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Saving Other Transaction Agreements from Bid Protest Review: How to Keep OTs as Innovative and Flexible Tools for Research and Development

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Summary

- Other transaction agreements (OTs) are a fast and flexible way for the Department of Defense (DoD) to benefit from the innovation that small businesses and nontraditional defense contractors can offer.
- OTs avoid some of the red tape some members of industry associate with the federal procurement system.

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Abstract

Other transaction agreements (OTs) are a fast and flexible way for the Department of Defense (DoD) to benefit from the innovation that small businesses and nontraditional defense contractors can offer. The benefits of OTs include that they are more flexible than traditional procurement contracts and they avoid some of the red tape some members of industry associate with the federal procurement system. One form of red tape that OTs largely avoid is the bid protest system in which losing competitors can challenge the DoD's contract awards to their rivals. Such protests consume time and money and can delay projects. Recently, however, the decision of the Court of Federal Claims (COFC) in *Hydraulics International* suggests that a significant portion of OTs are vulnerable to bid protest challenges after all.

This article proposes a three-part response to the developments at the COFC that threaten to mire OTs in bid protest litigation. First, this article outlines arguments to challenge the reasoning behind the COFC's decisions according itself jurisdiction over protests of OT awards. Second, this article proposes using OTs' flexibility on data rights and the flexibility that Congress gave the DoD for science and technology projects to insulate future OTs from bid protest review. These recommendations include using royalty and licensing agreements rather

than follow-on production awards as an incentive for private innovators to participate in OTs. Third, this article recommends Congress clarify the COFC's jurisdiction over protests of OTs by adding a definition of "procurement" to the statute controlling the COFC's jurisdiction.

I. Introduction

The recent Court of Federal Claims (COFC) decision in *Hydraulics International* subjects the award of other transaction agreements (OTs) for Department of Defense (DoD) prototype projects to "bid protest" review. Subjecting OTs to bid protest review inhibits the DoD's ability to quickly meet new technological needs. The DoD should follow a three-part plan to preserve the value of OTs in quickly developing and fielding new technology with fewer bid protests. This article proposes that plan.

The plan this article proposes sets out a three-part set of solutions to the problems posed by *Hydraulics International*. The DoD can use each part independently or in combination with the other parts. First, the government should argue against the COFC's continued application of the reasoning of *Hydraulics International*. That includes appealing any future decisions under the reasoning of *Hydraulics International* to the Court of Appeals for the Federal Circuit. Second, the DoD should begin using OTs in ways that do not trigger the bid protest jurisdiction of COFC under the reasoning of *Hydraulics International*. Third, the DoD should request Congress amend the law and make clear that the COFC's bid protest jurisdiction does not extend to OTs.

Before detailing each part of its proposed plan, this article will provide a brief history of OTs and the implications of *Hydraulics International*. After laying the foundation for why *Hydraulics International* unreasonably restrains the DoD's ability to use OTs as Congress intended, this article will move to potential legal challenges to the reasoning of *Hydraulics International*. Then this article will discuss how the DoD can use OTs in ways that avoid the COFC's bid protest jurisdiction even if *Hydraulics International* remains good law. After that, this article will examine options for statutory changes that would legislatively overrule *Hydraulics International*. Finally, this article will sum up the problem created by *Hydraulics International* and the options available to solve it.

II. Why the Decision in *Hydraulics International* Matters: An Overview of Federal Acquisitions, OTs, and *Hydraulics International* Itself

To understand the significance of recent developments in the use of OTs, it is helpful to understand the history of OTs and an overview of the federal procurement system. OTs are commonly defined in contrast to federal procurement contracts and the similar, but distinct, spending vehicles of federal grants and cooperative agreements. Congress established the Office of Federal Procurement Policy (OFPP) in 1974 and empowered it to "prescribe policies, regulations, procedures, and forms" for procurement by executive agencies. In 1983, Congress explicitly authorized the OFPP to implement a "single system of Government-wide procurement regulations." The next year, the OFPP published the Federal Acquisition Regulation (FAR) pursuant to that authority. Shortly thereafter, Congress passed the Competition in Contracting Act of 1984 (CICA) as a comprehensive overhaul of the federal procurement system. CICA required the OFPP to modify the FAR to conform to the various amendments CICA made to Title 41 of the U.S. Code.

Although the DoD is exempt from most procurement rules found in Title 41, CICA created a parallel regime for the DoD, which uses the FAR and incorporates many but not all the definitions found in Title 41. Functionally, the DoD operates under almost the same federal acquisition regime as other agencies. Like other agencies, the DoD also has its own supplement to the FAR, the Defense Federal Acquisition Regulation Supplement (DFARS).

The hallmark of the modern federal acquisition process is a preference for acquiring products and services through "full and open competition." Full and open competition typically means that federal agencies post public solicitations for bids or proposals to meet their needs for products and services. Interested offerors respond to the solicitations with bids or proposals offering to meet the needs specified in the solicitations. The acquiring agency selects from among the bids or proposals based on criteria contained in the agency's solicitation, CICA, and the FAR. The agency then awards a contract to the offeror with the winning bid or proposal.

If an offeror's bid or proposal is not selected for contract award, that offeror is commonly known as a "disappointed offeror." A disappointed offeror may protest the agency's decision to award a contract to a different offeror based on a variety of criteria. Common reasons for protest include that the award did not comply with the terms of the solicitation or that the award somehow violated CICA or the FAR. These are commonly known as "bid protests" or "post-award protests."

Sometimes, an offeror, potential offeror, or other interested party may protest the terms of a solicitation as violating CICA or the FAR before bids or proposals are due. These protests are commonly known as "pre-award protests." Protesters usually must raise such pre-award protests before the close of bidding or the protest will be denied as untimely.

In the early twentieth century, disappointed offerors could protest agency awards to the procuring agency or to the Government Accountability Office (GAO). The predecessor of the COFC also had limited jurisdiction over pre-award protests. In 1970, the Court of Appeals for the D.C. Circuit held that federal district courts could also rule on bid protests under the Administrative Procedure Act (APA). District courts' authority to review procurement awards under the APA was known as *Scanwell* jurisdiction. From about 1970 to 1996,

individual agencies, GAO, the COFC and its predecessor, and federal district courts all received bid protests with different authorities as to the scope of review and potential relief.

In 1996, Congress standardized the relief available at both the COFC and district courts in the Administrative Dispute Resolution Act (ADRA). This action gave the COFC jurisdiction over both pre-award and post-award protests. The ADRA also contained a "sunset" clause on district courts' bid protest jurisdiction. Under the sunset clause, as of January 1, 2001, district courts lost jurisdiction over any protest for which the COFC held jurisdiction under 28 U.S.C. § 1491(b)(1). This article will usually refer to the COFC's authority under Section 1491(b)(1) as its Tucker Act jurisdiction.

Because the ADRA deprives district courts of jurisdiction only to the extent the Tucker Act grants COFC jurisdiction, there is a good argument that district courts retain jurisdiction to review agency actions beyond the scope of Section 1491(b)(1). The ADRA deprived district courts of the ability to review APA claims as to procurement contract awards. Outside the context of procurement contracts, however, the principles behind *Scanwell* jurisdiction should still apply to the review of OTs and will feature in later parts of this article.

Today, disappointed offerors may protest agency awards at their choice of three forums. They may protest to the procuring agency itself, to GAO, or to the COFC. Subject to some timelines restrictions, unsuccessful protests at the agency level may still be pursued at GAO or the COFC. Unsuccessful protests at GAO may be pursued at the COFC. Unsuccessful protests at the COFC may be appealed to the Court of Appeals for the Federal Circuit (CAFC). Decisions of the CAFC may be appealed to the Supreme Court of the United States, but it is rare for the Supreme Court to grant review of such appeals.

As James Nagle, a notable scholar of federal procurement law has observed, "Believing that a strong mechanism was needed to enforce competition, Congress enlisted a powerful and unlimited army—disgruntled competitors!" Mr. Nagle goes on to describe the modern federal acquisition system as a "sea of paperwork" and bid protest litigation as having "encrusted itself like a barnacle onto the contracting process." Ultimately, some businesses simply avoid government contract work as "too much trouble."

The perception that the federal procurement system is slow, litigious, and too much trouble may make it difficult for federal agencies to entice new and innovative businesses into federal contracts. That concern appears to drive some of Congress's intent behind its creation of OT authority. Congress closely aligned the DoD's authority to use OTs for prototype projects with its ability to work with nontraditional defense contractors, small businesses, and nonprofit research institutions. Why should a nontraditional defense contractor be interested in participating in an OT if it would not be interested in a government procurement contract? Among other reasons: the terms of OTs are far more flexible; there are fewer procedural requirements; and—at least until recently—there was a far lower chance of an OT project becoming mired in bid protest litigation. To understand why, this article will next turn to the history of OTs and their oversight.

A. An Overview of OTs

Despite representing a small segment of government spending that has only existed for about sixty-five years, a full history of OTs would be far longer than practical for this article. Instead, Parts II.A.1–3, below, will provide a broad overview of OTs in general, a review of the development of the DoD's OT authority in particular, and a close examination of the DoD's current OT authority.

1. A Brief History of OTs in General

Congress created the first statutory authority for OTs in the National Aeronautics and Space Act of 1958. The original statutory text gave the National Aeronautics and Space Administration (NASA) the authority "to enter into and perform such contracts, leases, cooperative agreements, or *other transactions* as may be necessary in the conduct of its work and on such terms as it may deem appropriate. . . ." Consistent with that original language, many practitioners define OTs by what they are not. Under that definition, "an OT is not a contract, grant, or cooperative agreement." That method of defining OTs may be somewhat misleading in that it uses the term "contract" as a placeholder for the more precise concept of a Federal Acquisition Regulation (FAR)-based procurement contract. There is essentially no dispute that OTs are legally enforceable contracts in the common meaning of the word.

In 1972, Congress granted the National Institutes of Health (NIH) OT authority for research on certain cardiovascular diseases and treatments. After another seventeen years, Congress granted the Defense Advanced Research Projects Agency (DARPA) OT authority in 1989. Congress later expanded that OT authority throughout the DoD. From 1993 to 2011, Congress granted additional OT authorities to another eight agencies. In total, Congress has authorized eleven agencies to conduct OTs under fifteen authorizing statutes. It has also provided for the case-by-case authorization of OTs by other agencies subject to the approval of the Director of the Office of Management and Budget.

2. The Development of the DoD's OT Authority

The focus of this article is the DoD's OT authority for research and prototype projects currently found in 10 U.S.C. §§ 4041–4042. Congress divided that authority between research projects under Section 4041 and prototype projects under Section 4042. Congress originally granted the DoD OT authority in the National Defense Authorization Act for Fiscal Year 1990 (NDAA FY1990) under 10 U.S.C. § 2371. In its original form, that grant of authority allowed the DoD to "enter into cooperative agreements and other transactions" for research projects. Congress expanded that authority in NDAA FY1994 to include prototype projects. Congress did not initially incorporate the grant of prototype authority into the U.S. Code, but instead let it exist as an Act of Congress not reduced to statute. Congress paired the DoD

prototype OT authority with the direction that the DoD "shall, to the maximum extent practicable, use competitive procedures" when awarding prototype OTs.

When Congress first granted the DoD authority to use OTs for prototype projects, 10 U.S.C. § 2302 defined "competitive procedures" consistent with the CICA definition shared with 41 U.S.C. § 259. That definition included "procedures under which the head of an agency enters into a contract pursuant to full and open competition" and "the competitive selection for award of basic research proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals."

Congress later added to the DoD's prototype OT authority, again without actually amending the U.S. Code. In NDAA FY2002, Congress amended its 1994 grant of prototype authority to allow the DoD to award prototype OT participants follow-on production contracts. Congress allowed the DoD to grant these follow-on production contracts without the use of competitive procedures if the DoD used competitive procedures to award the original OT.

More than twenty years after it first granted the DoD authority to use OTs for prototype projects, Congress finally created a new section of the U.S. Code to reflect that authority. In NDAA FY2016, Congress created 10 U.S.C. § 2371b, which codified the DoD's OT authority. When it codified the DoD's OT authority, Congress also expanded the DoD's authority to award follow-on production "contracts" to also include the authority to award follow-on production "transactions."

Two years after Congress finally codified the DoD's OT prototype authority in Section 2371b, it expanded the definition of "competitive procedures" for the DoD. Three years after that, in NDAA FY2021, Congress moved Section 2302(2)(B) to Section 3012, as part of a general consolidation of the DoD's spending laws. The resulting clause defines "competitive procedures" for the DoD to include "the competitive selection for award of science and technology proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals."

3. The DoD's Current OT Authority

Section 4021 begins, "The Secretary of Defense and the Secretary of each military department may enter into transactions (*other than contracts, cooperative agreements, and grants*) under the authority of this subsection in carrying out basic, applied, and advanced research projects." The authority found in Section 4022 is a special exercise of the authority granted in Section 4021 specific to prototype projects. Prototype OT authority under Section 4022 includes the authority to award follow-on production contracts or transactions to a successful prototype developer. The DoD may award these follow-on production contracts or transactions outside the FAR process and need not use competitive procedures so long as it used competitive procedures to award the underlying OT.

The potential for follow-on awards outside the FAR process is a major incentive for the kinds of businesses to which Congress gave preference in Section 4022. Congress has required at least one of the following four conditions in every DoD prototype OT:

> (A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project.
>
> (B) All significant participants in the transaction other than the Federal Government are small businesses . . . or nontraditional defense contractors.
>
> (C) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.
>
> (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

The requirements of FAR-based procurements are commonly considered a significant bottleneck to new businesses entering the world of government procurement. By focusing on nontraditional defense contractors and small businesses, prototype OT authority can help businesses that would not otherwise work with the DoD to become government contractors. Such new businesses can bring innovative solutions from the private sector and help the DoD maintain a competitive edge against evolving national security challenges.

Speed is often cited as an advantage of OTs over FAR-based procurement contracts. Flexibility of contractual terms—particularly related to intellectual property—is another reason OTs can help entice nontraditional defense contractors to work with the DoD. The advantages of OTs over traditional procurement methods have led to notable success stories.

Successful OT projects include the unmanned aerial vehicle known as the MQ-1 Predator. Similarly impressive, though perhaps not as well known, is the RQ-4A/B Global Hawk. Perhaps the most remarkable recent use of OTs was the development and deployment of COVID-19 vaccines through Operation Warp Speed. In fact, 2020 COVID-19 response efforts alone received more OT funds than all 2019 DoD research and development OTs combined. In short, when fast and effective results mattered most, the DoD turned to OTs.

This article does not intend to suggest that OTs are a panacea for government acquisition challenges. The absence of FAR-based procedures has trade-offs. CICA and the FAR are both vital to ensuring good stewardship of public funds. The absence of those safeguards from OT awards invites the question: what prevents the abuse of OTs? Part II.B, below, addresses that question and related issues of striking the right balance of oversight for the OT process.

B. Executive, Legislative, and Judicial Oversight of OTs

Other transaction agreements are less regulated than FAR-based procurement contracts, but they are not entirely unregulated. Several broadly applicable statutes apply to the formation and performance of OTs. Occasionally, GAO and courts also provide oversight of OTs through protest litigation. Further, Congress requires the DoD to report the use of OT follow-on contracts over a $500 million threshold—calculated including all potential options under the contract. Congress also requires the DoD to report quarterly on all DoD OTs including:

> [1] [the] funding military service or DOD component;
>
> [2] major command (if applicable);
>
> [3] contracting activity;
>
> [4] appropriation title;
>
> [5] budget line item;
>
> [6] minimum and maximum award value;
>
> [7] vendor;
>
> [8] obligations and expenditures to date;
>
> [9] product service code;
>
> [10] period of performance; and
>
> [11] indication if the OT agreement included an option for follow-on production (with a description of the scope of anticipated follow-on production).

Congress also made the procurement integrity rules of 10 U.S.C. § 2101 et seq. explicitly apply to prototype OTs and their follow-on contracts. Otherwise, OTs are not subject to any laws that apply only to procurement contracts, grants, or cooperative agreements. They are, however, subject to all other potentially applicable laws and regulations. Commentators generally agree that OTs are legally enforceable contracts for the purposes of the Tucker Act's waiver of sovereign immunity and the COFC's authority over claims "founded . . . upon any express or implied contract with the United States."

The COFC's jurisdiction over claims arising from OT administration is uncontroversial, but the question of who may second-guess OT formation is fraught. A growing body of decisions from GAO, federal district courts, and the COFC has begun to address the oversight of OT formation. This article will discuss those decisions beginning with GAO, then moving to federal district courts, and finally to the COFC and the series of decisions that led to *Hydraulics International.*

1. Review of OT Formation at GAO

GAO will review an agency's use of an OT on the limited question of whether the OT was used improperly when the law required the use of a procurement contract instead. By statute, GAO may decide protests of the solicitation, cancellation, or award of a procurement contract. Because OTs are not procurement contracts, GAO will generally not review protests of OTs. Instead, GAO will review whether an agency has used a non-procurement instrument as a subterfuge to avoid the requirements of CICA and the FAR.

GAO's limited review of OTs, grants, and cooperative agreements necessarily shifts the timeframe for raising protests to the point of solicitation. Protesters must object to the use of OT authority—as opposed to procurement authority—before the final date for proposals or within ten days of when the protester knew or should have known the issue. GAO will generally consider protests after the agency announces the OT award untimely.

2. Review of OT Formation at Federal District Courts

There are two main cases in which federal district courts considered protests of OT awards. The first is *MD Helicopters*, in which the Federal District Court for the District of Arizona ruled it lacked jurisdiction to consider the protest of an OT award that included a follow-on production clause. The second is *SpaceX II*, in which the Federal District Court for the Central District of California determined that the

government did not violate the APA when it failed to award an OT to SpaceX. While a narrow window exists to potentially harmonize *MD Helicopters* and *SpaceX II*, that harmony is strained.

i. MD Helicopters

In 2018, the Army solicited proposals for an OT to develop a prototype of a next-generation attack and reconnaissance helicopter. MD Helicopters submitted a proposal, as did other competitors. MD Helicopters was not among the competitors to receive an OT award to develop a prototype. MD Helicopters filed a protest with GAO, but GAO dismissed the protest because the protest did not challenge the Army's use of an OT for the project, but instead challenged the Army's discretion in the award. MD Helicopters then filed suit in the district court.

Although both MD Helicopters and the government agreed the district court had jurisdiction to hear the suit under the APA, one of MD Helicopters' competitors moved to dismiss the suit for lack of jurisdiction. The district court agreed that it lacked jurisdiction to hear the case. The court based its conclusion on two points. First, it concluded, while OTs are not procurement contracts, they are binding agreements between parties that satisfy the common meaning of the word "contract." The district court observed that the APA only granted it jurisdiction over claims not "expressly or impliedly forbidden by another statue." Next, the court observed that the Tucker Act "impliedly forbids declaratory and injunctive relief and precludes [an APA-based] waiver of sovereign immunity in suits on government contracts." The court indicated that if a party's claim against the federal government was "contractually-based" it lacked jurisdiction. " The district court concluded that because OTs are "contracts" in the general sense, and because it lacked jurisdiction in a suit against the federal government that was "contractually-based," it lacked jurisdiction to consider MD Helicopters' claim related to the OT.

The district court's analysis of whether OTs were contracts in the general sense overlooked the more important point. It should not have mattered that OTs are contracts in the general sense because MD Helicopters was not pursuing any alleged contractual right. Instead, MD Helicopters was disputing the Army's award to MD Helicopters' competitors under the theory that the Army's award was a final agency action not otherwise subject to judicial review pursuant to 5 U.S.C. § 704. Under 5 U.S.C. § 706, an appropriate federal district court may hold an agency's action unlawful or compel an action unlawfully withheld if the action is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

In *MD Helicopters*, the district court relied heavily on the Ninth Circuit's unpublished opinion in *Gabriel v. GSA*. *Gabriel* was a remarkably terse opinion that also mistook an agency's actions related to the potential formation of a contract with rights arising out of a contract. The unpublished decision in *Gabriel* should be treated with caution because it seemed to turn, in large part, on the appellant's requested remedy of forced sale of certain government property to the appellant.

In *Gabriel*, the court decided that the appellant's requested remedy was the functional equivalent of a request for specific performance, and "the natural inference follows that a contractual remedy indicates a contractually-based set of claims." For that proposition, the court cited *Tucson Airport Authority v. General Dynamics Corp*. But *Tucson Airport* never said that. Instead, the opinion in *Tucson Airport* observed that General Dynamics sought specific performance of a specific contract right: the obligation of the U.S. government to assume General Dynamics' defense in a collateral suit. General Dynamics sought to enforce that earlier contract obligation through the Contract Settlement Act.

The *Tucson Airport* opinion observed General Dynamics' invocation of the Contract Settlements Act was merely a mechanism to enforce General Dynamics' prior contractual rights. The opinion then observed "that duty [to assume General Dynamics' defense], if it exists, derives from the contract." Therefore, the relief sought was prohibited by the Tucker Act's implicit prohibition on contractual claims for declaratory or injunctive relief against the government.

The holding of *Tucson Airport* seems a poor fit for the facts of *MD Helicopters* apart from one aspect. MD Helicopters sought relief akin to specific performance. Namely, MD Helicopters' requested relief was for the court to compel the Army to issue MD Helicopters a "Phase 1" OT award. That was likely a bridge too far.

The Ninth Circuit appears to have read its own decision in *Tucson Airport* for the proposition that the Tucker Act impliedly forbids courts from ordering the government to specifically perform as if under a contract. On that backdrop, the relief requested by MD Helicopters may have seemed too close to specific performance for the district court's liking.

But MD Helicopters asked for less ambitious relief too. MD Helicopters also asked the district court to "order [the Army] to 're-open the evaluation process to provide . . . [MD Helicopters] with a proper Phase 1 evaluation.'" The district court did not deny MD Helicopters' alternative request under the same theory that it denied the request for a compelled OT. Instead, the district court denied it under the theory that the COFC had exclusive jurisdiction over such a request. The district court's reasoning reaches back to *Scanwell* jurisdiction and the Tucker Act's sunset provision.

As discussed earlier, district courts used to routinely exercise jurisdiction over bid protests under the APA and *Scanwell* jurisdiction. The Tucker Act gave district courts and the COFC concurrent jurisdiction over procurement contract bid protests but had a sunset clause that ended district courts' jurisdiction in 2001. Since then, the COFC is the only federal court with jurisdiction to hear bid protests of procurement contract awards. Now, if the COFC has jurisdiction over a bid protest under the Tucker Act, district courts do not.

In *MD Helicopters*, the district court decided it lacked jurisdiction because it found the COFC had jurisdiction over the same suit. The district court found the COFC had jurisdiction over MD Helicopters' suit for two related reasons. First, it used a too-broad definition of "procurement" that is inapplicable to OTs. Second, it found that an OT with a follow-on production clause met that definition.

The Tucker Act grants the COFC jurisdiction to hear bid protests as follows:

> [The United States] Court of Federal Claims . . . shall have jurisdiction to render judgment on an action 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.

The district court acknowledged that the term "contract" in the Tucker Act refers to procurement contracts and not OTs. The district court still found the OT at issue was "in connection with a procurement or a proposed procurement" because of the potential for a follow-on production award. The COFC subsequently adopted similar reasoning, which this article addresses later in Part III on challenging *Hydraulics International*. For the purposes of this Part, it should suffice to observe that the Tucker Act never defines "procurement," and the district court adopted a definition of "procurement" that Congress made expressly inapplicable to the DoD's OT authority.

Once the district court decided the COFC had jurisdiction over MD Helicopters' suit, it necessarily followed that the district court lacked jurisdiction under the APA. The APA only grants district courts the jurisdiction to hear suits based on agency actions "made reviewable by statute and final agency action for which there is no other adequate remedy in a court." Once the district court interpreted the Tucker Act to grant the COFC jurisdiction over MD Helicopters' suit, the district court necessarily concluded it lacked jurisdiction under the APA because protest to the COFC provided "other adequate remedy in a court."

The district court appears to have accepted that it would have jurisdiction to hear MD Helicopters' suit but for the COFC's exclusive jurisdiction over procurement protests. Thus the district court's reasoning appears to accept that OTs *without* follow-on production clauses are not procurement or sufficiently related to procurement to fall under the COFC's jurisdiction. The district court contrasted the OT in *MD Helicopters* with the OT at issue in *SpaceX*. As discussed in detail later, in *SpaceX* the COFC found it lacked jurisdiction to review an OT award when the OT lacked a follow-on production clause. The COFC therefore granted transfer of the case to the Federal District Court for the Central District of California. This article will next turn to the dispositive ruling of the Federal District Court for the Central District of California after the transfer.

ii. SpaceX II

SpaceX filed a protest with the COFC challenging an Air Force OT award to several of SpaceX's competitors for prototyping certain space launch capabilities. The COFC dismissed the protest for lack of jurisdiction and granted transfer of the case to the Federal District Court for the Central District of California. This article details the COFC's dismissal of SpaceX's protest in Part II.B.3 below, on the oversight of OTs at the COFC. After transfer to the district court, SpaceX moved for judgment on the administrative record. The district court denied SpaceX's motion, functionally ending the company's challenge to the Air Force's space launch OT awards.

The district court's analysis of SpaceX's claims under the APA is instructive on how the APA is a proper vehicle for the review of substantive challenges to an OT award. Perhaps because the COFC had already determined it lacked Tucker Act jurisdiction over the case, the district court spent little ink analyzing its own jurisdiction. What time it did spend on threshold issues, the district court devoted to analyzing whether the OT award was a final agency action within the meaning of the APA.

The district court's analysis of the APA's applicability was notable both for what it concluded and for what it left unsaid. As discussed earlier, the APA allows district courts to review a "final agency action for which there is no other adequate remedy in a court." In any given case under the APA, that formula invites two questions. First, does the suit challenge a final agency action? Second, is there any other adequate remedy in a court? A district court may only review the underlying merits of a claim under the APA if the answer to the first question is "yes" and the answer to the second question is "no."

In *SpaceX II*, the district court reviewed whether the Air Force's award of OTs constituted a final agency action. In short, it did. The question of whether the award was a final agency action was complicated by the fact that SpaceX filed its objections to the award with the awarding "Agreements Officer" (AO) prior to challenging the award in court. The AO denied SpaceX's objections in a six-page decision. The district court disagreed for multiple reasons.

Notably, the district court did not significantly inquire into whether there was any other adequate remedy in a court. That is significant because it essentially acknowledged that, once the COFC found it had no Tucker Act jurisdiction to review SpaceX's claims, it was clear to all involved that the district court was the only judicial body with authority to review the case.

Once it established the threshold requirements for APA review, the district court applied the highly deferential standard prescribed in the APA. Under that standard, a court will only grant relief if an agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As the court noted, its deference to an agency's action is "at its highest where a court is reviewing an agency action

that required a high level of technical expertise." For that reason, APA review of OT prototype awards will usually exist at the apex of courts' deference to an agency. Accordingly, the district court began its ruling with the Star Trek reference: "I'm a Judge, not a rocket scientist."

Despite disclaiming its own technical acumen, the district court gamely engaged the underlying agency action through a fifty-five-page ruling that ultimately found ample technical and policy-based reasons for the Air Force's award to SpaceX's competitors. Overall, the district court's ruling in *SpaceX II* provides a glimpse into the sort of review that should be expected in challenges to OT awards filed in federal district courts.

District courts, however, are not the usual venue for practitioners of government procurement bid protests. When procurement contract bid protests are not filed with the awarding agency or GAO, they are filed with the COFC. It unsurprising that disappointed competitors for OTs have attempted to protest OT awards at the COFC much as they would protest a procurement award. This article next examines the COFC's treatment of such OT award protests.

3. Review of OT Formation at the Court of Federal Claims

To date, the COFC has only issued three decisions in cases directly challenging the award of an OT. The first was *Space Exploration Technologies Corp. v. United States* (*SpaceX*). The second was *Kinemetrics, Inc. v. United States* (*Kinemetrics*). The third was *Hydraulics International, Inc. v. United States* (*Hydraulics International*). In each successive case, the COFC ratcheted-up its assertion of jurisdiction over OT formation.

i. SpaceX

The *SpaceX* decision arose from the Air Force's use of its OT authority to solicit an agreement to develop space launch systems for national security missions. The Air Force used a multistage strategy to build out infrastructure for national security space launches. The OTs for development of launch services were the first phase of that strategy. The second phase was the procurement of launch services by a separate solicitation.

SpaceX and three other companies submitted proposals in response to the OT solicitation. The Air Force awarded OTs to the other three companies and not to SpaceX. SpaceX sued. SpaceX filed its suit with the COFC under the court's "bid protest" jurisdiction created by the Tucker Act. In relevant part, the Tucker Act grants the COFC jurisdiction to render judgment on an action 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.

As discussed in Part II.A, above, OTs are not procurement contracts. For that reason, the government moved to dismiss SpaceX's suit at the COFC for lack of subject matter jurisdiction. SpaceX responded that the OTs were "in connection with a procurement or a proposed procurement," because of the planned procurement of launch services in the second phase of the Air Force's plan.

SpaceX's argument was bolstered by the COFC's reliance on the definition of procurement found in 41 U.S.C. § 111. That definition reads in full:

In this subtitle, the term "procurement" includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.

The COFC agreed with the fundamental premise that OTs are not procurement contracts and therefore not inherently within Tucker Act jurisdiction. Further, the COFC concluded the Air Force's anticipated future solicitation for launch services was too attenuated from the OTs at issue to be "in connection with" a procurement. The COFC seemed particularly concerned with the fact that the second-phase procurement would involve a new competition—presumably under standard FAR acquisition procedures.

The COFC granted transfer of the case to the United States District Court for the Central District of California. SpaceX contended that was a proper venue for the matter if the COFC lacked jurisdiction under the Tucker Act. The district court's decision under the APA is discussed in Part II.B.2, above.

The COFC's decision in *SpaceX* was consistent with the government's position that the COFC lacks jurisdiction over OTs. In retrospect, the COFC's reliance on the break between the first and second phases of the Air Force's development strategy suggested trouble for the government's position in future.

ii. Kinemetrics

In *Kinemetrics*, the COFC decided the Tucker Act granted it jurisdiction over an OT "in connection with a procurement" because the OT provided for—and resulted in—a follow-on procurement contract. The unusual nature of the OT in question may have initially obscured the full significance of the *Kinemetrics* decision.

Kinemetrics was one of three companies that responded to a commercial solutions opening (CSO) for equipment in the general category of "nuclear proliferation monitoring technologies." A CSO is a special OT vehicle under the authority of 10 U.S.C. § 4022. The purpose of that

special vehicle is to "acquire innovative commercial items, technologies, and services through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals."

The particular CSO at issue in *Kinemetrics* shared many features with a FAR-based procurement. By the point of the process that led to litigation, the CSO called for "'[i]nterested parties [to] submit a complete technical and cost proposal.'" Similar to a FAR-based procurement, the CSO indicated that proposals would be evaluated on five distinct factors.

Kinemetrics' proposal was unsuccessful. It initially protested the result to GAO but withdrew that complaint after the government moved to dismiss it as an untimely protest of an OT. Kinemetrics then filed suit with the COFC alleging violations of CICA and "relevant regulations." The government moved to dismiss the protest based on failure to state a claim.

The COFC evaluated its subject matter jurisdiction over Kinemetrics' protest in a similar manner to its evaluation in *SpaceX.* In contrast to *SpaceX*, the COFC found it had jurisdiction over Kinemetrics' protest. The primary fact distinguishing *Kinemetrics* from *SpaceX* was the CSO's provision for—and award of—a follow-on contract.

In *SpaceX*, the Air Force planned to make a separate solicitation to acquire launch services after completing the OTs. In *Kinemetrics*, the Air Force anticipated purchasing commercial products through an indefinite delivery, indefinite quantity (IDIQ) contract established through the CSO. As the COFC explained, "Unlike the facts of . . . [*SpaceX*], where no procurement contract was contemplated, this solicitation had a direct effect on the award of a contract." That "direct effect" on a subsequent production award appears to be the critical factor distinguishing *SpaceX* and *Kinemetrics*. In hindsight, it also appears to be the line in the sand for COFC's assertion of jurisdiction over future OT protest cases.

Ultimately, the COFC granted the government's motion to dismiss Kinemetrics' protest for failure to state a claim. The court's analysis, however, was more akin to a judgment on the administrative record than a typical failure to state a claim motion.

In the COFC's estimation, the provision for purchasing products under the CSO was sufficient to be "in connection with a procurement." In hindsight, the COFC's reasoning foreshadowed its assertion of jurisdiction over any OT that provided for potential follow-on production under 10 U.S.C. § 4022(f). When the COFC decided *Kinemetrics*, some practitioners could reasonably have attributed the decision to the unusual structure of the CSO and the ultimate award of an IDIQ contract.

iii. Hydraulics International

The nature of the CSO in *Kinemetrics* left some room to question how the COFC viewed its jurisdiction over OTs with provisions for follow-on production under 10 U.S.C. § 4022(f). While COFC decisions are not formally precedential, *Hydraulics International* suggests that the COFC will likely continue to exercise protest jurisdiction over OTs with follow-on production clauses in the future.

The facts of *Hydraulics International* provide a good example of how prototype OTs operate. The Army uses aviation ground power units (AGPUs) to power systems on its helicopters during maintenance. Unfortunately, the Army's current AGPUs are not cross-compatible with all the Army's helicopters.

To develop an AGPU that it can use with all its helicopters, the Army turned to an OT. Specifically, the Army awarded an OT to a consortium that specializes in aviation and missile prototype development. The consortium issued a request for white papers proposing a new AGPU to meet the Army's needs.

The white papers were for the development of one prototype AGPU, with an option for later development of ten more prototypes for additional testing. Finally, the OT provided for a potential purchase of up to 150 of the new AGPUs under the authority of 10 U.S.C. § 4022(f).

Several businesses, including Hydraulics International, submitted white papers for AGPU prototypes. The Army did not select Hydraulics International to produce any prototypes. Hydraulics International sued. As in *SpaceX* and *Kinemetrics*, the government moved to dismiss Hydraulics International's protest for lack of subject matter jurisdiction.

The COFC briefly distinguished *SpaceX* and found that the facts in *Kinemetrics* were equivalent. Moreover, the COFC's statement of its own jurisdiction appeared to reach beyond the facts of its prior OT cases. The court asserted that "[i]t is . . . immaterial whether the potential procurement of 150 AGPUs ever occurs, so long as the government has 'initiated the process for determining a need for acquisition,' and that acquisition *might* occur via procurement."

The COFC's reasoning is noteworthy because it does not draw a principled distinction between *SpaceX* and the facts of *Hydraulics International* itself. In *SpaceX*, the government had initiated the process of determining its needs. The most significant difference between the two cases was the point in the government's decision-making process at which it used competitive procedures. The Tucker Act, however, grants the COFC jurisdiction based on procurement, not competition. Therefore, the COFC's decision in *Hydraulics International* calls into question its decision in *SpaceX* and suggests that the COFC may be willing to assert its own jurisdiction over any process that could lead to the government intentionally obtaining property or services.

To a casual observer, the COFC's ultimate judgment on the administrative record in favor of the government may obscure the significance of the jurisdictional decision in *Hydraulics International*. Even the fact the agency was compelled to compile an administrative record highlights one of the main problems with COFC exercising bid protest jurisdiction over OTs. The OT process is supposed to be fast and agile, without the bureaucratic hurdles of a FAR-based procurement. Subjecting OTs to the protests of disappointed offerors redirects resources away from the agency's needs and toward litigation. Litigation risk may inspire timidity where OTs are intended for bold innovation.

While some level of oversight is appropriate, the COFC's creeping exercise of jurisdiction over OTs jeopardizes the government's capacity for agile response in those situations where agile response is most needed. Agencies that rely on OTs to maintain a competitive edge should develop and deploy a plan to preserve the value of OTs to meet the government's most daunting challenges.

This article proposes such a response. First, the government should challenge the reasoning of *Hydraulics International* in future COFC cases and appeal any future COFC decision that follows the jurisdictional reasoning of *Hydraulics International*. Second, the DoD should modify its use of prototype OTs to insulate them from bid protests. Third, the DoD should request Congress clarify the scope of the COFC's authority to review OTs.

III. The Government Should Challenge the Reasoning of *Hydraulics International* in Future Cases.

As discussed above, the COFC's decision in *Hydraulics International* undermines the value of OTs in the speedy development of new technology because the decision potentially subjects them to lengthy litigation at their inception. If protests of OT formation become as common as protests of FAR-based acquisitions, the appeal of OTs could be diminished by the perception that they are little different from traditional government contracts. That perception would likely diminish the enthusiasm of small businesses and nontraditional defense contractors to participate in OTs. Without the participation of small businesses and nontraditional defense contractors, OTs' luster as a magnet for innovation would likely dim.

The government's most direct option to pursue the issue was probably an appeal of *Hydraulics International* itself. But *Hydraulics International* was not a good candidate for government appeal. The government prevailed on the merits of the case, and the COFC decision did not constitute binding precedent for future cases. The government appeared to consider appeal of *Hydraulics International* but ultimately decided against it.

Still, the facts of *Hydraulics International* provide a useful framework on which likely future arguments against the COFC's reasoning in that case can be based. For that reason, the balance of this Part will address how to challenge the COFC's reasoning in *Hydraulics International* to help dissuade the COFC in future cases.

Superficially, the COFC's decision in *Hydraulics International* turns entirely on the question of whether an OT is "'in connection with a procurement or a proposed procurement,' as required" by the Tucker Act. But the Tucker Act's grant of jurisdiction is narrower than the COFC's opinion suggested. The Tucker act grants the COFC jurisdiction as follows:

The Unite[d] States Court of Federal Claims . . . shall have jurisdiction to render judgment on an action 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.

While the COFC's decision in *Hydraulics International* focused on the question of whether the OT was "in connection with" a proposed procurement, that is not the full jurisdictional test from the Tucker Act. There are not one, but three requirements for the COFC to exercise jurisdiction over an action under the "in connection with" clause. First, the action must be brought by an "interested party." Second, the action must object to a "solicitation," "award," or "proposed award," or allege a "violation of statute or regulation," as required by the Tucker Act. Third, the solicitation, award, proposed award, or violation of statute or regulation must itself be "in connection with" a proposed procurement. An action must pass each threshold for the COFC to exercise Tucker Act jurisdiction over it.

By focusing on the question of whether the OT in general was in connection with a proposed procurement, the COFC essentially ignored the first two jurisdictional thresholds. That was an error. None of the jurisdictional elements should be taken for granted, especially in the unusual circumstance of the protest of an OT. This article will address each of the three threshold questions in turn.

A. The Protester Was Not an "Interested Party."

The Tucker Act does not define "interested party." The COFC has previously defined "interested party" by reference to CICA. Within CICA, "interested party" is defined, "with respect to a contract or a solicitation or other request for offers described in paragraph (1), [to mean] an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." The CICA's reference to "paragraph (1)" refers to a "solicitation or other request by a Federal agency for offers for a contract for the *procurement* of property or services." As discussed earlier, CICA does not apply to OTs, and an OT is not "a contract for the *procurement* of property or services." Indeed, OTs are explicitly defined in the negative as something "other than" a procurement contract.

If the term "interested party" as used in the Tucker Act is synonymous with the same term as used in CICA, then the COFC's jurisdictional analysis should end at the first threshold. An "interested party" is defined in terms of a procurement contract, and OTs are explicitly not procurement contracts. Some may argue that an OT like that in *Hydraulics International* is sufficient to confer "interested party" status because the follow-on production clause in the OT makes the entire OT "in connection with a procurement." That argument might claim the follow-on production award is a form of procurement, although the original OT was not. If the COFC adopted that approach, there would be a second problem with finding "interested party" status for an OT based on the follow-on production clause: the promise of any follow-on production award is illusory. To the extent "interested party" status is defined relative to "a contract for the procurement of property or services," the illusory nature of the follow-on production clause means that it is not a contract at all.

As the COFC's predecessor discussed in the context of indefinite quantity contracts, "[w]ithout an obligatory minimum quantity, the buyer would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable." In FAR-based procurements, the COFC will sometimes interpret a contract without a minimum quantity as a requirements contract to avoid finding the agreement unenforceable. "Requirements contracts also lack a promise from the buyer to order a specific amount, but consideration is furnished, nevertheless, by the buyer's promise to turn to the seller for all such requirements as do develop."

The provision for follow-on production need not guarantee production, if any, will flow to the OT partner. It merely allows for the award of production to the original OT partner without further competition. Neither party to the OT needs to have any affirmative obligations relating to follow-on production. The government "may" award it. The provision for follow-on production does not create a second agreement; it merely meets the statutory requirement to award a production contract or transaction without further competition.

A disappointed competitor for an OT is not an "interested party" because its alleged interest in any follow-on production contract is illusory. Because the follow-on production clause places no obligation on either party, it is not contractual. Where there is no procurement contract or solicitation for bids on a procurement contract, there can be no "interested party."

B. The Protest Did Not Object to a Solicitation or Award of a Procurement Contract and the Alleged Violation of Law Was Mere Disagreement with the DoD's Assessment of Practicability.

Under the Tucker Act, the COFC has jurisdiction over protests of a solicitation, award, or proposed award of a contract, or an "alleged violation of a statute or regulation in connection with a procurement or a proposed procurement." In that context, the term "contract" is synonymous with a procurement contract. As OTs are not procurement contracts, the narrow space left to argue the Tucker Act confers the COFC jurisdiction over OT awards like that in *Hydraulics International* seems limited to the third jurisdictional clause, that there was a violation of a statute or regulation in connection with a procurement or a proposed procurement.

Because OTs are subject to neither CICA nor the FAR, there are limited ways an OT can violate a statute or regulation other than its own underlying authorizing statute. Even then, such a violation would not give the COFC jurisdiction under the Tucker Act unless the violation was also in connection with "a procurement"—and OTs are not procurement.

In *Hydraulics International*, the plaintiff alleged a violation of the underlying statute granting the DoD prototype OT Authority. The plaintiff's argument ran something like this: OTs shall use competitive procedures to "the maximum extent practicable." Competitive procedures are "an analog" for CICA procedures. CICA procedures require that agencies apply the evaluation criteria listed in solicitations fairly and consistently. A fair and consistent application of the terms listed in the OT's request for whitepapers would have resulted in an award to the plaintiff. The defendant did not grant the plaintiff an award. Therefore, the defendant must not have used competitive procedures "to the maximum extent practicable."

The problem with the plaintiff's argument was two-fold. First, it conflated results with processes. Second, its substantive claim is that the agency failed to apply "an analog" to CICA procedures to "the maximum extent practicable." Thus, the protester invited the COFC to interpose its discretion for that of the agency over the practicability of an analog.

The focus on practicability distinguishes the sort of review appropriate to cases like *Hydraulics International* from true bid protests of procurement contracts subject to CICA and the FAR. Alleged violations of CICA or the FAR lend themselves to relatively expansive review under the COFC's Tucker Act jurisdiction. By contrast, the DoD's alleged failure to use a CICA analog to the extent practicable is an issue of agency discretion properly reviewed under the Administrative Procedures Act without an overlay of CICA and FAR requirements. As discussed earlier, district courts, not the COFC, have jurisdiction over alleged APA violations.

It is fair to contrast the "practicable" language found in Section 4022(b)(2), with the reference to competitive procedures found in Section 4022(f), which may point toward a different situation in which COFC review of an OT might be appropriate. Importantly, Section 4022 references competitive procedures in two different subsections. First, Section 4022(b)(2) states, "[t]o the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out the prototype projects." Later, in Section 4022(f)(2), the statute authorizes the award of follow-on production without the use of further competitive procedures if "competitive procedures were used for the selection of parties for participation in the transaction."

The way Congress split its attention on competitive procedures in the OT prototype statute suggests Congress anticipated full competitive procedures would not always be practicable in the OT prototype context. It also suggests that Congresses' primary concern with competitive procedures was preserving the requirement that the DoD should use competitive procedures for its production needs, not

prototyping. Congress's contrasting attention to competitive procedures also suggests the COFC's authority to review competitive procedures should similarly focus on actual production, not prototyping. After all, the requirement for competition prior to a follow-on production award is a bright-line rule and not a matter of agency discretion over "the maximum extent practicable."

Limiting COFC review of OTs to the actual award of follow-on production also makes good policy sense. It would allow the review of processes leading to potentially high-dollar production awards, while preserving agencies' ability to work with private industry for the rapid development of prototypes needed to maintain cutting-edge capabilities. Limiting COFC review in that way would also dovetail well with GAO's review of OTs for subterfuge when the law prohibits the use of an OT and requires the use of a procurement contract instead.

C. The Alleged Violation of Law Was Not in Connection with a "Procurement" or a Proposed "Procurement" as Congress Defined That Term.

Next is the issue of whether a violation of statute or regulation in the award of an OT with the possibility of follow-on production is "in connection with" a proposed procurement. As discussed earlier, it appears settled that an OT itself is not a procurement. Also discussed earlier, the possibility of any follow-on production is entirely speculative, and the typical OT obligates neither party to any such follow-on production. But is the possibility of follow-on production even "procurement" within the meaning of the Tucker Act?

"The Tucker Act does not define 'procurement.'" To interpret the scope of its jurisdiction, the COFC imported the definition of procurement found in 41 U.S.C. § 111, which states in full: "In this subtitle, the term 'procurement' includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." Based on that definition, the COFC determined that the possibility of follow-on production qualified as "procurement" because the OT "initiated the process for determining a need for acquisition." The COFC concluded that "[s]uch activity fits squarely within the first 'stage of the federal contracting acquisition process.'"

The COFC's reliance on Title 41's "procurement" definition essentially begged the question of whether follow-on production under 10 U.S.C. § 4022(f) was "procurement" within the meaning of the Tucker Act. The definition in Title 41 is explicitly limited to Title 41 and those other sections of the U.S. Code that adopt it. Taken out of context, that definition is so broad, it encompasses almost any action in the chain of events leading to the government obtaining any property or services. That definition is too expansive unless it is tethered to the federal acquisition system that explicitly adopts it.

Congress did not intend the definition of "procurement" found in Title 41 to apply to OTs under Sections 4021 or 4022 of Title 10. This limitation is underscored by the narrow scope Congress allotted to the definition of "procurement" in Title 10 in contrast to the broad scope it allotted to the definition of "competitive procedures" in Title 10. Congress limited the definition of "procurement" in Title 10 to "Chapter 137 legacy provisions," while Congress simultaneously extended the Title 10 definition of "competitive procedures to all of Part V of Title 10, which includes 10 U.S.C. § 4021–4022. As noted earlier, Congress defined "competitive procedures" differently for the DoD than it did for most other agencies. In fact, when Congress consolidated the DoD's spending laws, it moved the DoD's definition of competitive procedures under its own section, 10 U.S.C. § 3012. The definition of competitive procedures in Section 3012 expressly applies to all of Title 10, Subtitle A, Part V, which contains essentially all the DoD-specific spending laws including the sections on OTs, 10 U.S.C. § 4021–4022.

By making the definition of competitive procedures apply to OTs in addition to procurement contracts, Congress set that definition in contrast to most other definitions applicable to the DoD's spending laws. Most of the DoD's spending definitions are found in 10 U.S.C. § 3011, which incorporated Title 41's definitions of several key terms including "procurement." Section 3011, however, only applies to "chapter 137 legacy provision[s]." "Chapter 137 legacy provisions" refers to those provisions that Congress moved, in 2021, from Title 10, Subtitle A, Part IV, Chapter 137, to various locations in Title 10, Subtitle A, Part V. Chapter 137 included 10 U.S.C. §§ 2301–2339c. The legacy provisions do not include the former location of the DoD's OT authority, 10 U.S.C. §§ 2371–2371b. To remove any doubt or confusion, Congress even included a comprehensive list of the current sections of the Code that contain Chapter 137 Legacy provisions. Sections 4021 and 4022 are not among them. Thus, Congress expressly declined to extend the definition of "procurement" found in Title 41 to the OT authorities found in Sections 4021 and 4022.

The *Hydraulics International* decision cited three opinions by the CAFC to support applying the definition of procurement found in Title 41 to some OTs. Though the COFC must follow the precedent of its superior court, careful application of the CAFC's guidance should have yielded a different outcome in *Hydraulics International*. The CAFC has explained why the definition of "procurement" found in Title 41 is applicable to the Tucker Act as follows: The definition is "a subsection of the statutory provisions related to the establishment of the Office of Federal Procurement Policy . . . . [Those] provisions give overall direction for federal procurement policies, regulations, procedures, and forms."

To put a finer point on the CAFC's overview, The Office of Federal Procurement Policy Act Amendments of 1979 added the definition of "procurement" to 41 U.S.C. § 403. That definition was limited to the term "procurement," "as used in this Act." The word "act" became "chapter" in the next printed version of the U.S. Code. Later, Congress moved the definitions section to Chapter 1 of Title 41, and the word "chapter" became "subtitle." At all times, Congress has expressly limited Title 41's definition of "procurement" to a subset of Title 41.

In *Distributed Solutions*, the CAFC considered the definition of "procurement" in the context of the government essentially using one FAR-based contract to circumvent the usual acquisition process for other FAR-based contracts. The protesters in *Distributed Solutions* alleged the government's actions had violated CICA. In that context, the CAFC's reference to how Title 41's definition of "procurement" was found within the OFPP's authorizing statutes made sense because the OFPP implemented its authority through the FAR. Congress also required

the OFPP to implement CICA through the FAR. Therefore, in *Distributed Solutions*, it was reasonable to apply Title 41's definition of "procurement" to actions using FAR-based contracts allegedly in violation of CICA. The same reasoning does not necessarily extend beyond procurement actions under the FAR and CICA.

The CAFC has cautioned that the jurisdictional reach of the Tucker Act under 28 U.S.C. § 1491(b)(1) "is exclusively concerned with procurement solicitations and contracts." That guidance is consistent with limiting the scope of Tucker Act jurisdiction to FAR-based procurements subject to CICA. The CAFC elaborated that "[t]he definition of 'procurement' in 41 U.S.C. § 111 is not the only provision relevant to our inquiry. . . ." The definitions of other spending vehicles, such as cooperative agreements and grants, are also relevant. Thus, the CAFC has held that cooperative agreements are not subject to Tucker Act jurisdiction and has stated in dicta that grants are beyond that jurisdiction too. The same principle should apply to OTs.

Hydraulics International was not the first time the COFC asserted jurisdiction based on an out-of-context reading of "procurement." In *Hymas v. United States*, the COFC asserted jurisdiction over the Fish and Wildlife Service's award of cooperative farming agreements (CFAs) to individual farmers. The COFC reasoned that the CFAs constituted procurement contracts despite being framed as cooperative agreements based on 41 U.S.C. § 111 and noted that "the [FWS] contracted with farmer-cooperators, not to benefit them financially, but to obtain their services to provide food for migratory birds and wildlife." Despite the fact the cooperative agreements were authorized by a separate statute outside Title 41, the COFC decided its "jurisdictional inquiry should focus on the definition of procurement in the CICA, 41 U.S.C. § 111." The COFC was wrong, as the CAFC soon explained.

On the FWS's appeal to the Federal Circuit, the appellate court cautioned that 41 U.S.C. § 111 should not be used "without regard to other relevant statutes," as the sole source for determining whether a particular transaction qualifies as a "procurement" for Tucker Act purposes. The appeals court noted that sort of expansive reading of Section 111 would be akin to "hiding an 'elephant[] in [a] mousehole[].'"

Ultimately, the appeals court held the CFAs were proper cooperative agreements under the Federal Grants and Cooperative Agreements Act (FGCAA), 31 U.S.C. § 6301 *et seq*. It further held that cooperative agreements were not procurement contracts and noted that the COFC's jurisdiction under 28 U.S.C. § 1491(b) "exclusively concerns procurement solicitations and contracts." Because cooperative agreements—similar to OTs—are defined in juxtaposition to contracts, the appeals court held cooperative agreements were not procurement contracts, and the COFC had no jurisdiction over protests of their formation.

The Federal Circuit's conclusion that the COFC's jurisdiction under the Tucker Act "exclusively concerns procurement solicitations and contracts" is consistent with the definition of an interested party, discussed above. Because an "interested party" is defined relative to procurement solicitations and contracts, it makes sense that the jurisdictional requirement of an action by an "interested party" align with the jurisdictional limitation to procurement solicitations and contracts. Although *Hymas* involved cooperative agreements rather than OTs, it is highly instructive on the Federal Circuit's view of Tucker Act jurisdiction.

Cooperative agreements share several traits with OTs that are relevant to the question of the COFC's jurisdiction. Originally, Congress codified the DoD's authority for OTs and cooperative agreements in the same sentence of NDAA FY1990. Specifically, Congress granted the DoD authority to "enter into cooperative agreements and other transactions" for research projects. That original grant of authority points to the second major similarity. The primary purpose of both OTs and cooperative agreements is research and development, not procurement. Though some OTs include the possibility of a follow-on production award, only a tiny portion of OT spending actually goes to follow-on production. Similarly, because they are primarily research vehicles, both OTs and cooperative agreements are eligible for the alternate forms of "competitive procedures" defined by 10 U.S.C. § 3012. Perhaps most importantly, both OTs and cooperative agreements are defined in juxtaposition to procurement contracts.

With so many similarities between cooperative agreements and OTs, a reader might expect the COFC would have spent significant time distinguishing the agreement in *Hymas* from that in *Hydraulics International.* It did not. In *Hydraulics International,* the COFC analyzed *Hymas* as follows: "[T]he Federal Circuit . . . found cooperative agreements do not fall under the Tucker Act but said nothing of OTAs . . . ." Put mildly, the COFC's distinction lacked depth.

The COFC's failure to engage its superior court's opinion in *Hymas* is unfortunate because *Hymas* also suggests the answer as to when the COFC has jurisdiction over an OT. In *Hymas*, the appeals court confirmed the COFC will have jurisdiction over transactions where an agency obtains goods or services through the misuse of a non-procurement authority.

In essence, the Federal Circuit's opinion in *Hymas* mirrors GAO's treatment of OTs. Under the framework of *Hymas*, the COFC would have jurisdiction if an OT or cooperative agreement were improperly used when the law required the use of a procurement contract instead. That interpretation is also consistent with the Tucker Act's second jurisdictional threshold, discussed above, that there must be a violation of statute or regulation in connection with a procurement. If an agency erroneously uses an OT when the law requires it use a FAR-based procurement, then it has violated a statute in connection with a procurement.

For example, if the Army attempted to award a "prototype" OT that was for the purchase of dozens of preexisting products for the common use of those products, it would be acting outside the OT authority of 10 U.S.C. §§ 4021–4022. If the transaction was outside its OT authority,

then the Army was required to use the federal acquisition system for the transaction. If the Army was required to use the federal acquisition system, then the COFC would have Tucker Act jurisdiction to review the transaction award.

Similarly, if the Army awarded follow-on production after the successful completion of an OT but had not used competitive procedures to select the original OT awardee, then the follow-on production would exceed the grant of authority in § 4022(f). In that situation, the Army could lawfully accomplish follow-on production only through a FAR-based contract. Again, the COFC would have jurisdiction to review the solicitation and award of a FAR-based contract for mass production of the technology prototyped in the OT.

Distinguishing between prototype projects and follow-on production projects is also consistent with the history of Congress's incremental grants of OT authority to the DoD. As discussed above, DoD's authority to award OTs for prototypes is a special subset of its older research and development authority now found in § 4021. Section 4022(a) is functionally Congress's recognition that prototypes are a form of research and development.

Another way of examining the COFC's Tucker Act jurisdiction is to seek evidence of Congress's intent. Did Congress intend the COFC to have jurisdiction over the formation of any OT prototype agreements awarded under § 4022? To answer that question, consider that the DoD's authority to enter into OT prototype agreements is derivative of its older authority to enter into research and development agreements under § 4021.

As discussed above, the COFC has already found it does not have authority over OTs without a follow-on production clause. As OTs awarded directly under § 4021 cannot include follow-on production clauses, it seems reasonably safe to say there is no serious argument the COFC has Tucker Act jurisdiction over § 4021 OTs. Nor does it have authority to review OTs awarded under any of the other research and development OT authorities scattered about the U.S. Code.

Section 4022 is explicitly derivative of the authority found in § 4021. Section 4022 does not purport to create a stand-alone OT authority for prototype projects. Rather, it states an authorized official "may, *under the authority of section 4021* of this title, carry out prototype projects that are directly relevant to enhancing the effectiveness of [the armed forces]." The derivative nature of the authority in § 4022 raises an interesting question: Did Congress intend to subject § 4022 OTs to COFC review when § 4022 authority is a subset of an authority beyond COFC review? It seems unlikely.

If the COFC does not have jurisdiction over the formation of properly used OTs, are they unreviewable? No. Contrary to the government's suggestion in the *Hydraulics International* oral argument, the process of awarding OTs is not exempt from judicial review. They are reviewable under the APA in federal district courts.

As discussed earlier, the logical underpinning of district courts' *Scanwell* jurisdiction also applies to the review of OTs. While Congress legislatively repealed *Scanwell* jurisdiction for procurement contracts reviewable by the COFC, that repeal was tied to the limits of the COFC's jurisdiction under 28 U.S.C. § 1491(b)(1). For agency actions beyond the scope of § 1491(b)(1), district courts may still exercise jurisdiction over APA suits. *SpaceX II* was exactly such a case.

In summary, in some situations the COFC properly has jurisdiction to review whether an agency wrongly used an OT when the transaction required a procurement contract instead. Similarly, it would be proper for the COFC to review a follow-on production award if the underlying prototype OT was not awarded through competitive procedures. In both situations, the COFC would review whether an agency exceeded the scope of its OT authority and therefore engaged in spending that required a procurement contract instead.

By contrast, properly used OTs should not be subject to bid protest jurisdiction of the COFC. Subjecting all OTs with the potential for follow-on production to such review would erode the value of OTs for speedy innovation and it would exceed the limited jurisdiction Congress granted the COFC. Even if the COFC lacks jurisdiction, agencies' use of OTs is still subject to judicial review. An agency's discretion in awarding an OT may be challenged in federal district court under the APA, just as cooperative agreements are.

The foregoing Part presents several arguments that cut against the COFC's reading of its own jurisdiction in *Hydraulics International*. Because of the decision in *Hydraulics International*, however, the DoD should consider insulating its prototype OTs from potential protests unless and until the issue of the COFC's jurisdiction is favorably resolved. The next Part discusses steps that the DoD can take to make prototype OTs less vulnerable to protest.

IV. The DoD Should Use Strategies to Insulate Prototype OT Awards from Protests.

Even if some DoD OT awards are subject to bid protest review at the COFC, the DoD can preemptively insulate its OT awards from such challenges. Some methods of insulating OT awards from bid protest challenge may even have collateral benefits regardless of the prospect for COFC review. This article proposes two methods.

The first method of insulating prototype OT awards from protest is for the DoD to forgo follow-on production clauses and rely on traditional FAR-based procurement for later production of successful prototypes. To incentivize innovation without the possibility of a competition-free follow-on production award, the DoD can use carefully crafted data rights and royalty agreements in its OTs. Such data

rights and royalty agreements should provide a sufficient incentive for innovative partners to participate in OTs despite potentially needing to compete for any later production contracts.

The second method of insulating OT awards from protest is for the DoD to leverage its ability to award science and technology projects based on peer review or scientific review rather than full and open competition. That would likely decrease the chances of a protester succeeding on the merits of a protest. With a reduced chance of success, potential protesters will be less likely to protest OT awards.

A. The DoD Can Forego the Use of Follow-On Production Clauses and Instead Use Data Rights Agreements in OTs to Incentivize Participants.

The DoD can decouple its award of OTs from follow-on production under § 4022(f). The DoD can use a project development model like that used by the Air Force in the launch programs at issue in *SpaceX*. Under the *SpaceX* model, the government will need to navigate the divergent interests of giving private industry incentives to participate in prototype programs and maintaining the DoD's access to the resulting technology.

Under its follow-on production authority, the DoD can provide OT partners incentives to develop prototypes by offering successful partners the potential for follow-on production contracts without further competition. Such locked-in production is a major incentive for OT partners to work with the DoD and develop products that meet the DoD's needs. When any follow-on production is likely to flow to the OT partner under § 4022(f), an OT partner can grant the government greater data rights than might otherwise be prudent. The follow-on production option decreases any risk the OT partner will lose a follow-on production competition to a less-innovate but more production-oriented competitor. If the DoD removes the follow-on production clause from OTs to insulate them from litigation delays at the COFC, it will need to find another incentive for innovative partners to participate in OT projects.

To maintain a high probability of recruiting innovative partners without a follow-on production clause, the DoD can leverage the flexibility of OTs to increase its OT partners' competitiveness for future contracts under traditional competitive solicitations. To understand how that method of incentivizing private innovators would work, it is useful to understand how data rights acquisition works under traditional procurement contracts.

In traditional acquisitions under the Defense Federal Acquisition Regulation Supplement (DFARS), there are three main levels of data rights that the government can acquire under a contract: "limited," "government purpose," and "unlimited." Limited rights give the government a license "to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government." With limited rights, the government may not disclose the data outside the government or use it for commercial purposes except in extraordinary circumstances. Government purpose rights are unique to the DoD. They give the government a license to "[u]se, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction." Government purpose rights also allow the government to do essentially anything it wants with technical data or computer software "within the Government" or for "United States government purposes." "United States government purposes" includes allowing third parties to produce an item under a government production contract. Unlimited rights, as the name implies, gives the government the right "to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so." Granting the government unlimited rights in technical data or computer software critically erodes the value of intellectual property because it represents a potential total loss of control over technical data or computer software—subject only to the government's discretion.

In traditional procurements, the DoD will acquire limited rights in any technical data of items delivered under a government contract that were developed with exclusively private funding. It will acquire government purpose rights in any technical data or computer software that was developed with mixed private and government contract funds. It will acquire unlimited rights in any technical data or computer software that was developed with exclusively government procurement contract funds.

Computer software delivered under a DoD contract that was developed with exclusively private funds is treated a little differently. For commercial computer software, the government will usually acquire a modified commercial license. For non-commercial computer software developed with exclusively private funds, the government will usually acquire a "restricted" license. Restricted rights essentially mean that the software may only be used on the computers for which it was acquired and any backups and replacements thereof. Otherwise, it may not be used, copied, or disclosed.
Table 1 shows (1) the types of data in which a contractor will typically grant a government agency rights under a procurement contract; and (2) the types of data rights conferred based on how much government funding is at play.

Table 1– Matrix of Data Rights by Data and Funding Type

	Government Funding of Development		
Types of Data Rights	Private Expense	Mixed Funding	Government Expense

<table>
<tr><td>Noncommercial Technical Data</td><td>Limited rights</td><td rowspan="2">Government purpose rights (DoD) or

Unlimited rights (all other agencies)</td><td rowspan="2">Unlimited rights</td></tr>
<tr><td>Noncommercial Software</td><td>Restricted rights</td></tr>
<tr><td>Commercial Software</td><td rowspan="2">Commercial license rights except as inconsistent with federal law or the government's [legitimate] needs</td><td colspan="2" rowspan="2">If the government funded development of software later commercialized without substantive revision, the government will retain its original unlimited or government purpose license rights over that IP.</td></tr>
<tr><td>Commercial

Software Documentation</td></tr>
<tr><td>F3 & OMIT</td><td colspan="3">Unlimited rights</td></tr>
</table>

Other transaction agreements are not "contracts" for the purposes of determining the funding source under which technical data or computer software was developed. For that reason, the government will ordinarily acquire only limited or restricted rights if it acquires a product developed through an OT in a later FAR-based procurement, unless the terms of the OT already gave the government greater rights.

The government's license rights in patentable inventions—such as prototypes—shares some features of its rights in technical data and computer software. Under the Bayh-Dole Act, the government will ordinarily acquire a limited license in patented inventions developed under a procurement contract or government grant. With such rights, the government may contract with a third party to produce copies of the patented inventions, while the patent holder retains the rights to commercial use of the patents. That arrangement works well for inventions that have a large commercial market because the patent retains substantial value even though it does not guarantee continued government business for the patent holder.

For inventions with a large government market but a limited commercial market, the government's right to copy an invention for government use may discourage private innovators from working with the government under grants or traditional procurement contracts. If the primary value of an invention is future government sales, then it benefits innovators little to develop such inventions only to have the government license production of future sales to a third party. By using OTs instead of grants or procurement contracts, the government can incentivize innovators in at least two ways. First, it can offer follow-on production contracts under § 4022(f). Second, it can structure the data rights clauses of its OTs to ensure that OT partners will reap the rewards of their innovation even if a third-party manufacturer produces the end-product for the government.

If *Hydraulics International* poses too great a disincentive to future use of § 4022(f) follow-on authority, the DoD's best option may be to restructure the data rights clauses of its OTs. The DoD can structure the data rights resulting from OTs in a way that provides innovative partners the incentives that they need to participate in future OT prototype projects.

Because there are so few restrictions on the terms of OTs, there are many potential ways the government can write in incentives other than follow-on production contracts. This article will focus on one: structuring the government's license rights to guarantee OT partners royalties from the subsequent production of any products based on the OT partner's prototypes.

The DoD can take advantage of the flexible nature of OTs to grant the government control of the relevant intellectual property while creating an adequate profit incentive for potential OT partners. To do that, the OT could grant the government a transferrable license to produce the relevant technology subject to a royalty fee payable to the original OT partner. The royalty fee could be based on the quantity of items produced, the time during which items will be produced, or some other metric appropriate the technology and its use. Under such a license, the government could use third-party manufacturers, and the original OT partner would receive royalties commensurate with the scale of the production.

The royalty system would preserve the government's ability to contract freely for the mass production of technology developed under an OT. At the same time, it would preserve the OT partner's incentive to work with the government to develop innovative prototypes. It would not require a follow-on production clause as an incentive to OT participation. The royalty-based model would also dovetail with the general policy expressed in 10 U.S.C. § 3771 for the DoD to not impair the rights of businesses to receive royalties from third parties. It would also leverage the existing provisions of FAR 27.202-2, which relate to passing on fees of preexisting licenses.

Some potential OT partners may even find the royalty-based model preferable to the possibility of follow-on production orders under § 4022(f). For example, some OT partners may have expertise in product development and innovation, but not necessarily in production at

scale. Such innovation specialists may prefer a system where their largest financial incentive is tied to their success in innovating, and not their success at mass-production.

In particular, some small businesses may find the follow-on production volume daunting. Section 4022 defines "small business" based on the standards set by the Small Business Administration (SBA). The SBA publishes size standards that define what qualifies as a "small business" for various industries. The SBA's size standards for some industries are based on average annual receipts and the standards for other industries are based on the business's number of employees. The military and aerospace equipment and military weapons industries enjoy the highest current dollar-value cap to qualify as a small business—$47 million. But even that relatively high cap is far surpassed by the potential size of § 4022 follow-on production awards.

Section 4022 allows follow-on production awards up to $100 million without any special authorizations other than the basic criteria outlined in § 4022(f). With the written authorization of an agency's senior procurement official, a § 4022 follow-on award can run up to $500 million. Under certain conditions, the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment can authorize follow-on production awards in excess of $500 million.

Even the comparatively low-level follow-on awards that are capped at $100 could easily surpass the capacity of a small business that has average annual receipts of no more than $47 million. Based on the SBA's size standards, a $90 million follow-on production award would be almost double the *total* annual average receipts of even comparatively "large" small businesses in the military and aerospace industries. Such a jump in volume could easily outpace a small business's experience and capacity.

In OTs with follow-on production awards under § 4022(f), OT partners without large-scale production capacity may need to partner with established manufacturers to meet the government's ultimate production goals. That may be a factor in the rise of the consortium model of OTs noted in *Hydraulics International*. The royalty approach would avoid the need for smaller OT participants to partner with large firms to reap the benefits of their innovation. That arrangement could be a major boon for the small businesses and nontraditional defense contractors Congress sought to preference in § 4022.

What about established manufacturers who offer innovation and production under one roof? Major manufacturers may be well situated to take OTs from prototype to production, and follow-on awards may be a big incentive to their participation in OTs. It is a fair question whether the royalty approach would be a step backward for such established businesses.

Major manufacturers would likely still benefit from the royalty approach. If a major manufacturer received an OT award that used the royalty approach, it would still need to compete for the eventual production contract under the FAR. It would, however, enjoy three big advantages over its competition. First, it would be intimately familiar with the product and better able to assess its likely production costs. Second, its mastery of the product itself would likely improve its technical approach to production. Third, it would not need to pay royalties to produce the product while its competition would. It would therefore enjoy a head start on offering the government the lowest price for production.

At the same time, the government would benefit from competitive bidding on the production contract and would be free to contract for multiple or alternate suppliers if it needed to quickly increase its supply of the new product. The ability to work with third-party manufacturers is particularly important for the DoD because national security exigencies might cause an unexpected jump in the government's need for certain products. In such situations, the government needs the flexibility to contract with a wide spectrum of potential producers to ensure its requirements are met.

Thanks to the flexibility of OTs, the government could also structure such agreements to gradually phase out the relevant royalties with the lapse of time or the rate of production. In that way, OT partners could expect a reasonable return on their innovative efforts while the government could retain the long-term flexibility to continue servicing and upgrading the products. Such service requirements include acquiring replacement parts and similar as-needed maintenance products. By phasing out the royalties over time, the government could preserve the OT partner's reasonable return on its efforts while not unduly inflating the total lifecycle costs of the products.

A full license agreement would be too long and technology-specific to include in this article. But the basic features of such an agreement can be summarized as follows:

(1) The government should receive the functional equivalent of government purpose rights in the prototyped technology and its technical data subject to item (2), below.

(2) The rights in item (1), above, should be subject to the following caveat: The government's license to manufacture or produce the prototyped technology is subject to the payment of royalties to the prototype's developer pursuant to a schedule of royalties. The agreement should include the schedule of royalties.

(3) The government should also receive the right to sub-license the production or manufacture of the prototyped technology to a third party subject to items (1) and (2), above. Thus, the data rights conferred by the agreement would only allow third-party manufacturing for government purposes and would require the third-party manufacturer to pay the prototype's developer royalties.

(4) The government should receive sufficiently detailed manufacturing and process data to provide a third-party manufacturer all the data needed to produce the product subject to the schedule of royalties.

(5) Depending on the nature of the prototype, the government should consider including a phased sunset provision for the royalties. Under such a provision, the royalties due to the original prototype developer would gradually decrease. The agreement could link the decrease to either the lapse of time or the cumulative volume of government-purpose production of the prototype.

The full details of any royalty agreement for a prototype OT would necessarily vary based on the kind of technology contemplated by the agreement. Depending on those details, it is important to acknowledge there is some risk that the COFC would view the royalty agreement as bringing the OT under its bid-protest jurisdiction. Because the potential royalties would be based on the possibility of future competitive procurements of the prototyped technology, the COFC could conceivably conclude the OT was "in connection with" a procurement. That would be too broad a reading of the language "in connection with" as the royalty model could be used regardless of whether § 4022(f) production authority ever existed.

Indeed, the royalty model would have far more in common with the facts of *SpaceX* than with the facts of *Kinemetrics* and *Hydraulics International*. Like *SpaceX* and unlike *Hydraulics International*, the royalty model would omit any § 4022(f) follow-on-production clause. Also, like *SpaceX* and unlike *Hydraulics International*, a royalty-based OT could explicitly state any production of the prototyped technology would be subject to full and open competition under the FAR. In *Kinemetrics*, the COFC appeared to draw its jurisdictional line at the point where an OT had a "direct effect" on a subsequent procurement. Under the royalty model, the OT would have, at most, an indirect effect on any future procurement. So too did the OT in *SpaceX*, and the COFC found that it lacked jurisdiction to review the substance of that protest.

Moreover, the royalty model would have advantages over the use of § 4022(f) follow-on awards. From the government perspective, the royalty model would allow the government significant flexibility to open competition for production contracts to established manufacturers. That flexibility could ultimately yield lower costs for the government and greater resilience in its production base. From the perspective of innovators, decoupling the innovation and prototyping process from the production process opens the field to new entrants who lack the capacity for production at scale but who can prototype new and innovative solutions to the government's emerging needs. Put simply, not all inventors want to be manufacturers. While both skills are needed to maintain the United States' competitive edge, smaller businesses tend to be better suited to the former than the latter.

While large defense contractors often provide both innovation and production, Congress expressed a preference for encouraging small businesses and nontraditional defense contractors to participate in OTs. That preference reflects the general sentiment that small-scale innovators often operate with greater agility than large-scale manufactures. It also recognizes the general sentiment that outside thinking can help find new solutions.

These same small-scale innovators may be hesitant to work too closely with large businesses in the same field. Several reasons exist for small businesses to hesitate before entering partnership with a large business. Simple size disparity can cause unequal bargaining positions. Small businesses may be concerned that a large partner will poach their top talent or ideas. Specific to the government procurement realm, nontraditional defense contractors will usually operate with less sophistication toward government procurement contracts than traditional defense contractors. For these reasons, many small innovators may prefer an OT model where the government finds the third-party manufacturer, and the original OT partner reaps the benefits of their innovation through royalties. After all, the royalty model is a common mechanism for inventors to capitalize on their inventions in private business.

To be sure, the royalty model might slow down the process of taking a prototype to production because it would inject the full FAR-based acquisition process between the end of prototype development and the beginning of production at scale. By contrast, a follow-on production award pursuant to § 4022(f) would bypass competition immediately before production, but it would front-load that competition into the OT itself.

If delays from competition and potential litigation are inevitable, it is more practical to place those delays after research and prototyping and not before. That is true for at least two reasons. First, not all research or prototyping efforts produce results fit for production. Front-loading delays will slow down the government's product development schedule even for products that never achieve full development. It makes sense to consolidate the bulk of the delays after a viable product has been prototyped. Second, small businesses and nontraditional defense contractors may not be well-positioned to absorb undue delays. Those groups are a large part of the innovation framework for which Congress has shown its preference in § 4022. It makes sense to limit the impact of delays on those businesses that may be less equipped to absorb them.

Hydraulics International both poses a challenge and presents an opportunity for the DoD. The challenge is to prevent the OT process from being mired in bid-protest litigation. The opportunity is to revise the structure of OTs to avoid litigation and inspire innovation. Doing so, the DoD can better implement Congress's intent for incorporating nontraditional defense contractors into the OT process. The royalty-based model brings at least four benefits. First, it accelerates the OT process by reducing potential bid-protest litigation pursuant to the *SpaceX* decision. Second, it streamlines the OT formation process by allowing the DoD to leverage the use of competition only "[t]o the [maximum] extent practicable" pursuant to § 4022(b)(2). Third, it incentivizes OT participation by small innovators that may not want to navigate the production process. Fourth, it allows the government greater flexibility to contract for production at scale through competitive procedures after the OT prototype is complete.

B. The DoD Can Also Leverage Its Ability to Award Science and Technology Projects Through Peer Review or Scientific Review Rather Than Full and Open Competition to Streamline OT Awards.

The DoD's other main option for insulating OT awards from bid protests is to use its unique definition of "competitive procedures" to streamline OT awards and bypass the typical standards of full and open competition. While that adjustment would not foreclose COFC review of OT awards with follow-on production transactions, it would place any such review at the apex of courts' deference to an agency's technical judgments.

As discussed earlier, Congress gave the DoD a unique definition of competitive procedures. Other federal agencies' parallel authority to use peer review or scientific review as competitive procedures is limited to "basic research." In contrast, the DoD may use peer review or scientific review in lieu of full and open competition for any "science and technology proposals" so long as it is a competitive award following a general solicitation.

To the extent the COFC appeared to graft the full panoply of FAR-based procurement standards into its review of the OT awards in *Hydraulics International*, those standards should not apply to an award using a competitive peer review or scientific review in lieu of full and open competition. Further, as the district court observed in *SpaceX II*, judicial deference to an agency's action is "at its highest where a court is reviewing an agency action that required a high level of technical expertise." The scientific review of prototype technology proposals is an excellent example of agency action requiring "a high level of technical expertise."

The DoD could use its unique version of competitive procedures in conjunction with any of the other strategies outlined in this article. In fact, it appears the DoD used the pilot version of that same authority in the OT at issue in *Kinemetrics*. The OT award in *Kinemetrics* was based on peer review of the technical proposals and a separate review of the prices. The COFC explicitly noted that it treated peer review conclusions with special deference.

While litigation of any type risks complicating OT projects, highly deferential review reduces the chance of a judgment adverse to the DoD that might further mire an OT in re-competition. Highly deferential review also discourages challenges because it reduces the chances of a protester prevailing on the merits of the challenge.

Overall, the DoD's ability to substitute peer review or scientific review for the rigid requirements of full and open competition is a potentially powerful tool to streamline OT awards and reduce litigation challenges. Congress gave the DoD that unique ability for a good reason and the DoD should use it.

V. The DoD Should Ask Congress to Save OTs from Bid Protest Review.

Congress should clarify the COFC's jurisdiction over grants, cooperative agreements, and OTs. The uncertainty caused by *Hydraulics International* is a good reason for the DoD to request Congress step in. The most elegant means of clarifying the COFC's jurisdiction over OTs may be for Congress to explicitly define the term "procurement" as used in the Tucker Act.

Much of the disagreement in *SpaceX*, *Kinemetrics*, and *Hydraulics International* hinged on the fact that "procurement" is not defined in the Tucker Act. Lacking an on-point definition, the COFC has imported the CICA's definition of "procurement," which is intentionally expansive, as it is meant to encompass all stages of the federal government's usual process of acquiring goods and services. As discussed in Part III, above, transplanting the CICA's definition of "procurement" into the Tucker Act wreaks havoc on the statutory scheme. To remedy that problem, Congress can add a definition of "procurement" specific to the Tucker Act. Congress could easily insert such a definition as a new subsection "(d)" at the end of 28 U.S.C. § 1491. That new subsection could be as simple as the following: "As used in this chapter, the term "procurement" has the same meaning given in 41 U.S.C. § 111 and does not include a transaction authorized by statute as a transaction other than a contract."

That definition would have the advantage of importing the CICA's broad definition of procurement, while exempting grants, cooperative agreements, and OTs. The final clause "but does not include a transaction authorized by statute as a transaction other than a contract" mirrors the language of OT authorizing statutes that grant authority to enter transactions "other than contracts, cooperative agreements, and grants." It conspicuously omits the words "cooperative agreements, and grants" to make clear that the COFC's jurisdiction does not extend to the review of properly authorized cooperative agreements and grants.

That relatively simple definition also preserves the COFC's authority to review *unauthorized* use of OT authorities as a subterfuge to avoid CICA requirements. Because that definition of procurement "does not include a transaction *authorized* by statute as a transaction other than a contract," the definition does include transactions *not authorized* by such a statute. Hence, that definition of procurement would preserve the COFC's ability to review the improper use of OT authorities. Conversely, it would preclude the COFC second-guessing the wisdom of an agency's otherwise proper use of an OT authority. That proposed definition makes explicit what this article argues is otherwise implicit in the interplay between the Tucker Act, CICA, and the OT authorizing statutes. Namely, Congress did not intend for the COFC to have jurisdiction to review protests of OT awards within the scope of an agency's OT authority.

VI. Conclusion

Other transaction agreements are important tools that allow federal agencies to invest in research, development, prototyping, and building the capacity to respond to future challenges. Their key features include flexibility and speed. Within the DoD, they also are designed to appeal to small businesses and nontraditional defense contractors.

Other transaction agreements are fundamentally unlike procurement contracts in that they are not intended to acquire mature technologies for ongoing use. Instead, they share more characteristics with grants and cooperative agreements, which allow agencies flexibility in bringing future and indirect benefits to the agency's missions.

Like grants and cooperative agreements, OTs are exempt from CICA and the FAR. Instead, they are subject to highly deferential review under the APA. Burdening OTs with bid protest-style review at the COFC risks miring them in litigation. Such litigation would degrade OTs' usefulness. It risks turning the next "Operation Warp Speed" into an "Operation Slow Crawl." The COFC's decision in *Hydraulics International* risks exactly that result. The DoD should respond to *Hydraulics International* in three ways.

First, the government should challenge the COFC's reasoning from *Hydraulics International* in any future cases that present the issue of the COFC's jurisdiction to review an OT award. The government should pursue the argument at the COFC and, if necessary, appeal an adverse decision to the Court of Appeals for the Federal Circuit.

Second, the DoD should consider restructuring its OTs to bifurcate the underlying OT award from the eventual production contract award like the process used in *SpaceX*. Instead of incentivizing OT partners with follow-on production awards, the DoD can incentivize partners with royalty and licensing agreements. Carefully structured royalty and licensing agreements will allow OT partners to receive future income for third-party production of the systems the OT partners prototyped. The royalty-based approach will also give the government more flexibility than just using follow-on production clauses. It will allow the government to partner with nontraditional defense contractors for prototyping while still holding full and open competitions for production contracts. The DoD should also consider making more use of its unique definition of "competitive procedures" to streamline the competitive process for prototypes.

Third, the DoD should ask Congress to clarify the scope of the COFC's jurisdiction over OTs under the Tucker Act. The COFC should retain jurisdiction to review OTs and other non-procurement spending for compliance with its authorizing statutes, but not for the wisdom of the underlying award decisions. That balance will provide sufficient oversight of OT use and ensure that agencies do not dress up procurement contracts in OT clothing. At the same time, the COFC should not have bid protest jurisdiction to review an agency's substantive judgment on the award of a valid OT.

The DoD can use these three responses together or separately to preserve OTs usefulness for maintaining the United States' competitive edge through research, development, and prototyping. It is hoped that these potential responses will find their way to the appropriate decision-makers to help ensure a vibrant future for innovation in support of our national defense.

Endnotes

1. Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167 (2022).
2. The acronym "OTA" is often used to refer to both other transaction authorities—the constellation of statutes authorizing executive branch agencies to enter transactions with private businesses outside the usual federal acquisition system—and other transaction agreements—the actual agreement between the federal agency and private business under an other transaction authority. *See* Heidi M. Peters, Cong. Research Serv., R45521, Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress 2 (2019) [hereinafter Use of Other Transaction Authority]. For clarity, this article will refer to other transaction agreements or other transactions as "OTs" and will refrain from using the acronym "OTA" to reduce potential confusion.
3. *See Hydraulics*, 161 Fed. Cl. at 174.
4. *See id.* at 172.
5. Office of Federal Procurement Policy Act, Pub. L. No. 93-400 § 6 (1974).
6. Office of Federal Procurement Policy Act Amendments of 1983, Pub. L. No. 98-191 § 6 (1983).
7. Kate M. Manuel et al., Cong. Research Serv., R42826, The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions 11 (Feb. 3, 2015).
8. *See generally* Competition in Contracting Act of 1984, Pub. L. No. 98-369 § 2711 *et seq.* (1984).
9. *Id.*
10. 41 U.S.C. § 3101(c)(1)(A).
11. *See* Competition in Contracting Act § 2721, 98 Stat. 1185; *see also* 10 U.S.C. §§ 3001–4985.
12. *See, e.g.*, Competition in Contracting Act §§ 2711–2723.

13. All agency supplements to the FAR are available online at https://www.acquisition.gov/content/regulations [https://perma.cc/UPX6-JQ3U] (last visited Mar. 3, 2023).

14. *See, e.g.*, Competition in Contracting Act §§ 2711–2723; 2 James F. Nagle, A History of Government Contracting 160 (3d ed. 2012).

15. *See, e.g.*, FAR 5.001-2 (requiring publication of solicitations for bids and proposals); *see also* 41 U.S.C. § 3301 (discussing full and open competition in general).

16. *See, e.g.*, 41 U.S.C. § 3306 (on the content of solicitations and criteria for award); FAR 6.102 (on the use of competitive procedures in general). *See generally* FAR 14 (on sealed bidding); FAR 15 (on negotiated procurements).

17. *See, e.g.*, FAR 14.408-1.

18. *See generally* FAR 33.1.

19. *See, e.g.*, Comint Sys. Corp. v. United States, 700 F.3d 1377, 1383 n.7 (Fed. Cir. 2012) (contrasting pre-award protests and post-award protests).

20. *See id.* at 1382.

21. *See id.* at 1383 n.7.

22. *See* Blue & Gold, Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007).

23. *See* John Cibinic, Jr. et al., Formation of Government Contracts § 15–13, 18 (2023).

24. *Id.* at § 15–86.

25. *See* Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 875–76 (D.C. Cir. 1970).

26. *See, e.g.*, Jordan Hess, *All's Well That Ends Well: Scanwell Jurisdiction in the Twenty-First Century*, 46 Pub. Cont. L.J. 409, 414, 417 (2017).

27. *See, e.g.*, Daniel I. Gordon, *Bid Protests: The Costs Are Real, but the Benefits Outweigh Them*, 42 Pub. Cont. L.J. 489, 490–91 (2013).

28. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 § 12, 110 Stat. 3870, 3874–76.

29. *Id.*

30. *Id.*

31. *Id.*

32. *See* 28 U.S.C. § 1491.

33. *See, e.g.*, Jordan Hess, *All's Well That Ends Well:* Scanwell *Jurisdiction in the Twenty-First Century*, 46 Pub. Cont. L.J. 410 (2017).

34. *See, e.g.*, *id.* at 409, 411.

35. *See* FAR 33.1.

36. FAR 33.103.

37. FAR 33.104.

38. FAR 33.105.

39. FAR 33.103(d)(4), (f)(4).

40. *See* Harmonia Holdings Grp., LLC v. United States, 147 Fed. Cl. 749, 51 (2020).

41. *See generally* Health Sys. Mktg. & Dev. Corp. v. United States, 26 Cl. Ct. 1322, 1325 (1992) (discussing effect of successive protests to different forums). Technically, GAO's opinions are advisory. Therefore, the COFC does not review GAO decision on appeal but reviews the underlying merits of the protest. *See id.*

42. *See* 28 U.S.C. § 1295(a)(3).

43. *See* Sup. Ct. R. 10.

44. *See e.g.*, *Supreme Court Procedures,* USCourts.gov, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/S3BP-QA3Q] (last visited Apr. 12, 2024) (providing basic data on the low rate of review).

45. Nagle, *supra* note 14, at 160.

46. *Id.* at 158.

47. *Id.*

48. *Id.* at 202.

49. Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 638 (2001).

50. *See* 10 U.S.C. § 4022(d).

51. *What Are OTs?*, Def. Advanced Rsch. Projects Agency, https://acquisitioninnovation.darpa.mil/what-are-ots [https://perma.cc/33X5-JB8W].

52. U.S. Gov't Accountability Off., GAO-16-209, Federal Acquisitions: Use of 'Other Transaction' Agreements Limited and Mostly for Research and Development Activities (2016).

53. *See* National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § 203(b)(5), 72 Stat. 430; *see also* Office of the Undersecretary of Defense for Acquisition and Sustainment, Other Transactions Guide 4 (version 2.0 2023) [hereinafter DoD OT Guide].

54. National Aeronautics and Space Act of 1958 § 203(b)(5) (emphasis added).

55. *See, e.g.*, L. Elaine Halchin, Cong. Rsch. Serv., RL34760, Other Transaction (OT) Authority 1 (2011) (observing OTs are "defined in the negative").

56. *Id.*; *see also* DoD OT Guide, *supra* note 53, at 4.

57. *See* DoD OT Guide, *supra* note 53, at 43.

58. *See id.*

59. *See* Ryan Tobin et al., *Analysis of Other Transaction Agreements to Acquire Innovative Renewable Energy Solutions for the Department of the Navy*, Naval Postgraduate School, Dec. 2016, Table 1.

60. *See* DoD OT Guide, *supra* note 53, at 4.

61. *See id.*

62. *See* Tobin et al., *supra* note 59. This article uses the term "agency" broadly to include "departments," "agencies," "administrations," and "offices."

63. *See id.*, Table 1. This number can vary depending on how sub-agencies with unique authorities are counted within larger agencies or departments with their own OT authority.

64. *See* Halchin, *supra* note 55, at 18.

65. Congress recently moved this authority to 10 U.S.C. §§ 4041–4022. Previously, it was codified in 10 U.S.C. § 2371(b), and before that in 10 U.S.C. § 2371.

66. *See* National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352, § 251(a)(1) (1989). For simplicity, the main text of this article will refer to all national defense authorization acts as the "NDAA" of the fiscal year "FY" for which the act authorizes funding—e.g., "NDAA FY1990."

67. *Id.*

68. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, div. A, tit. VIII, § 845 (Nov. 30, 1993).

69. *See id.*

70. *Id.*

71. *Compare* Competition in Contracting Act of 1984, Pub. L. No. 98-369 § 2711, 98 Stat. 1175, 1175-81 (amending 41 U.S.C. § 259 to define "competitive procedures"), *with id.* § 2722(a) (amending 10 U.S.C. § 2302 to define "competitive procedures").

72. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107 § 822, 115 Stat. 1012, 1182–83.

73. *See id.*

74. *See id.*

75. *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 § 815(a)(1), 129 Stat. 726 (2015).

76. *See id.*

77. *See id.*

78. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-131, § 221, 131 Stat. 1283, 1333 (2017).

79. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 1801–1806 (2021).

80. 10 U.S.C. § 3012(2).

81. 10 U.S.C. § 4021(a) (emphasis added).

82. *See* 10 U.S.C. § 4022(a).

83. *See id.* § 4022(f).

84. *See id.* § 4022(f)(2).

85. *Id.* § 4022(d).

86. *See, e.g.*, Nagle, *supra* note 14, at 202.

87. *See, e.g.,* DoD OT Guide, *supra* note 53, at 4.

88. *See* Surya Gablin Gunasekara, *"Other Transaction" Authority: NASA's Dynamic Acquisition Instrument for the Commercialization of Manned Spaceflight or Cold War Relic?*, 40 Pub. Cont. L.J., 95, 117 (2011) (discussing the speed advantages of OTs in the context of NASA's OT authority); *see also* John Dobriansky & Patrick O'Farrell, *Other Transaction Authority: Acquisition Innovation for Mission-Critical Force Readiness*, Contract Mgmt., July 2018, at 50, 53.

89. *See* Use of Other Transaction Authority, *supra* note 2, at 13 (compiling accounts of OTs' flexibility as an incentive to nontraditional defense contractors); *see also* Dobriansky & O'Farrell, *supra* note 88, at 53.

90. Richard H. Van Atta, R. Royce Kneece, Jr., & Michael J. Lippitz, Institute for Defense Analysis, Assessment of Accelerated Acquisition of Defense Programs V (2016).

91. An unmanned aerial vehicle is commonly referred to as a "drone." *Id.* at 8.

92. *Id.* at 30, 34 (noting "there was no way to have specified [requirements like the Predator's eventual capabilities] because the users did not know what could or could not be done").

93. *See* 2 Richard Van Atta et al., Institute for Defense Analyses, Transformation and Transition: DARPA's Role in Fostering an Emerging Revolution in Military Affairs, Detailed Assessments VI–29 (2003).

94. *See, e.g.*, U.S. Gov't Accountability Off., GAO-21-319, Operation Warp Speed: Accelerated COVID-19 Vaccine Development Status and Efforts to Address Manufacturing Challenges 6 (2021).

95. *See* Rhys McCormick & Gregory Sanders, *Trends in Department of Defense Other Transaction Authority Usage*, Center for Strategic and International Studies, 8–9, 48 (May 2022). McCormick & Sanders report that the DoD obligated $7.6 billion to R&D OTs in 2019, and $7.1 billion to COVID-19 response OTs in 2020.

96. *See id.*

97. *See* Scott Amey, *Other Transactions: DO the Reward Outweigh the Risks?,* Project on Government Oversight, (2019) https://www.pogo.org/reports/other-transactions-do-the-rewards-outweigh-the-risks [https://perma.cc/TJF5-9NKT].

98. *See id.*

99. *See* Diane Sidebottom et al., *Guide to Research Other Transactions Under 10 U.S.C. 4021*, Off. of the Under Sec'y of Def. Acquisition & Sustainment, at 6, https://www.acq.osd.mil/asda/dpc/cp/policy/docs/guidebook/Guide%20to%20Research%20Other%20Transactions.pdf [https://perma.cc/6E32-DX8E].

100. Examples of relevant statutes include the False Claims Act, *see* 31 U.S.C. §§ 3729 –3733; the Antideficiency Act, *see* 31 U.S.C. §§ 1341–1342, 1511–1519; federal bribery laws, *see* 18 U.S.C. § 201; restrictions on post-government employment and transaction involving a personal financial interest, s*ee* 18 U.S.C. §§ 207–208; and protections of trade secrets, *see* 18 U.S.C. §§ 1831–1839. This list is by no means exhaustive and merely shows that many of the protections relied on to preserve the integrity of public-private business dealings apply to OTs.

101. *See* 10 U.S.C. § 4022(a)(2)(B).

102. U.S. Congress, House Committee on Appropriations, Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, Department of Defense for the Fiscal Year Ending September 30, 2019, and for Other Purposes, Conference Report to Accompany H.R. 6157, 115th Cong., 2d Sess., Sept. 13, 2018, H. Rept. 115-952, at 153 (Washington: GPO, 2018).

103. *See* 10 U.S.C. § 4022(h).

104. *See id.* § 4022(d)(ii)(3).

105. *See supra* note 100.

106. 28 U.S.C. § 1491(a)(1); *see AESOP's Guide to Litigating Under Other Transactions,* DAU, https://www.dau.edu/datl/b/aesops-guide-litigating-under-other-transactions#:~:text=Although%20OTs%20are%20not%20subject,and%20procedures%20for%20resolving%20disputes [https://perma.cc/GNV8-ZBCX] ("Although OTs are not subject to the Contract Disputes . . . [Act], an OT dispute can potentially be the subject of a claim in the Court of Federal Claims.").

107. *See* Anne Perry & Lillia Damalouji, *Challenging Other Transaction Agreements— Navigating the Jurisdictional Highway,* SheppardMullin (Sept. 13, 2023), https://www.governmentcontractslawblog.com/2023/09/articles/bid-protest/challenging-other-transaction-agreements-navigating-the-jurisdictional-highway [https://perma.cc/998P-Q9PQ].

108. *See, e.g.*, *id.*

109. *See* Exploration Partners, LLC, B-298804, 2006 CPD ¶ 201 at 5 (Comp. Gen. Dec. 19, 2006).

110. *See* 31 U.S.C. §§ 3551(1), 3552(a). Two additional bases for protest are "(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. [And] (E) Conversion of a function that is being performed by Federal employees to private sector performance." 31 U.S.C. § 3551(1).

111. Rocketplane Kistler, B-310741, 2008 CPD ¶ 22 at 3 (Comp. Gen. Jan. 28, 2008).

112. *See id.*

113. *See* 4 C.F.R. § 21.2 (2023).

114. *See id.* GAO's protest timeliness rules vary slightly based on the type of solicitation at issue. Sealed-bid protests must be filed before opening of the bids. Protest of a solicitation for proposals subject to negotiation must be filed before the time set for receipt of initial proposal. *Id.* If there is no set date for bid opening or submission of initial proposals, protests must be filed no less than ten days after the protester knew or should have known the basis for the protest. *Id.*

115. *See* Expl. Partners, LLC, B-298804, 2006 CPD ¶ 201 at 5 (Comp. Gen. Dec. 19, 2006).

116. MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020).

117. *Id.* at 1014.

118. Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW (GJSx), 2020 U.S. Dist. LEXIS 245693 (C.D. Cal. Sept. 24, 2020). This article refers to the federal district court's decision as "*SpaceX II*" because it came after the same action was granted and transferred to the district court by the COFC after the COFC decided it lacked jurisdiction to consider SpaceX's protest of the government's OT award. *See* Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 446 (2019).

119. Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW (GJSx), 2020 WL 7344615, at *19 (C.D. Cal. Sept. 24, 2020).

120. *Cf.* Major Anthony V. Chanrasmi, *Preventing Protest Purgatory: Providing Clarity by Placing Prototype Other Transaction Jurisdiction with the Court of Federal Claims*, 230 Mil. L. Rev. 159 (2022) (discussing how these cases might be harmonized by viewing them as a multistep test for where jurisdiction may be appropriate but arguing for a different approach because the relation between the cases makes the process difficult).

121. *MD Helicopters*, 435 F. Supp. 3d at 1006.

122. *Id.*

123. *Id.*

124. *Id.* at 1006–07.

125. *Id.* at 1007.

126. *Id.*

127. *Id.* at 1008, 1010.

128. *Id.* at 1009.

129. *Id.* at 1008 (citing Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998)).

130. *Id.* (quoting N. Side Lumber Co. v. Block, 753 F.2d 1482, 1485 (9th Cir. 1985)).

131. *Id.* at 1008–09.

132. *Id.* at 1008, 1010.

133. *See id*.

134. *Id.* at 1008–09.

135. 5 U.S.C. § 706; *see also id.* § 702 (waiving sovereign immunity for such lawsuits).

136. *See MD Helicopters*, 435 F. Supp. 3d at 1008 (citing Gabriel v. GSA, 547 F. App'x 829 (9th Cir. 2013)).

137. *See Gabriel*, 547 F. App'x at 831.

138. *See id.*

139. *Id.*

140. *See id.* (citing Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 647 (9th Cir. 1998)).

141. *See* Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 643 (9th Cir. 1998).

142. *See id.* at 644 (citing the Contract Settlements Act, 41 U.S.C. § 106(c)).

143. *Id.* at 647.

144. *Id.*

145. *See id.*

146. MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003, 1008 (D. Ariz. 2020).

147. *Id.*

148. *See* Gabriel v. GSA, 547 F. App'x 829, 831 (9th Cir. 2013). While the Ninth Circuit certainly may interpret its own cases as it sees fit, an outside observer might conclude that the *Gabriel* decision read *Tucson Airport* too broadly. Still, *Gabriel* is undeniably how the Ninth Circuit interpreted its own words from *Tucson Airport*, albeit in an unpublished opinion.

149. *MD Helicopters*, 435 F. Supp. 3d at 1008.

150. *See id.* at 1010.

151. *Id.*

152. *Id.*

153. *Id.* at 1007.

154. *Id.*; *see supra* note 25 and accompanying text.

155. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 § 12, 110 Stat. 3870, 3874–76.

156. *See supra* note 28 and text accompanying notes 28–31.

157. *See supra* note 33 and accompanying text.

158. *MD Helicopters*, 435 F. Supp. 3d. at 1013.

159. *Id.*

160. *Id.*

161. *Id.*

162. 28 U.S.C. § 1491(b)(1).

163. *MD Helicopters*, 435 F. Supp. 3d at 1011.

164. *Id.* at 1012–13.

165. *See* discussion *infra* Part III.

166. *See* discussion *infra* Part III.C (discussing how 41 U.S.C. § 111 does not apply beyond its own subchapter and how 10 U.S.C. § 3011 only applies to Chapter 137 legacy provisions, which does not include the DoD's OT authorities found in 10 U.S.C. § 4021–4022).

167. *MD Helicopters*, 435 F. Supp. 3d at 1007.

168. *See* 5 U.S.C. § 704; *see also MD Helicopters*, 435 F. Supp. 3d at 1011 (citing multiple cases for the same proposition but not explicitly citing Section 704).

169. 5 U.S.C. § 704; *MD Helicopters*, 435 F. Supp. 3d at 1008, 1013.

170. *MD Helicopters,* 435 F. Supp. 3d at 1013.

171. *Id.* at 1012–13 (contrasting the OT in *SpaceX,* discussed below, with the facts in *MD Helicopter*).

172. *Id.* at 1012–13.

173. *See* discussion *infra* Part II.B.3.ai.

174. Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 442 (2019).

175. *Id.* at 445–46.

176. "SpaceX" is the popular name of Space Exploration Technologies, Corp. *See NASA-Department of Defense Cooperation in Space Transportation: Hearing Before the H. Subcomm. on Space and Aeronautics of the H. Comm. on Science*, 108th Cong. 7 (2004).

177. *See* Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 434–38 (2019).

178. *See id.* at 445–46.

179. *See infra* Part II.B.3.

180. Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW(GJSx), 2020 U.S. Dist. LEXIS 245693, at *2 (C.D. Cal. Sept. 24, 2020) [hereinafter *SpaceX II*].

181. *See id.* at *3.

182. This article avoids using the term "jurisdictional" to describe the APA's requirement for a "final agency action." Federal circuit courts are split on whether the "final agency action" requirement is technically a jurisdictional requirement. *Compare* S.F. Herring Ass'n v. United States DOI, 946 F.3d 564, 571 (9th Cir. 2019) ("In this circuit, the final agency action requirement has been treated as jurisdictional."), *with* Trudeau v. FTC, 456 F.3d 178, 184 (D.C. Cir. 2006) ("[W]here 'judicial review is sought under the APA rather than a particular statute prescribing judicial review, the requirement of final agency action is not jurisdictional.") (quoting Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 731 (D.C. Cir. 2003)). On balance, the D.C. Circuit makes a highly persuasive argument that the "final agency action" requirement is essential to a cause of action but not a district court's jurisdiction. *Reliable Automatic Sprinkler Co.*, 324 F.3d at 731. After all, the APA does not confer jurisdiction but instead creates a cause of action. *See Trudeau*, 456 F.3d 184–85. Instead, district courts have jurisdiction over APA causes of action under the federal question statute 28 U.S.C. § 1331. *See Trudeau*, 456 F.3d at 185. This same line of reasoning calls into question the district court's dismissal of *MD Helicopters* for lack of APA jurisdiction. Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW (GJSx), 2020 U.S. Dist. LEXIS 245693, at *11 (C.D. Cal. Sept. 24, 2020) (SpaceX II). Admittedly, the *MD Helicopter's* dismissal was based on Ninth Circuit case law, which holds 5 U.S.C. § 704's threshold issues as jurisdictional requirements. *See id.* The intricacies of this circuit split are beyond the scope of this article and are explored in good detail elsewhere. *See, e.g.*, Sundeep Iyer, Comment, *Jurisdictional Rules and Final Agency Action*, 125 Yale L.J. 785 (2016).

183. *See* Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW(GJSx), 2020 U.S. Dist. LEXIS 245693, at *9–10 (C.D. Cal. Sept. 24, 2020).

184. *See id.* at *12–15.

185. *See* Chanrasmi, *supra* note 120, at 159, 174.

186. 5 U.S.C. § 704.

187. *See* at *12.

188. *See id.*

189. A separate basis for APA review exists if a statute explicitly makes an agency action reviewable. 5 U.S.C. § 704. No statute explicitly states OT awards are reviewable under the APA. *See* Nikole R. Snyder, *Jurisdiction Over Federal Procurement Disputes: The Puzzle of Other Transaction Agreements*, 48 Pub. Cont. L.J. 515, 525 (2019).

190. *See SpaceX II*, at *12–15.

191. *See id.* at *15.

192. *See id* at *12. An agreements officer functions essentially like a contracting officer for an OT.

193. *See id.* at *13.

194. *See id.* at *13–14.

195. *Id.* at *14. The district court's discussion of why the AO's final decision was not a final agency action is interesting, but not particularly relevant to how OT's fit into federal district courts' jurisdiction in general. *See id.*

196. *See id.* at *12–55. The only reference to the "no other adequate remedy in court" requirement was in the initial discussion of the APA's threshold requirements, *see id.* at *12, and the court did not revisit the issue.

197. *See id.* at *15.

198. 5 U.S.C. § 706(2)(A). Several other bases for relief do not apply to OT awards. One notable basis is if the agency's action exceeded its statutory authority. 5 U.S.C. § 706(2)(C). If an agency's OT award exceeded its statutory authority, however, that would be a matter properly reviewable by the COFC for the reasons discussed later in this article. *See* discussion *infra* Part III C. Under that circumstance, APA review would be inappropriate because the claim would be subject to another adequate remedy in a court, and therefore fail the APA's second threshold question. 5 U.S.C. § 706(2)(A).

199. *See* Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW(GJSx), 2020 U.S. Dist. LEXIS 245693, at *10 (C.D. Cal. Sept. 24, 2020).

200. *See id.* at *2.

201. *Id.* at *2.

202. *See generally* Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW(GJSx), 2020 U.S. Dist. LEXIS 245693.

203. *See id.* at *15–55.

204. FAR 33.101 ("*Protest venue* means protests filed with the agency, the Government Accountability Office, or the U.S. Court of Federal Claims. U.S. District Courts do not have any bid protest jurisdiction.").

205. *See* Chanrasmi, *supra* note 120, at 179 (discussing the various fora at which bid protests may be brought).

206. *See id.* (discussing the reasons why the COFC would be well-suited to review OT award protests).

207. *See* Aron Beezley, Patrick Quigley & Sarah Osborn, *The 6 Most Important Bid Protest Decisions of 2022*, Law360 (Dec. 21, 2023, 3:54 PM), https://www-law360-com.gwlaw.idm.oclc.org/articles/1560142/the-6-most-important-bid-protest-decisions-of-2022 [https://perma.cc/3WYM-YLXE] (discussing the impact of the *Hydraulics* case and how "this decision is the most recent in a line of cases that have begun to reveal . . . the contours of the court's jurisdiction over OTA protests").

208. Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 435 (2019).

209. *See* Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777 (2021).

210. Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167 (2022).

211. *See* Beezley, Quigley & Osborn, *supra* note 207.

212. *See SpaceX*, 144 Fed. Cl. At 435–37.

213. *See id.* at 436–37.

214. *See id.* at 437.

215. *See id.* at 437–38.

216. *See id.* at 438.

217. *See id.*

218. *See id.*

219. *See id.* at 438–39; *see also* 28 U.S.C. § 1491(b)(1).

220. 28 U.S.C. § 1491(b)(1).

221. *See supra* Part II.A; *see also* DoD OT Guide, *supra* note 53, at 5.

222. *See SpaceX*, 144 Fed. Cl. at 438.

223. *See id.* at 441–42.

224. *See id.* at 439.

225. 41 U.S.C. § 111.

226. *SpaceX*, 144 Fed. Cl. at 442 ("[T]here can be no genuine dispute that [OTs] are not procurement contracts that fall within the purview of this Court's bid protest jurisdiction.").

227. *See SpaceX*, 144 Fed. Cl. at 442.

228. *See id.* at 442–43.

229. *See id.*

230. *See id.* at 445–46.

231. *See infra* Part II.B.2.

232. *See SpaceX*, 144 Fed. Cl. at 445–46.

233. *See id.*

234. *See* Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 783–83, 85 (2021).

235. *See id.* at 782.

236. *See supra* note 65 (moved from 10 U.S.C. § 2371b. All references in *Kinemetrics* are to the § 2371b).

237. *Kinemetrics*, 155 Fed. Cl. at 781 (quoting National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 879(a), 130 Stat. 2000, 2312 (2016)).

238. *Compare Kinemetrics*, 155 Fed. Cl. at 782 ("The proposals would be evaluated based on technical merit/applicability, specifically the 'ability to meet threshold capability requirements'"), *with* FAR 15.203 (establishing requests for proposals (RFPs) as a means of determining contract requirements and responsibility).

239. *Kinemetrics*, 155 Fed. Cl. at 782.

240. *See id.*

241. *Id.*

242. *See id.* at 783.

243. *See id.*

244. *See id.* at 784.

245. *Compare* Space Expl. Tech. Corp. v. United States, 144 Fed. Cl. 433, 442 (2019) (finding no subject matter jurisdiction under the Tucker Act because the LSAs "are not procurement contracts"), *with Kinemetrics*, 155 Fed. Cl. at 785 (finding subject matter jurisdiction because the CSO was awarded "in connection with" a procurement) (internal quotations omitted).

246. *See Kinemetrics*, 155 Fed. Cl. at 785.

247. *See id.*

248. *See SpaceX*, 144 Fed. Cl. at 441–42.

249. *See Kinemetrics*, 155 Fed. Cl. at 785. The IDIQ contract itself appears to have used FAR-based terms rather than OT terms as might be expected of a follow-on production "transaction" pursuant to 10 U.S.C. § 4022(f).

250. *Kinemetrics*, 155 Fed. Cl. at 785.

251. *See id.*

252. *See* Beezley, Quigley & Osborn, *supra* note 207.

253. *See Kinemetrics*, 155 Fed. Cl. at 788.

254. *See id.* The court seemed concerned with whether it had been presented enough factual information to support the motion to dismiss, rather than enough factual allegations to support a *prima facie* claim. *See id.* That question turns the failure to state a claim test on its head. The standard is whether the "[f]actual allegations . . . raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 543 (2007).

255. *See Kinemetrics*, 155 Fed. Cl. at 785.

256. Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167 (2022) at 177.

257. *See Kinemetrics*, 155 Fed. Cl. at 780–85.

258. *See id.*

259. *Hydraulics Int'l, Inc.*, 161 Fed. Cl. at 172.

260. *See id.* at 171–72.

261. *See id.*

262. *See id.* at 172.

263. *See id.*

264. *See id.*

265. *See id.*

266. *See id.* at 173.

267. *See id.* at 173–74.

268. *See id* at 167.

269. *See id* at 174.

270. *See id.* at 177.

271. *See id.*

272. *Id.* at 179 (emphasis added) (quoting AgustaWestland N. Am., Inc. v. United States, 880 F.3d 1326, 1330 (Fed. Cir. 2018)).

273. *See* Space Expl. Tech. Corp. v. United States, 144 Fed. Cl. 433, 442 (2019).

274. *See id.* at 442.

275. 28 U.S.C. § 1491.

276. *See Hydraulics*, 161 Fed. Cl. at 178–79.

277. *See id.* at 191–92.

278. *Id.* at 180.

279. *See id.*

280. *See* Use of Other Transaction Authority, *supra* note 2, at 6–7.

281. *See id.* at 5–6.

282. *See id.* at 32.

283. *Hydraulics*, 161 Fed. Cl. at 180.

284. When trying to entice small businesses and nontraditional defense contractors, common perceptions may be just as important as objective facts. On average, less than half of one percent of procurement contracts are subject to a bid protest. *See* Mark V. Arena et al., RAND Corporation, Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers xv (2018), https://www.rand.org/pubs/research_reports/RR2356.html [https://perma.cc/F3GN-M8GV]). Nevertheless, some in private industry continue to perceive government contracting as a quagmire of hassle. *See* Nagle, *supra* note 14, at 202.

285. *Hydraulics*, 161 Fed. Cl. at 187–89, 191. Admittedly, practical experience shows the COFC often views its own prior decisions as highly precedential.

286. The government filed a notice of appeal with the Federal Circuit on September 26, 2022. *See* Notice of Appeal, Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167 (2022) (No. 22-364). The government filed three motions for an extension of time to file briefs. *See* Motion for an Extension of Time, Hydraulics International, No. 22-2287 (Fed. Cir. Nov. 17, 2022); Motion for an Extension of Time, Hydraulics International, No. 22-2287 (Fed. Cir. Jan. 19, 2023); Motion for an Extension of Time, Hydraulics International, No. 22-2287 (Fed. Cir. Feb. 17, 2023). Ultimately, the parties moved to voluntarily dismiss the appeal. *See* Joint Stipulation of Voluntary Dismissal, Hydraulics International, No. 22-2287 (Fed. Cir. Mar. 28, 2023). The Court of Appeals accordingly dismissed the case without briefing. *See* Order, Hydraulics International, No. 22-2287 (Fed. Cir. Mar. 31, 2023).

287. In a future case raising the same issues, the government may also be in a position to challenge whether the protest of an OT award states a claim—an issue foreshadowed by *Kinemetrics*, but as yet unexplored. *See* Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 785–88 (2021). As discussed below, the two questions—jurisdiction and statement of the claim—are linked, and that link has not been adequately explored at the COFC.

288. *Hydraulics*, 161 Fed. Cl. at 174 (citing 28 U.S.C. § 1491(b)(1)).

289. 28 U.S.C. § 1491.

290. *Id.* § 1491(b)(1).

291. *See Hydraulics*, 161 Fed. Cl. at 175 (citing 28 U.S.C. § 1491(b)(1)).

292. 28 U.S.C. § 1491(b)(1).

293. *Id.*

294. *Id.*

295. *Id.*; Lockhart v. United States, 136 S. Ct. 958, 959 (2016). It may be tempting to apply the rule of the last antecedent to the clause "in connection with" and conclude it modifies only the immediately preceding clause "violation of statute or regulation." Despite the merits of that grammatically accurate reading, the Federal Circuit has rejected it when interpreting the Tucker Act. *See* Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010). This departure from standard grammatical rules was probably unnecessary because the same result follows a close reading of "solicitation," "award," and "contract" as elsewhere used in relation to bid protests. *See generally* discussion *infra* Part III.A–B. *See also* 31 U.S.C. § 3551 (defining interested party status in terms of procurement contracts).

296. *See* 28 U.S.C. § 1491(b)(1).

297. Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 174 (2022).

298. *See, e.g.*, AFGE, Local 1482 v. United States, 258 F.3d 1294, 1297 (Fed. Cir. 2001).

299. *See id.* at 1299 (citing 31 U.S.C. § 3551(2)).

300. 31 U.S.C. § 3551(2)(A).

301. *Id.* § 3551(1) (emphasis added).

302. *See supra* notes 55–57 and accompanying text.

303. *See* 10 U.S.C. § 4021(a).

304. 28 U.S.C. § 1491(b)(1).

305. *See infra* Part II.B.1.

306. Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 177 (2022).

307. This stage of analysis assumes for the sake of argument that follow-on production under 10 U.S.C. § 4022(f) is "procurement." As will be discussed *infra* Part III.C, that assumption is itself flawed.

308. *See* 31 U.S.C. § 3551.

309. Torncello v. United States, 231 Ct. Cl. 20, 28 (1982).

310. *Id.*

311. *Id.* at 761. This is why indefinite delivery/indefinite quantity (ID/IQ) contracts often contain minimum quantity terms. *See id.* ("With indefinite quantities contracts, however, the buyer's promise specifically is uncertain, and such a contract would fail for lack of consideration if it did not contain a minimum quantity term.").

312. *See* 10 U.S.C. § 4022(f) (using the permissive "may" to describe the Government's authority to award follow-on production without competitive procedures under certain circumstances).

313. *See id.*

314. *Id.*

315. *Id.*

316. NDAA FY2023 amended § 4022(f)(2) so that a follow-on production transaction may be awarded under § 4022(f)(1) "even if explicit notification was not listed within the request for proposal for the transaction." James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 842(1), 136 Stat. 2395, 2717 (2022). To make a follow-on production award without further competition, the initial prototype OT must still "provide[] for" such a follow-on award. *See infra* note 445. If a provision for follow-on production is not included in the initial request for proposals, that would put yet another layer of speculation between the request for OT proposals and the possibility of a future production award.

317. *See supra* note 312 (noting that follow-on production is not required under § 4022(f)).

318. *See supra* note 309 and accompanying text. Theoretically, an OT could be structured to obligate the parties to follow-on production, but none of the reported cases on OTs thus far suggests any such agreements.

319. The OT at issue in *Hydraulics International* used a follow-on production clause that stated that "this project may result in the award of a follow-on production contract." Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 172 (2022). 10 U.S.C. § 4022(f) also allows for a follow-on production "transaction." In context, "transaction" means a follow-on OT for production. 10 U.S.C. § 4022(f). Because OTs are not procurement contracts, a follow-on production clause that provides for a production OT but not a production "contract" should not trigger COFC's Tucker Act jurisdiction, even under the reasoning of *Hydraulics International*. Dept. of Defense, Off. of the Under Sec. of Defense for Acquisition and Sustainment, Other Transactions Guide 5 (2023).

320. 28 U.S.C. § 1491(b).

321. *See* Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010) ("[Section] 1491(b)(1) in its entirety is exclusively concerned with procurement solicitations and contracts.").

322. Some practitioners may argue that it is enough that the OT award was an award in connection with a proposed procurement based on the expansive definition of procurement found in 41 U.S.C. § 111. That argument would suffer from at least three problems. First it would require applying the Title 41 definition of "procurement" outside its strict statutory limits. *See infra* note 356 and accompanying text. Second, if the COFC's application of the definition of "interested party" to the Tucker Act is valid, then the linked definitions limiting "interested party" status to procurement contracts and solicitations should also apply. *See* discussion *supra* Part III.A. *See also* 31 U.S.C. § 3552. Third, the opinion in *Resource Conservation Group* appears to contradict such a broad reading. *See* Res. Conservation Grp., LLC v. United States, 597 F.3d 1238 (Fed. Cir. 2010).

323. *See* DoD OT Guide, *supra* note 53, at 43.

324. *Id.* at 5. Some practitioners might object that, while OTs are not themselves procurements, an OT may be in connection with a procurement. Perhaps so, but then the alleged violation of statute or regulation would be in connection with something that is in connection with a procurement. The problem becomes how many connections are allowed before everything is somehow "in connection with a procurement." Dept. of Energy, Guide to Other Transactions Guide 22 (2023). A strict reading of the statute allows one connection or else no limiting principle at all.

325. *See* Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 167–68 (2022).

326. *See* 10 U.S.C. § 4022(b)(2).

327. Complaint at 27, Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167 (2022) (No. 22-364).

328. *See id.*

329. *See id.* at 27–28.

330. *Hydraulics Int'l*, 161 Fed. Cl. at 174.

331. *See* Complaint, Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167 (2022) (No. 22-364) (this is a simplification but conveys the basic outline of the plaintiff's argument).

332. *See Hydraulics Int'l*, 161 Fed. Cl. at183.

333. *See id.*

334. *See id.* at 185.

335. *See* Morgan W. Huston et al., *Year in Review: The Federal Circuit's 2021 Government Contract Law Decisions*, 71 AM. U. L. Rev. 1699, 1764 (2022).

336. *See* Kevin J. Wilkinson & John M. Page, *CICA Stays Revisited: Keys to Successful Overrides*, 66 A.F. L. Rev. 135, 141 (2010).

337. The COFC uses the APA standards when it reviews agencies' actions in bid protest cases, but, despite the standard used, these claims are not brought directly under the APA. *See Hydraulics Int'l*, 161 Fed. Cl. at 175. Instead, the ADRA imported the APA standard of review into bid protest cases pursuant to 21 U.S.C.§ 1491(b)(4). Ramcor Servs. Grp., Inc. v. United States, 185 F.3d 1286, 1290 (Fed. Cir. 1999).

338. *See* 10 U.S.C. § 4022(b)(2), (f).

339. *See id.* § 4022(b)(2), (f)(2).

340. *Id.* § 4022(b)(2).

341. *Id.* § 4022(f)(2)(A).

342. *Id.* § 4022(b).

343. *See id.* § 4022(b)(2), (f).

344. *Id.* § 4022(b)(2).

345. *Cf.* Chanrasmi, *supra* note 120, at 159 (discussing how standardizing the review process for DoD OT protests can better maintain the benefits the OTs provide to the agency).

346. *See* Exploration Partners, LLC, B-298804, 2006 CPD ¶ 201 at 5 (Comp. Gen. Dec. 19, 2006).

347. *See* Chanrasmi, *supra* note 120, at 159.

348. *See* Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 422 (2019).

349. *See supra* notes 312–313 and accompanying text.

350. Hydraulics Int'l, Inc., v. United States, 161 Fed. Cl. 167, 176 (2022).

351. *See id.* (citing 41 U.S.C. § 111).

352. *Id.* at 179 (quoting AgustaWestland N. Am., Inc. v. United States, 880 F.3d 1326, 1330 (Fed. Cir. 2018)) (internal quotations omitted). COFC's reliance on *AgustaWestland* for this proposition was a curious choice. In *AgustaWestland*, the CAFC held that the Army's selection of a particular helicopter as the exclusive future training helicopter of the Army *was not* part of the process of determining the need for acquisition. *AgustaWestland*, 880 F.3d at 1330–31. But under the COFC's reasoning in *Hydraulics International*, an OT prototype award to help inform the selection of a future training helicopter for the Army *is* part of the process of determining the need for acquisition. *See Hydraulics Int'l*, 161 Fed. Cl. at 176.

353. *Hydraulics Int'l*, 161 Fed. Cl. at 197 (quoting Distributed Sols., Inc. v. United States, 539 F.3d 1340, 1346 (Fed. Cir. 2008)). Some readers may question whether the COFC should have Tucker Act jurisdiction over prototype OT awards because the outcome of prototype projects may inform the government's decisions for future acquisitions. This article has two main answers to that question. First, research and development conducted through OTs under 10 U.S.C. § 4021 may also inform future government spending, but Section 4021 OTs seem plainly beyond COFC's jurisdiction. *See supra* notes 227–28 and accompanying text (indicating even a Section 4022 OT without the possibility of a follow-on production award is beyond the COFC's jurisdiction). Second, framing the question in terms of informing future government acquisitions overlooks the fact that spending through a future production OT might be an acquisition but it is not a "procurement." *See infra* Part II.B.1. The CAFC has explicitly stated that Tucker Act jurisdiction "exclusively [concerns] . . . procurement solicitations and contracts." Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010); *see also infra* text accompanying note 398.

354. *See Hydraulics Int'l*, 161 Fed. Cl. at 176.

355. *See* 41 U.S.C. § 111 (limiting the definition to "this subtitle"); 10 U.S.C. § 3011 (applying some Title 41 definitions to specific parts of Title 10, but not to Section 4021 or 4022). The scope of Title 41's definition of procurement predates CICA and has been adjusted slightly to conform with various amendments to Title 41. The Office of Federal Procurement Policy Act Amendments of 1979 defined "procurement" in 41 U.S.C. § 403. Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, § 3, 93 Stat. 648, 649 (1979). That definition of "procurement" was limited to the word "[a]s used in this Act." *Id.* The word "act" was interpolated as "chapter" in the next printed version of the U.S. Code. *See* 41 U.S.C. § 403(b)

(1982). Congress moved the definitions section to Chapter 1 of Title 41 in 2011. *See* Act of Jan. 4, 2011, Pub. L. No. 111-350, § 3, 124 Stat. 3677, 3677 (2011). As part of that move, the definition of "procurement" was limited to "this subtitle," meaning all of Subtitle I of Title 41. Until the recent move of the parallel definition within Title 10, the term "procurement" for DoD contracting purposes was defined with the same meaning as found in Title 41, but that definition was limited to Chapter 137 of Title 10. *See* 10 U.S.C. §§ 2302(2)-(3)(A) (repealed 2021). At the same point in time, the DoD's OT authority was found in Chapter 139, not Chapter 137. *See* 10 U.S.C. § 237(1)(b) (2018 ed., Supp. II).

356. *Compare* 10 U.S.C. § 3011 (limiting the definition of "procurement" to Chapter 137 legacy provisions, which do not include Sections 4021 or 4022), *with* 10 U.S.C. § 3012 (extending the definition of "competitive procedures" to all of Title 10, including Sections 4021 and 4022).

357. *Compare* 10 U.S.C. § 3011 (limiting the definition of "procurement" to Chapter 137 legacy provisions, which do not include sections 4021 or 4022), *with* 10 U.S.C. § 3012 (extending the definition of "competitive procedures" to all of Part V of Title 10, including Section 4021 and 4022).

358. While the definitions in Section 3011 only apply to Chapter 137 legacy provisions, the definition in Section 3012 applies to all of Part V of Title 10. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1806, 134 Stat. 3388, 4153 (2021) (moving the definition of "procurement Section 3011 while moving the definition of "competitive procedures" to Section 3012). Before the 2021 NDAA, Title 10 defined both "procurement" and "competitive procedures" in the same section, which applied only to Chapter 137 of Title 10. *See* 10 U.S.C. §§ 2302(2)-(3)(A) (repealed 2021).

359. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 221, 131 Stat. 1283, 1333 (2017).

360. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1806, 134 Stat. 3388, 4153 (2021).

361. 10 U.S.C. § 3012.

362. *See* 10 U.S.C. § 4022(b)(2).

363. *See* 10 U.S.C. § 3011.

364. *See id.*

365. *See id.* § 3016.

366. *See* 10 U.S.C. Ch. 137 front matter (2018 & Supp. I 2020).

367. *See id.*

368. *See* 10 U.S.C. § 3016.

369. *See id.*

370. *Compare* 10 U.S.C. § 3011 (applying the definition of "procurement" only to Chapter 137 legacy provisions), *with id.* § 3012 (applying the DoD-specific definition of "competitive procedures" to all of Part V of Title 10, including the OT authorizing statutes at Sections 4021 and 4022).

371. Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 176 (2022) (citing Distributed Sols., Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008)); Res. Conservation Grp., LLC, v. United States, 597 F.3d 1238 (Fed. Cir. 2010); AgustaWestland N. Am., Inc. v. United States, 880 F.3d 1326 (Fed. Cir. 2018)).

372. *See Hydraulics Int'l*, 161 Fed. Cl. at 192 (denying the government's motion to dismiss and granting the government's motion for judgment on the administrative record).

373. The definition was moved from 41 U.S.C. § 403(2) to 41 U.S.C. § 111. Hymas v. United States, 810 F.3d 1312, 1325 n.4 (Fed. Cir. 2016).

374. Distributed Sols., Inc. v. United States, 539 F.3d 1340, 1345 (2008).

375. Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, § 3, 93 Stat. 648, 649 (1979).

376. *Id.*

377. *See* 41 U.S.C. § 403(b) (1982).

378. *See* Act of Jan. 4, 2011, Pub. L. No. 111-350, § 3, 124 Stat. 3677, 3677 (2011).

379. *See Distributed Sols.*, 539 F.3d at 1342–43.

380. *Id.*

381. *See* Manuel et al., *supra* note 7, at 13–14.

382. Competition in Contracting Act of 1984, Pub. L. No. 98-369 § 2752 (1984) (requiring the OFPP to modify the FAR to conform to the various amendments CICA made to Title 41 of the U.S. Code).

383. *See Distributed Sols.*, 539 F.3d at 1344–46.

384. Res. Conservation Grp., LLC, v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010).

385. *See* 28 U.S.C. § 1491.

386. Hymas v. United States, 810 F.3d 1312, 1325 (Fed. Cir. 2016).

387. *Id.* at 1326.

388. *Id.* at 1329–30 (citing S. Rep. No. 95-449, at 11 (1977) ("explaining that if an award changes from a procurement contract to a grant, it need not comport with federal procurement law.").

389. Hymas v. United States, 117 Fed. Cl. 466, 487 (Fed. Cl. 2014), *vacated*, 810 F3.d 1312 (Fed. Cir. 2016).

390. *See id.*

391. *Id.*

392. *Id.*

393. *Hymas*, 810 F.3d at 1326–27.

394. *Id.* at 1327 (quoting Whitman v. Am. Trucking Assn's, 531 U.S. 457, 468 (2001)) (alternations original to *Hymas*).

395. *See id.* at 1329.

396. *Id.* (quoting Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010)).

397. *See id.* at 1327, 1329.

398. Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010).

399. *See id.* at 1243.

400. *See id.* at 1329–30.

401. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 251(a)(1), 103 Stat 1352, 1403 (1989).

402. *See id.*

403. *See id.*; *see also* Chanrasmi, *supra* note 120, at 166 (stating that procurement is not an aspect of many OTs).

404. *See* McCormick & Sanders, *supra* note 95, at 8 (observing less than $1 billion was spent on OT production awards in 2022). McCormick & Sanders note that one major OT award for COVID-19 response efforts combined prototyping and production, which may yield an artificially low figure for production in 2020. *See id.* at 8–9. Still that OT was itself an anomalous result of pandemic response efforts. *See id.*

405. 10 U.S.C. § 3012(2).

406. *See, e.g.*, 10 U.S.C. § 4021(a); 10 U.S.C. § 4841; *see also,* Halchin, *supra* note 55, at 1–2 n.5.

407. Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 179 (2022).

408. Hymas v. United States, 810 F.3d 1312, 1317 (Fed. Cir. 2016).

409. *See id.*

410. *See id.*; Expl. Partners, LLC, B-298804, 2006 CPD ¶ 201 at 5 (Comp. Gen. Dec. 19, 2006).

411. *See Hymas*, 810 F.3d at 1317.

412. *See id.*

413. *See id.*

414. *See* 10 U.S.C. § 4022(a)(1).

415. *See Expl. Partners, LLC*, 2006 CPD ¶ 201, at 5, n3.

416. *See* 28 U.S.C. § 1491(b)(1).

417. 10 U.S.C § 4022(f)(2).

418. *See id.*

419. *See* Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 784–85 (2021); 28 U.S.C. 1491(b)(1).

420. *See, e.g.*, National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845, 107 Stat. 1966, 1721–22 (1993).

421. *See* 10 U.S.C. § 4022(d).

422. *See* National Defense Authorization Act for Fiscal Year 1994 § 845, 107 Stat. at 1721.

423. *See* 10 U.S.C § 4022(a); 10 U.S.C § 4021.

424. *See* 10 U.S.C. § 4022(d).

425. *See* Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 442–44 (2019).

426. *Compare* § 4022(a)(2)(A)-(B) (explicitly granting authority for the execution of follow-on contracts), *with* § 4021 (containing no such provision).

427. *See* 6 U.S.C. § 391 (Department of Homeland Security) (this authority is explicitly a copy of the DoD's authority); 6 U.S.C. § 596 (Domestic Nuclear Detection Office); 42 U.S.C. § 247d–7e (Department of Health and Human Services); 42 U.S.C. 284n(b), 42 U.S.C. § 285b-3(b)(3) and 42 U.S.C. § 287a€(3)(C) (National Institutes of Health); 42 U.S.C. § 7256(g) (Department of Energy); 42 U.S.C. § 16538(f) (Advanced Research Projects Agency—Energy); 49 U.S.C. § 106(l)(6) (Federal Aviation Administration); 49 U.S.C. § 114(m)(1) (Transportation Safety Administration) (this authority being explicitly defined in terms of the authority of the FAA under 49 U.S.C. § 106(l)(6)); 49 U.S.C. § 5312 (b)(1) (Department of Transportation); 51 U.S.C. § 20113 (National Aeronautics and Space Administration); *see also* Tobin et al., *supra* note 59, Table 1.

428. 10 U.S.C § 4022(a)(1).

429. *Id.* (emphasis added).

430. *See* Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 178 (2022) (citing Transcript at 43:4–11, *Hydraulics Int'l, Inc.*, 161 Fed. Cl. (2022) (No. 22-364) (the COFC's decision stated, "The government believes it is 'conceivable' no court could ever review an agency's OT[]").

431. *See* Space Expl. Techs. Corp v. United States, 144 Fed. Cl. 433, 446 (2019) (dismissing SpaceX's claim at the Court of Federal Claims and granting SpaceX's motion to transfer venue to consider if the Air Force's decision in awarding the LSA was arbitrary or capricious); *SpaceX II*, at *3 (reviewing SpaceX's claim under the Administrative Procedure Act that the Air Force acted arbitrary and capricious in awarding the LSA).

432. *See SpaceX*, 144 Fed. Cl. at 446; *see generally SpaceX II*.

433. *See supra* note 25 and accompanying text; *MD Helicopters*, 435 F. Supp. 3d at 1007.

434. 28 U.S.C. § 1491(b)(1).

435. *See SpaceX*, 144 Fed. Cl. at 441.

436. *See* discussion *supra* Part III.C.

437. *See* Space Expl. Techs. Corp v. United States, 144 Fed. Cl. 433, 444 (2019) (holding that had Procurement II been connected to the OT, COFC would have jurisdiction).

438. 10 U.S.C. § 4022(f); Hymas v. United States, 10 F.3d 1312, 1317 (Fed. Cir. 2016).

439. 28 U.S.C. § 1491(b)(1).

