AR, Tab 5a, Prototype OTA D&F, at 4.

Although the protester urges our Office to apply a dictionary definition of "prototype," instead of that in the OT Prototype Guide, we decline to do so where the agency guidance was published well in advance of the AOI and the protester does not explain how the definition in the OT Prototype Guide is improper, ambiguous, or should be disregarded in favor of another definition. See, e.g., AINS, Inc., B-400760.4, B-400760.5, Jan. 19, 2010, 2010 CPD ¶ 32 at 11 (relying on internal guidance for definition of terms); Protest at 22-23. On this record, we conclude that the underlying prototype OTA properly consisted of a prototype project.

Follow-On Production Transaction Without Competitive Procedures

This protest also challenges the agency's use of its statutory authority to award a follow-on P-OTA under 10 U.S.C. § 2371b(f). Both Oracle and the Army agree that the P-OTA was awarded without competitive procedures, relying on the exception under subsection (f)(2). Protester Post-Hearing Brief at 22-25; Agency Post-Hearing Brief at 7. Oracle argues that the Army lacked the authority to award a follow-on P-OTA because the prototype OTA did not provide for a follow-on P-OTA, as required by subsection (f)(1). Protester Comments at 24-25. Oracle also alleges that the P-OTA award was improper because the prototype project is not complete, a prerequisite to award under subsection (f)(2)(B).[24] Protester Post-Hearing Brief at 64. The agency contends that its award of the P-OTA complied with the relevant statutory requirements to enter into a follow-on production transaction. COS/MOL at 50. Here, we find that the Army did not comply with the statutory provisions regarding the award of a P-OTA because the prototype OTA did not provide for the award of a follow-on production transaction and because the prototype project provided for in the prototype OTA has not been completed.

[24] The protester also raises a variety of related protest grounds. After review, we find that none of these arguments provides an independent basis to sustain the protest. For example, Oracle also asserts that the agency did not comply with the provision in subsection (f)(2)(A) that requires competitive procedures to have been used to select the parties to the prototype OTA in order to award a follow-on P-OTA without competitive procedures. Protester Post-Hearing Brief at 23. The June 2016 CSO provides that the procedures therein constitute a "competitive process." AR, Tab 2, CSO, at 1. The AOI was published on March 10, 2017. AR, Tab 25, AOI. There is nothing in the record to suggest that the agency did not follow the procedures in the CSO in selecting REAN for the prototype award. To the extent that Oracle now challenges those procedures as not in compliance with subsection (f)(2)(A), this is an untimely challenge to the terms of the solicitation. 4 C.F.R. § 21.2(a)(1). To the extent that Oracle contends that the P-OTA was outside of the scope of the CSO and AOI, given the bases for sustaining the protest described below, we need not address this argument in order to resolve the protest. See, e.g., Protester Comments at 35-36.

The provision at issue here, subsection (f), "Follow-on Production Contracts or Transactions," states:

> (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.
>
> (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.

10 U.S.C. § 2371b(f).

The starting point for our analysis is the statutory language used by Congress. See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself."). In construing the statute, "'we look first to its language, giving the words used their ordinary meaning.'" Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, 519 U. S. 248, 255, 117 S. Ct. 796, 136 L. Ed. 2d 736 (1997) (quoting Moskal v. United States, 498 U. S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990)). Generally, we must give effect to all words in the statute, as Congress does not enact unnecessary language. Life Techs. Corp. v. Promega Corp., 580 U.S. __, __, 137 S. Ct. 734, 740, 197 L. Ed. 2d 33, 41 (2017) (citing Hibbs v. Winn, 542 U.S. 88, 89, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004)). It is a cardinal principle of statutory construction that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001), citing Duncan v. Walker, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125, 150 L. Ed. 2d 251 (2001). If the statutory language is clear and unambiguous, the inquiry ends with the plain meaning. Myore v. Nicholson, 489 F.3d 1207, 1211 (Fed. Cir. 2007) (internal citations omitted). GAO likewise applies the "plain meaning" rule of statutory interpretation. See, e.g., Technatomy Corp., B-405130, June 14, 2011, 2011 CPD ¶ 107.

Follow-on Transaction

Applying the principles above to the language of 10 U.S.C. § 2371b(f), we conclude that a follow-on P-OTA may only be awarded to the prototype transaction participants without the use of competitive procedures 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." 10 U.S.C. § 2371b(f)(1), (2). The Army acknowledges that the prototype OTA does not in any way "provide for" a follow-on P-OTA. Agency Post-Hearing Brief at 10. The agency contends, however, that the June 2016 CSO's references to a possible follow-on P-OTA satisfy the statutory requirement to "provide for" a P-OTA. Id. at 11 ("The language in the CSO has the same effect as if it were specifically incorporated in the individual prototype OTAs – it is clearly an optional part of the intent of the parties from the inception, if the prototype is successful."); see also tr. at 257:5-13 ("Q. Where is your . . . authority to award a follow-on production transaction without having that follow-on transaction being initially provided for in a transaction under paragraph [(f)]1? A: Again, I point to the CSO and the fact that we had in there[,] in the solicitation document that we were going to potentially go to commercial.").