440. *See id.*; Nat'l Fed'n of the Blind v. U.S. Abilityone Comm'n, 421 F. Supp. 3d 102, 142 (D. Md. 2019). Some readers may question why APA review of OT awards in federal district courts would be any less disruptive of the OT process than bid protest review at the COFC. The answer is that district courts performing pure APA review are less likely to import FAR-like standards than the COFC. *Compare SpaceX*, 144 Fed. Cl. at 446 (applying the APA standard of review in a district court), *with* Cubic Applications, Inc. v. United States, 37 Fed. Cl. 345, 349, 354 (1997) (importing FAR standards into APA review). Because district courts do not routinely decide cases involving FAR-based contracts and FAR-based rules, they are unlikely to import such standards to their APA review of OTs. *See generally* MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020). By contrast, the COFC is unlikely to distinguish between OT protest and any other bid protest cases if it views the OT award as "procurement." For example, in *Hydraulics International*, the COFC applied standards from many of its own bid protest cases to the OT protest. *See* Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 182, 185–91 (2022). But there is a significant problem with imposing standards developed to review FAR-based procurements on non-FAR OTs. The standards developed for reviewing procurement contracts presuppose many FAR requirements that do not properly map onto OTs, which are designed to be more flexible than FAR-based procurement. *See supra* Section II.A.3 (comparing OTs to procurements and highlighting the benefits of flexibility).

441. A third method is suggested, *supra* note 319, but it has none of the collateral benefits of the methods discussed in Parts IV.A–B, below.

442. The DoD has broad authority to use peer review or scientific review in lieu of full an open competition for the award of science and technology projects. *See, e.g.*, DFARS 235.006-71(a)(2).

443. *See generally SpaceX II*.

444. *See* 10 U.S.C. § 4022(f). NDAA FY2023 amended Section 4022(f)(2) to clarify that a follow-on production contract may be awarded under Section 4022(f)(1) "even if explicit notification was not listed within the request for proposal for the transaction." James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 § 842(3) (2022). NDAA FY2023's clarification about the content of the request for proposals did not change the requirements for the content of the prototype OT itself (amending 10 U.S.C. § 4022, but not amending § 4022(f)(2)).The statute still allows for a follow-on production award without further competition only if follow-on production is "provided for" per Section 4022(f)(1). *See id.* §§ 842–843; 10 U.S.C.A. § 4022(f) (West). Thus, to make a production award without further competition, the underlying OT award must still "provide for" follow-on production. *See also* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 § 322(h)(2), 136 Stat. 2395, 2513 (requiring prototype OTs for certain military energy resilience projects to "provide for" follow-on production "to the extent practicable"). The recently passed NDAA FY2024 erased any residual ambiguity about the prerequisites for follow on production. *See* National Defense Authorization Act for Fiscal Year 2024, Pub. L. 118-31 § 821, 137 Stat. 136, 326 (2023). That Act amended 10 U.S.C. § 4022(a)(2)(C)(i)(I), to clarify that follow-on production is allowed only if "[the requirements of subsection (d)] were met for the prior transaction for the prototype project *that provided for the award of the follow-on production* contract or transaction . . . ." National Defense Authorization Act for Fiscal Year 2024, Pub. L. 118-31 § 821, 137 Stat. 136, 326, 327 (2023) (emphasis added).

445. *See* The Judge Advocate Gen.'s Legal Ctr. and Sch., U.S. Army, 2023 Contract Attorneys Deskbook 35-27 (2023).

446. *See* 10 U.S.C. § 4022 (f).

447. Omitting a follow-on production clause from an OT essentially forecloses the DoD's ability to award any competition-free follow-on production under 10 U.S.C. § 4022(f). 10 U.S.C. § 4022(a)(2)(C)(i)(I). The decision to include or omit a follow-on production clause need not be made in the request for proposals. 10 U.S.C. § 4022(f)(2). But follow-on production is only allowed if it is provided for in the OT itself. *Supra* note 444. Therefore, the decision to include a follow-on production clause or a royalty-based data rights agreement is a matter that should probably be discussed between the DoD and its OT partners in pre-award negotiations.

448. DFARS 252.227-7013(a)(13)–(16). Under certain conditions, the government may also acquire "restricted rights" in noncommercial computer software or a commercial license in commercial computer software. *See infra* Table 1.

449. DFARS 252.227-7013(a)(14).

450. *Id.*

451. *Compare* DFARS 252.227-7013(b)(2) (defining government purpose rights), *with* FAR 52.227-14(b) (granting the government unlimited right in the same situations).

452. DFARS 252.227-7013(a)(13)(i) (technical data); DFARS 252.227-7014(a)(12)(i) (computer software).

453. DFARS 252.227-7013(a)(13)(i)–(ii) (technical data); DFARS 252.227-7014(a)(12)(i)–(ii) (computer software).

454. *See* DFARS 252.227-7013(a)(13)(ii) (technical data); DFARS 252.227-7014(a)(12)(ii) (computer software).

455. FAR 52.227-14(a); *see also* DFARS 252.227-7013(a)(16). Parallel citations are provided to relevant DFARS terms, which apply only to DoD contracts. *See* DFARS 201.101, 201.301.

456. FAR 52.227-14(a); DFARS 252.227-7013(b)(3).

457. DFARS 252.227-7013(b)(2). Of note, in federal agencies other than the DoD, the government received unlimited rights in technical data developed under mixed funding. FAR 52.227-14(b).

458. FAR 52.227-14(b); DFARS 252.227-7013(b)(1).

459. FAR 12.212; DFARS 227.7202-1.

460. *See* FAR 52.227-14(a), (g)(4).

461. FAR 52.227-14(g)(4) (Alternative III).

462. *Id.*

463. At least in the DoD, "private expense" means "costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof." DFARS 252.227-7013(a)(8). This means technical data and computer software developed under a grant, cooperative agreement, or OT are considered developed at private expense for data rights purposes. See Boeing Co., ASBCA No. 60373, 18-1 BCA ¶ 37,112 at 180, 624–26.

464. At least in the DoD, "'Developed with mixed funding' means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract." DFARS 252.227-7013(a)(10). In other words, it refers to any combination of funds charged directly to a government procurement contract and any other funds.

465. At least in the DoD, "'Developed exclusively with government funds' means development was not accomplished exclusively or partially at private expense." DFARS 252.227-7013(a)(9). This means the technical data or computer software was developed entirely with funds charged directly to a government procurement contract.

466. FAR 52.227-14(a); DFARS 252.227-7013(b)(3).

467. DFARS 252.227-7013(b)(2).

468. FAR 52.227-14(b).

469. Id.; DFARS 252.227-7013(b)(1).

470. FAR 52.227-14(a).

471. FAR 12.212; DFARS 227.7202-1(a).

472. *See generally* W. Jay DeVecchio, *Taking the Mystery out* of Data Ri*ghts*, 18–8 Briefing Papers 7 (2018).

473. Form, fit and function data. Sometimes abbreviated "FFF" or "F3." DFARS 252.227-7013(b)(1)(iv).

474. Operation, maintenance, installation, and training data. Essentially, user's manuals. DFARS 252.227-7013(b)(1)(v).

475. FAR 52.227-14(b); DFARS 252.227-7013(b)(1)(iv)-(v).

476. The definition of "private expense" is limited to acquisition contracts under the FAR. *See* DFARS 252.227-7013(a)(8); *see also* Boeing Co., ASBCA No. 60373, 18-1 BCA ¶ 37,112 at 180,624–26.

477. *See e.g.,* Boeing Co., ASBCA No. 60373, 18-1 BCA ¶ 37,112 (noting that "the funding of software is relevant" in determining the government's rights).

478. 35 U.S.C. §§ 200–212.

479. *See* 35 U.S.C. § 20(e)(c)(2). Although the Bayh-Dole Act statutorily applies to small businesses and research institutions, federal agencies apply the protections of the act to all businesses by executive order. *See* Exec. Order No. 12591, 52 Fed. Reg. 13410, 13414 (Apr. 10, 1987).

480. *See* FAR 52.227-11.

481. Gabrielle Athanasia, *The Legacy of Bayh-Dole's Success on U.S. Global Competitiveness Today*, CSIS (Jan. 12, 2022), https://www.csis.org/blogs/perspectives-innovation/legacy-bayh-doles-success-us-global-competitiveness-today#:~:text=The%20Implications%20of%20the%20Bayh%2DDole%20Act&text=In%20essence%2C%20it%20allows%20institutions,who%20can%20then% [https://perma.cc/7UPY-RF5Q]); DoD OT Guide, *supra* note 53, at 8.

482. Gabrielle Athanasia, *The Legacy of Bayh-Dole's Success on U.S. Global Competitiveness Today*, CSIS (Jan. 12, 2022), https://www.csis.org/blogs/perspectives-innovation/legacy-bayh-doles-success-us-global-competitiveness-today#:~:text=The%20Implications%20of%20the%20Bayh%2DDole%20Act&text=In%20essence%2C%20it%20allows%20institutions,who%20can%20then% [https://perma.cc/7UPY-RF5Q]).

483. 10 U.S.C. § 4022(f)2; Scott Amey, Other Transaction: Do the Rewards Outweigh the Risks 1, 2, 10 (May 15, 2019), https://www.pogo.org/reports/other-transactions-do-the-rewards-outweigh-the-risks [https://perma.cc/TJF5-9NKT].

484. W. Jay DeVechchio, *DOD's Other Transactions: Data Rights & Intellectual Property Simplified*, 119 Thompson Reuters Briefing Papers Simplified 1, 2 (July 2019), https://govcon.mofo.com/topics/dods-other-transactions-data-rights-intellectual-property-simplified.

485. *See* Schwartz & Peters, *supra* note 2, at 1.

486. In this context, a "license" is the right to produce or reproduce a patented invention or copyrighted work. Licensing is one of the primary methods of transferring rights in intellectual property. *See generally* Ralph Nash & Ronald Rawicz, Intellectual Property in Government Contracts 53–55 (6th ed. 2008).

487. A royalty is a "payment—in addition to or in place of an up-front payment—made to an author or inventor for each copy of a work or article sold under a copyright or patent. Royalties are often paid per item made, used, or sold, or per time elapsed." *Royalty*, Black's Law Dictionary (11th ed. 2019).

488. *See, e.g.*, Bitmanagement Software GMBH v. United States, No. 16-840C, 2021 WL 4272874, at *3 (Fed. Cl. Sept. 21, 2021) (holding that damages for unauthorized use of software by the Navy should be calculated with a hypothetical negotiation (*citing* Gaylord v. United States, 668 F.3d 1339, 1344 (Fed. Cir. 2012)) (holding that an agency must consider all relevant evidence in a hypothetical negotiation, not limited to the agency's internal policies or past negotiations).

489. 10 U.S.C. § 3771(a)(2)(B).

490. *See* FAR 27.202-2 (Notice of Government as a Licensee).

491. 10 U.S.C. § 4022(d)(1)(B) (citing 15 U.S.C. § 638). 15 U.S.C. § 638(e) (citing 15 U.S.C. § 632). 15 U.S.C § 632(a)(2)(A) ("the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this chapter or any other Act.").

492. *See* 13 C.F.R. § 121.201.

493. *See id.*

494. *See* 10 U.S.C. § 4022(a)(2)(A); *id.* § 4022(f)(1).

495. *Id.* § 4022(a)(2)(A).

496. *Id.*

497. *Id.* § 4022(a)(2)(B).

498. *Compare* 10 U.S.C. § 4022(a)(2)(A) (allowing follow-on awards under $100 million within special authorization), *with* 13 C.F.R. § 121.201 (defining small business in the military and aerospace equipment and military weapons industries as those with average annual receipts not exceeding $47 million). Depending on the industry, a business may also qualify as small, based on its number of employees. *See* 13 C.F.R. § 121.201. Businesses in several relevant research and development industries can qualify as "small" so long as they have no more than 1,000 employees. *See* 13 C.F.R. § 121.201 (specifically NAICS codes 541713, 541714, and 541715). A well-run business with nearly 1,000 employees could easily exceed $100 million in annual receipts. Consider for example that Northrop Grumman Corp. reported over $39 billion in 2023 sales with about 101,000 employees. *See* Northrop Grumman Overview (Jan. 25, 2024), https://investor.northropgrumman.com/static-files/7bc16bfa-7992-4cf2-8f46-218299d4a1ba. That ratio of sales to employees means Northrop Grumman had sales of over $360,000 per employee. If a business with just under 1,000 employees achieved the same sales per employee, it would equal about $360 million in sales annually. That would easily exceed the $100 million threshold referenced in 10 U.S.C. § 4022(a)(2)(A). Northrop Grumman, however, is a large business that has had years to build efficiencies. The overarching point is not that large follow-on awards would *necessarily* surpass a small business's production capacity, but that large follow-on awards easily *could* surpass the capacity of some qualifying small businesses based on the SBA's definitions.

499. *See* Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 172 (2022) (noting that the OT at issue was routed through the Aviation and Missile Technology Consortium, which itself was awarded an OT for the management of such projects).

500. 10 U.S.C. § 4022(d).

501. *See id.* § 4022(f).

502. Whether an OT proceeds under the follow-on production model or a royalty model can even be a matter of negotiation prior to award thanks to the recent statutory clarification that a follow-on production contract may be awarded even without explicit notification in the request for proposals. *See supra* note 444.

503. *See* Dep't of Defense, 2023 National Defense Industrial Strategy 33 (2023) (finding that "[t]he Russian Federation's full-scale invasion of the Ukraine highlights how protracted attritional conflicts can rapidly deplete military resources" and requires developmental flexibility to increase output).

504. *See, e.g.*, DFARS 252.227-7013(a)(13), (b)(2).

505. *Cf.* Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 785 (2021). *But see* discussion *supra* Part III.C.

506. *See supra* Part III.C; 10 U.S.C. § 4022(f).

507. *See* Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 437–38 (2019); Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 172 (2022).

508. *See SpaceX*, 144 Fed. Cl. at 437–38; *Hydraulics Int'l, Inc.*, 161 Fed. Cl. at 172.

509. *See Kinemetrics*, 155 Fed. Cl. at 785; *see also supra* text accompanying note 250.

510. *See SpaceX*, 144 Fed. Cl. at 442–45.

511. *Choosing Between Licensing and Manufacturing an Invention,* Justia, https://www.justia.com/intellectual-property/patents/licensing/choosing-between-licensing-and-manufacturing-an-invention [https://perma.cc/623B-J8CU].

512. *See* 10 U.S.C. § 4022(d) (allowing use of the prototype authority in only four situations, two of which require the participate of nontraditional defense contractors or small businesses).

513. Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. Small & Emerging Bus. L. 232, 246 (2020).

514. *See id.*

515. *See, e.g.*, *id.*

516. *See, e.g.*, Alexander R. Migliorin, Note, *The Big Box Versus the Mom & Pop Shop: The Beauty of the (Data Privacy) Bills Are in the Eye of the Beholder*, 19 J. Int'l Bus. & L. 232, 246 (2020).

517. *See, e.g.*, *Challenges Facing Non-Traditional Contractors*, Def. Acquisition Univ., https://www.dau.edu/datl/b/challenges-facing-non-traditional-contractors [https://perma.cc/V8SR-PYCX] (last visited Apr. 10, 2024).

518. *See, e.g.*, Nash & Rawicz, *supra* note 486, at 1332 (in the context of remedies for breach).

519. *See* 10 U.S.C. § 4022(f)(2).

520. *See, e.g.*, McDonnell Douglas Corp. v. United States, 182 F.3d 1319 (Fed. Cir. 1999) (example of a high-profile research effort failing to reach production).

521. *See, e.g.*, U.S. Gov't Accountability Off., GAO-22-104621, Small Business Contracting: Actions Needed to Implement and Monitor DoD's Small Business Strategy 11–12 (2021).

522. *See* 10 U.S.C. § 4022(d) (allowing use of the prototype authority in only four situations, two of which require the participate of nontraditional defense contractors or small businesses).

523. *See id.*

524. 10 U.S.C. § 3012(2).

525. *See SpaceX II* at *10.

526. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 221, 131 Stat. 1283, 1333 (2017).

527. 41 U.S.C. § 152(2). Several other types of competitive procedures have been authorized for both the DoD and other agencies. This includes authority to use peer review and scientific review for certain research projects under the oversight of the Small Business Administration. *Id.* § 152(5). The nature of this authority appears to be narrow enough that this article does not treat it as a viable means of awarding most OTs. *See generally id.* § 152.

528. *Id.* § 152 (2) (defining competitive procurements to include "the competitive selection for award of science and technology proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals").

529. This is because "full and open competition" is a different form of competitive procedure than peer review or scientific review. *See* 41 U.S.C. § 152(2) (defining "the competitive selection of basic research proposals resulting from a general solicitation and the peer review or scientific review" as an additional form of competitive procedures distinct from full and open competition). In fact, "full and open competition" is a term of art in the CICA and FAR, which serves to apply a broad range of requirements to the procurement process when the procurement proceeds under "full and open competition." *See, e.g.*, § 107 (defining "full and open competition" by reference to "sealed bids" and "competitive proposals."). The processes for sealed bids and competitive proposals are further regulated in detail under the FAR. *See* FAR Part 14 and FAR Part 15.

530. *See SpaceX II*, at *10.

531. *See* Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 787 (2021) (noting that "the court defers to the agency's expertise, especially in the context of a peer-review process").

532. *See id.* at 781.

533. *See id.* at 780, 782. The price of the proposals was reviewed separately from the technical merits. *See id.*

534. *See id.* at 787 ("[T]he court defers to the agency's expertise, especially in the context of a peer-review process . . . .").

535. *Id.* at 782–83.

536. *See* discussion *supra* Part III.C; *see also* Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 176 (2022) (observing that the lack of a definition for "procurement" in the Tucker Act compelled the court to look elsewhere to define it).

537. *See Hydraulics Int'l, Inc.*, 161 Fed. Cl. at 176.

538. *See supra* Part III.C.

539. Currently, 28 U.S.C. § 1491 has subsections "(a)," "(b)," and "(c)."

540. *See, e.g.*, 10 U.S.C. § 4021(a).

541. *See, e.g.*, Hymas v. United States, 810 F.3d 1312, 1329 (Fed. Cir. 2016).

542. *See Hydraulics Int'l, Inc.*, 161 Fed. Cl. at 192.

543. *See id.* at 172.

544. *See supra* Part III.B.

545. *See supra* Part III.B.

546. *See* Gunasekara, *supra* note 88, at 117 (discussing the speed advantages of OTs in the context of NASA's OT authority); *see also* Dobriansky & O'Farrell, *supra* note 88, at 50, 53.

547. *See, e.g.*, 10 U.S.C. § 4022(d).

548. Off. of the Under Sec. of Def. for Acquisition and Sustainment, *supra* note 319.

549. *Id.*

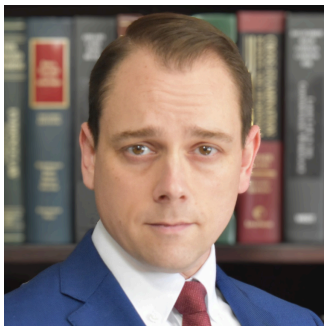
550. *See* Novell, Inc. v. United States, 109 F. Supp. 2d 22 (D.D.C. 2000).

551. *See* Press Release, U.S. Department of Defense, Trump Administration Announces Framework and Leadership for 'Operation Warp Speed' (May 15, 2020) https://www.defense.gov/News/Releases/Release/Article/2310750/trump-administration-announces-framework-and-leadership-for-operation-warp-speed [https://perma.cc/YM2Y-543Z].

552. Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 443–44 (Fed. Cl. 2019).

553. 10 U.S.C. § 3012.

Author



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