The agency argues that the CSO's language properly "provides for" a follow-on P-OTA in accordance with subsection 2371b(f)(1), in order to allow for a non-competitive award of a P-OTA under (f)(2). Agency Post-Hearing Brief at 10-11. This position, however, 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. MorphoTrust, supra, at 6; see also Exploration Partners, supra, at 4. Thus, the only reasonable reading of this phrase is as a reference to the prototype OTA itself, which does qualify as a "transaction [that is] entered into." Id. We therefore conclude that the Army's argument as to the sufficiency of the CSO references is unreasonable because it neither reflects the ordinary meaning of the statute nor accounts for all of the phrases therein. TRW Inc. v. Andrews, supra; Alaska Dept. of Envtl. Conservation v. Environmental Protection Agency, 540 U.S. 461, 489 n.13, 124 S. Ct. 983, 157 L. Ed. 2d 967 ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (citation omitted).

Not only is this reading consistent with the plain meaning of the statute, but it is also concordant with the agency's own internal guidance, which advises that the agency's "acquisition approach should . . . [a]ddress the OT source selection process, the nature and extent of the competition for the prototype project, and any planned follow-on activities." AR, Tab 16, OT Prototype Guide at 10; id. at 6 ("It is the Agreements Officer's responsibility to ensure that the terms and conditions negotiated [for the prototype OTA] are appropriate for the particular prototype project and should consider expected follow-on needs."). The agency explains, however, that although all of the

DIUx OTAs contemplate that the prototype "projects may eventually result in follow-on production," planning for a P-OTA was not addressed at the time of the award of the prototype OTA because "it's too early in the process." Tr. at 157:18-20; 158:1.

Thus, because the plain and unambiguous meaning of the statute provides that the Army only has the authority to award a follow-on P-OTA if it was provided for in the prototype OTA, and because the prototype OTA here included no provision for a follow-on P-OTA, we conclude that the Army lacked the statutory authority to award the P-OTA and sustain the protest on this basis.

Completion of Prototype Project

As another prerequisite to award of a P-OTA without competition, subsection (f)(2) states that "the participants in the transaction [must have] successfully completed the prototype project provided for in the transaction." 10 U.S.C. § 2371b(f)(2)(B). Oracle asserts that the agency lacked authority to award the P-OTA because the prototype project was not completed. Protester Post-Hearing Brief at 63-64. The Army contends that "[t]he prototype project was successfully completed (as required by section (f)(2)(B)) under the prototype other transaction agreement awarded to REAN on May 23, 2017." COS/MOL at 22.

The prototype OTA as awarded contemplated the migration of six applications, and the option to migrate an additional six. AR, Tab 6a, Prototype OTA, at 4, 7. The prototype OTA was subsequently modified to include enclave migration.[25] AR, Tab 7e, Amend. P0005, at 1 ("The purpose of this modification is to incorporate the movement of Enclaves into the prototype effort."). The enclave work was not completed on February 1, 2018, when the Army signed the D&F approving the award of the P-OTA and awarded the P-OTA. Tr. at 86:18-20.

The Army acknowledges that the enclave work is not complete, but contends that its award of the P-OTA was nevertheless in compliance with the statute because REAN had completed those "parts of the prototype" project that were included in the P-OTA. COS/MOL at 30 ("Only those same capabilities successfully prototyped are included in the production OT."); tr. at 471:19. Because award of a P-OTA requires "successful[] complet[ion of] the prototype project provided for in the transaction," the Army in essence argues that, for the purposes of awarding the $950 million P-OTA, the enclave work is not part of the prototype project. COS/MOL at 21; 10 U.S.C. § 2371b(f)(2).

[25] Although the modification adding funding for the enclaves was signed on December 22, i.e., after the prototype OTA had apparently expired, the enclaves were added as part of the prototype OTA scope of work on August 29, prior to the expiration. AR, Tab 7f, Amend. P0006; Tab 7e, Amend. P0005. In this regard, the agency also argues that the failure to change the period of performance in the prototype OTA was, alternatively, an oversight. Agency Post-Hearing Brief at 5.

We apply the same principles of statutory interpretation described above to determine whether the requirement for successful completion of "the prototype project provided for in the transaction" refers to all of the prototype project or only the project as initially awarded. Again, 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 record shows that the transaction includes enclaves. Furthermore, if the enclaves were not properly part of the "prototype project," then they would not be included in the Army's award authority under 10 U.S.C. § 2371b(a).

The Army argues, on one hand, that the enclaves were properly added to the prototype OTA as an in-scope modification, and that the prototype OTA has not expired. Agency Post-Hearing Brief at 6. On the other hand, the Army asserts that the prototype project has been completed. COS/MOL at 21-23. These inconsistent positions are not persuasive, because it is unreasonable to simultaneously conclude that the modifications were effective to change the scope of work and extend the period of performance, but did not form part of the prototype effort. We agree with the Army that the prototype OTA was modified to include enclave migration. As a result, enclave migration now forms part of the prototype project. It is undisputed that this work is not complete. As a prerequisite to award of a P-OTA, the statute requires successful completion of "the prototype project provided for in the transaction." 10 U.S.C. § 2371b(a). Because the prototype project provided for in the transaction has not been successfully completed, we conclude that the Army did not comply with the statutory requirements in awarding the P-OTA, and we sustain the protest.

RECOMMENDATION

As set forth above, we conclude that the Army had no authority to award the P-OTA here. As a result, we recommend that the Army terminate the P-OTA and review its procurement authority in accordance with this decision. To the extent the Army has a requirement for cloud migration and/or commercial cloud services, we recommend that the agency either conduct a new procurement using competitive procedures, in accordance with the statutory and regulatory requirements, prepare the appropriate justification required by CICA to award a contract without competition, or review its other transaction authority to determine whether an award is possible thereunder. See 10 U.S.C. § 2304(c); 10 U.S.C. § 2371b.

We also recommend that the agency reimburse the protester the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The

protester must submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel