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PREVENTING PROTEST PURGATORY: PROVIDING CLARITY BY PLACING PROTOTYPE OTHER TRANSACTION JURISDICTION WITH THE COURT OF FEDERAL CLAIMS

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> *[The Senate Armed Services C]ommittee remains frustrated by an ongoing lack of awareness and education regarding other transactions, particularly among . . . lawyers. This lack of knowledge leads to an overly narrow interpretation of when [other transaction authorities (OTAs)] may be used, narrow delegations of authority to make use of OTAs, a belief that OTAs are options of last resort for when Federal Acquisition Regulation (FAR) based alternatives have been exhausted, and restrictive, risk averse interpretations of how OTAs may be used.*[1]

I. Introduction

Since the 2017 Senate Armed Services Committee (SASC) report bemoaning the lack of other transaction authority (OTA) employment and

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[1] S. REP. NO. 115-125, at 189 (2017).

understanding by the Department of Defense (DoD), their use has increased in quantity and value. In the Army alone, obligations for other transactions (OTs)[2] for prototypes increased from $1.59 billion in fiscal year (FY) 2017, to $2.98 billion in FY 2018, to $4.80 billion in FY 2019.[3] With Congress encouraging the use of OTs, and DoD answering that call, DoD attorneys must understand the benefits and risks associated with using OTs so they can best advise commanders and acquisition professionals on legal issues associated with this acquisition tool.

The strict rule-based framework of traditional FAR-based Government contracts often impedes the Government's ability to engage with industry. Exempt from many of these constraints, OTs provide the DoD greater flexibility to articulate its objectives and potentially obtain its desired product or service more efficiently.[4] Thus, OTs can ameliorate several of the barriers preventing nontraditional defense contractors (NDCs) from working with the Government.[5] Reducing these barriers is important because NDCs offer the DoD new technologies, unique solutions, and a diversified supply chain that can get cutting-edge equipment and capabilities to warfighters faster.[6]

Although OTs provide agencies with more freedom to engage with both NDCs and the traditional defense industry, their flexibility comes with uncertainty over how OTs should be used. This uncertainty is compounded by the fact that no single court or dispute resolution forum definitively exercises jurisdiction over complaints regarding OT solicitations and awards. Such complaints, called protests, have been raised in three different

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[2] Confusion exists around the terms and abbreviations associated with other transactions (OTs) and other transaction authorities (OTAs). Some commentators use "OTA" to mean "other transaction agreement." *See, e.g.*, Scott Amey, *Other Transactions: Do the Rewards Outweigh the Risks?* PROJECT ON GOV'T OVERSIGHT (Mar. 15, 2019), https://www.pogo.org/report/2019/03/other-transactions-do-the-rewards-outweigh-the-risks. This article will refer to OTs as the actual agreements and OTAs as the authority to enter into such agreements.

[3] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-8, ARMY MODERNIZATION: ARMY SHOULD IMPROVE USE OF ALTERNATIVE AGREEMENTS AND APPROACHES BY ENHANCING OVERSIGHT AND COMMUNICATION OF LESSONS LEARNED 10 (2020).

[4] *See* discussion *infra* Section II.B.1.

[5] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-644, MILITARY ACQUISITIONS: DOD IS TAKING STEPS TO ADDRESS CHALLENGES FACED BY CERTAIN COMPANIES 8–9 (2017) (detailing challenges inhibiting companies' pursuit of Government contracts, including the complexity of the DoD's acquisition process, lengthy contracting timeline, Government-specific contract terms, and intellectual property rights concerns).

[6] *See* discussion *infra* Section II.B.2.

fora: the Government Accountability Office (GAO),[7] the Court of Federal Claims (COFC), and federal district court. Two recent cases, *Space Exploration Technologies Corp. v. United States*[8] (*SpaceX*) in the COFC and *MD Helicopters Inc. v. United States*[9] in the District Court of Arizona reached seemingly contradictory results, with each court holding it did not have jurisdiction over the specific OT challenge before it. This has created an OT protest jurisdictional morass, with potential for multiple rounds of litigation in multiple courts, different rules in different circuits, and ultimately significant delay in the DoD receiving its desired product or service.

To resolve this ambiguity and provide clarity for all parties, Congress should enact legislation to amend the DoD's prototype and follow-on production OTA statute[10] or the Tucker Act[11] to confer on the COFC exclusive federal court bid protest jurisdiction over DoD prototype and production OTs. Such a reform would ensure private industry can still dispute perceived flaws in the OT award process but make that dispute process more predictable and efficient. As it is already the exclusive judicial venue for FAR-based bid protests,[12] the COFC could create a uniform body of prototype OT law that incorporates its principles of Government contract jurisprudence while acknowledging and applying the fewer regulatory restrictions governing OTs.

Part II of this article provides background on bid protests and OTAs, examining the different fora for bid protests, the policy rationale underpinning the bid protest system, and the increasing use of OTAs in the DoD. Part III analyzes the OT jurisdictional confusion created by *SpaceX*

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[7] The GAO is a legislative federal agency led by the Comptroller General of the United States with authority to resolve protests involving procurement contracts. *See* 31 U.S.C. § 3553; U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-510SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 4–5 (10th ed. 2018).

[8] Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019).

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

[10] 10 U.S.C. § 4022. 10 U.S.C. § 4022 was previously found at 10 U.S.C. § 2371b but was renumbered by the FY 2022 National Defense Authorization Act. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 1701, 135 Stat. 1541, 2151 (2021).

[11] 28 U.S.C. § 1491.

[12] *See id.* § 1491(b)(1).

and *MD Helicopters*. Part IV introduces the proposed solution to this problem and explains how it can help OTAs better achieve their potential.[13]

II. A Background on Bid Protests and Other Transactions

A. Bid Protests

1. What They Are and Where They Are Litigated

A foundational understanding of bid protests and OTs is necessary to grasp the challenges created by the current legal regime and the impact this has on both Government contractors and federal agencies. A bid protest is a written objection by an interested party to a solicitation or other request for a contract with a federal agency or to an award or proposed award of a contract.[14] Simply put, it is a potential Government contractor's lawsuit against a Federal Government agency based on an alleged defect in the contracting process. Common reasons a potential contractor protests a contract solicitation or award include allegations of the agency's improper evaluation of competing contract proposals, inadequate documentation of the Government's contract file, and a flaw in the contract award decision.[15]

For FAR-based procurement contracts, bid protests can be filed with the contracting federal agency, the GAO, or the COFC.[16] The GAO's jurisdiction over bid protests stems from the Competition in Contracting

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[13] This article does not examine jurisdiction of OT performance disputes or claims (e.g., Contract Disputes Act litigation before the Armed Services Board of Contract Appeals or the COFC). Likewise, by focusing on subject matter jurisdiction, this article does not address 28 U.S.C. § 1491(b)(1)'s "standing" requirement of who is eligible to bring a protest. However, "interested party" standing status is a separate requirement for COFC jurisdiction and provides a greater constraint on who can raise bid protests than under the Administrative Procedure Act. *See* Banknote Corp. of Am., Inc. v. United States, 365 F.3d 1345, 1351–52 (Fed. Cir. 2004). Thus, the current legal framework may allow for a wider range of parties to bring OT protests in federal district courts than can raise procurement protests in the COFC, which may discourage agencies' use of OTs.

[14] *See* 31 U.S.C. § 3551(1).

[15] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-220SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2019, at 2 (2019).

[16] *See* MARK V. ARENA ET AL., RAND CORP., ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS 7–9 (2018). At the formal bid protest level (i.e., outside of agency-level protests), the vast majority are filed at the GAO. *Id.* at xv (finding 11,459 bid protests filed at the GAO between fiscal years (FYs) 2008 and 2016, compared with 475 filed at the COFC between calendar years 2008 and 2016).

Act (CICA)[17] and the GAO's implementing regulations.[18] In contrast, the COFC's bid protest jurisdiction derives from the Tucker Act, as amended by the Administrative Disputes Resolution Act (ADRA).[19] This congressional grant of jurisdiction is necessary because of the "fundamental precept that federal courts are courts of limited jurisdiction"[20] and the doctrine of sovereign immunity.[21] The Tucker Act both affords subject matter jurisdiction for the COFC to decide bid protests and constitutes a limited waiver of sovereign immunity.[22] Thus, the COFC is the only judicial forum available at which parties can protest a Federal Government

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[17] 31 U.S.C. §§ 3551–3557.

[18] 4 C.F.R. § 21 (2019). The GAO is a legislative branch agency rather than a federal court, and its bid protest decisions are framed as non-legally binding "recommendations" for the procuring agency, though in practice executive agencies almost always implement those recommendations. *See* DAVID H. CARPENTER, CONG. RSCH. SERV., R45080, GOVERNMENT CONTRACT BID PROTESTS: ANALYSIS OF LEGAL PROCESSES AND RECENT DEVELOPMENTS 7 (2018). Furthermore, the COFC and the Federal Circuit consider GAO protest decisions as "expert opinions" and afford them significant deference. *See* Thompson v. Cherokee Nation of Okla., 334 F.3d 1075, 1084 (Fed. Cir. 2003), *aff'd sub nom.*, Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631 (2005); Glenn Def. Marine (Asia), PTE Ltd. v. United States, 97 Fed. Cl. 568, 577 n.17 (2011).

[19] 28 U.S.C. § 1491. Specifically, the COFC has jurisdiction over challenges 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." *Id.* § 1491(b)(1). Prior to the passage of the Administrative Disputes Resolution Act (ADRA) in 1996, district courts and the Court of Claims (the COFC's predecessor) possessed concurrent jurisdiction over bid protests. *See* Scanwell Lab'ys, Inc. v. Shaffer, 424 F.2d 859, 868–69 (D.C. Cir. 1970); Jordan Hess, *All's* Well *That Ends* Well*:* Scanwell *Jurisdiction in the Twenty-First Century*, 46 PUB. CONT. L.J. 409, 414 (2017). The ADRA initially provided for continued concurrent jurisdiction of bid protests but included a sunset provision that ended district courts' jurisdiction on 1 January 2001, leaving the COFC as the sole judicial body for bid protest actions. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874–76 (amending 28 U.S.C. § 1491).

[20] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

[21] *See* United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). Under the doctrine of sovereign immunity, the United States may not be sued unless it consents. *See id.*

[22] *Id.* ("[B]y giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims." (citation omitted)).

procurement solicitation or contract, or any dispute "in connection with a procurement" with the Federal Government.[23]

The COFC's bid protest jurisdiction under 28 U.S.C. § 1491(b)(1) can be classified into three categories: (1) a pre-award protest of a solicitation for a proposed contract or award, (2) a post-award protest of a contract, or (3) an alleged violation of statute or regulation in connection with a procurement.[24] The definition and limits of "procurement" and "in connection with a procurement" play a key role in the current OT protest landscape.[25] Although the word "procurement" is only used after the third category of cases listed in the statute, the Federal Circuit has held that 28 U.S.C. § 1491(b)(1) "in its entirety is exclusively concerned with procurement solicitations and contracts."[26] In other words, all three categories must involve *procurement* solicitations or contracts, not *any* type of solicitation or contract with the Federal Government.[27] Thus, based on this Federal Circuit precedent, the COFC's Tucker Act jurisdiction is limited to pre-award procurement solicitations or contracts, post-award procurement contracts, and violations "of statute or regulation in connection with a procurement or proposed procurement."[28]

Case law provides a broad interpretation of the phrase "in connection with a procurement" for purposes of category three jurisdiction.[29] Despite

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[23] 28 U.S.C. § 1491(b)(1). Although the ADRA initially gave concurrent jurisdiction to both the COFC and federal district courts, the district courts' jurisdiction over bid protests terminated on 1 January 2001. § 12(d), 110 Stat. at 3875.

[24] *See* OTI Am., Inc. v. United States, 68 Fed. Cl. 108, 113 (2005).

[25] *See* discussion *infra* Part III.

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

[27] See 31 U.S.C. §§ 6301–6305, for examples of non-procurement agreements with the Federal Government. Those provisions distinguish between procurement contracts, grant agreements, and cooperative agreements, and they explain when each should be used. *Id.* The Tucker Act does not define the word "procurement," but 41 U.S.C. § 111 does: "[T]he 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." 41 U.S.C. § 111. The Federal Circuit has adopted this definition. *See* AgustaWestland N. Am., Inc. v. United States, 880 F.3d 1326, 1330 (Fed. Cir. 2018).

[28] 28 U.S.C. § 1491(b)(1).

[29] *See* Ramcor Servs. Grp., Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999) ("The operative phrase 'in connection with' is very sweeping in scope. As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction."). Thus, the following were held "in connection with a procurement": an agency's statutory and FAR interpretation rendering the protestor ineligible for potential future solicitations, Acetris Health, LLC v. United States, 949 F.3d 719, 726–27 (Fed. Cir. 2020); an agency's

this sweeping scope, the Federal Circuit and the COFC have found no jurisdiction in several cases that had some relation to the overall procurement system.[30] The result is a complicated body of jurisdictional jurisprudence for cases not clearly involving procurement contracts but with some relation to Government contracts.

Outside of the COFC's limited bid protest jurisdiction, private parties can sue federal agencies in federal district court under the Administrative Procedure Act (APA), which provides a separate waiver of sovereign immunity.[31] Under the APA, district courts shall "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[32] The APA provides a broad right of redress for anyone allegedly injured by a federal agency.[33] The Tucker Act provides for the same standard of judicial review as the APA (i.e., the COFC shall overturn agency action that is arbitrary, capricious, or an abuse of discretion).[34] However, as the United States Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction for COFC cases,[35] litigants may face different legal standards and precedents depending on whether their case is at the COFC under the Tucker Act or at the numerous federal district courts under the APA.[36]

The scope of Tucker Act jurisdiction lies at the heart of the OT bid protest thicket, with courts, agencies, and litigants forced to consider how

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Competition in Contracting Act (CICA) stay override, *Ramcor Servs. Grp., Inc.*, 185 F.3d at 1289–90; and an agency's elimination of a previous awardee from consideration for a subsequent phase of the acquisition, *OTI Am., Inc.*, 68 Fed. Cl. at 116.

[30] For example, courts held Tucker Act jurisdiction did not extend to the following: an Army execution order implementing a new training helicopter in the Army but not directing or discussing the procurement of new helicopters, *AgustaWestland N. Am., Inc.*, 880 F.3d at 1330–31; an agency's revocation of a company's Service-Disabled Veteran-Owned Small Business designation where the company was not bidding on a specific procurement, Geiler/Schrudde & Zimmerman v. United States, 743 F. App'x 974, 976–77 (Fed. Cir. 2018); and a Small Business Innovation Research Phase II award for research and development, resulting in a deliverable prototype, despite the potential to lead to production of goods or services in Phase III, R&D Dynamics Corp. v. United States, 80 Fed. Cl. 715, 722 (2007).

[31] *See* 5 U.S.C. § 702.

[32] *Id.* § 706.

[33] Under the Administrative Procedure Act, parties can bring suit against a federal agency to challenge any rulemaking or adjudication action taken by the agency, such as the Department E ordering a waste facility to correct its practices. *See* JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 22 (2016).

[34] *See* 28 U.S.C. § 1491(b)(4).

[35] *See id.* § 1295(a)(3).

[36] *See* discussion *infra* Section IV.C.

related an OT is to a procurement.[37] Many OTs, especially research OTs, do not involve acquiring goods or services, placing them in a jurisdictional gray zone under the Tucker Act. Explanation of the broader rationale underpinning the protest system will inform analysis of bid protests' application to OTs and supports the need for a single clear forum of review, especially since one alternative to the current state is to insulate OTs from protest in any forum.[38]

2. Purposes and Perceptions of the Protest System

Experts have cited various benefits in support of an effective bid protest system for public contracts.[39] Such a system provides transparency and fairness to potential contractors and the public, promoting compliance with federal procurement rules and supporting equitable competition.[40] Bid protests provide a mechanism to hold Government officials accountable to use public funds responsibly.[41] The Federal Government's waiver of sovereign immunity for bid protests incentivizes potential contractors' initial entry into the Government contracts marketplace by providing them an accessible, fair, and predictable forum to litigate their grievances with the public procurement process.[42]

However, perceptions vary as to how successfully the bid protest system meets these goals. Private industry appears to largely agree the bid protest system fulfills its aims, holding the Government accountable when it errs and providing transparency into the procurement process that would not otherwise be available.[43] Conversely, DoD contracting officers sometimes express frustration with the bid protest system, citing unsuccessful offerors' ability to use the system to delay award and commencement of contract performance,[44] lengthen the procurement process timeline, and force the

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[37] *See* discussion *infra* Part III.

[38] *But see* discussion *infra* Section IV.B (arguing in favor of a protest system for OTs).

[39] *See generally* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103, 106 n.16 (2002) (describing how protest procedures can benefit both the parties involved and the procurement system in general).

[40] *See* ARENA ET AL., *supra* note 16, at 11–12.

[41] *See id.* at 12.

[42] *See id.*

[43] *See id.* at 19–21.

[44] Timely protest to the GAO triggers an automatic stay that prevents contract award or performance, absent specific limited circumstances. *See* 31 U.S.C. § 3553. Although no

Government to respond to all allegations of governmental error, however frivolous.[45] Despite these differing perspectives, the bid protest system is familiar to Federal Government acquisition personnel, private contractors, and counsel for both, at least in the context of traditional FAR-based procurement contracts.

B. Other Transaction Authorities: An Overview

Distinct from traditional procurement contracts, OTs are a separate form of Government contract. Since OTs are not subject to the FAR's more formulaic contracting approach, they provide the DoD with a flexible and potentially faster path to work with NDCs and collaborate with industry in innovative ways.[46] The DoD has statutory authority for three types of OTs: research,[47] prototype,[48] and follow-on production of a successful prototype

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similar automatic stay provision exists in COFC cases, protestors can seek a preliminary injunction to accomplish the same effect and the agency may voluntarily stay contract award or performance. *See* CARPENTER, *supra* note 18, at 9.

[45] *See id.* at 16–18. *See generally* Timothy G. Hawkins et al., *Federal Bid Protests: Is the Tail Wagging the Dog?*, 16 J. PUB. PROCUREMENT 152 (2016) (finding consensus in a survey of 350 contracting personnel that fear of protests increases agency costs, adds to the procurement lead time, and decreases contracting officer authority and performance).

[46] *See* U.S. DEP'T OF DEF., OTHER TRANSACTIONS GUIDE 4 (2018) [hereinafter DOD OTA GUIDE]; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-84, DEFENSE ACQUISITIONS: DOD'S USE OF OTHER TRANSACTIONS FOR PROTOTYPE PROJECTS HAS INCREASED 2 (2019) [hereinafter GAO OTA REPORT] ("This flexibility [of OTs] can also help DOD address non-traditional companies' concerns about establishing a government-unique cost accounting system or intellectual property rights, among other concerns.").

[47] 10 U.S.C. § 4021. Research OTs allow the Federal Government to provide funding for private entities' basic, applied, and advanced research programs. *See* DOD OTA GUIDE, *supra* note 46, at 7, 36. Research OTs typically focus on "increasing knowledge and understanding in science and engineering" and finding practical applications for that knowledge and understanding, but without a specific product, process, or requirement in mind. 32 C.F.R. § 22.105 (2020).

[48] 10 U.S.C. § 4022. For purposes of the DoD prototype OTA, the DoD defines a prototype project as a project "address[ing] a proof of concept, model, reverse engineering to address obsolescence, pilot, novel application of commercial technologies for defense purposes, agile development activity, creation, design, development, demonstration of technical or operational utility, or combinations of the foregoing," as well as a process. DOD OTA GUIDE, *supra* note 46, at 31. Thus, in contrast with research OTs, prototype OTs seek a deliverable product, service, or process to meet a specific requirement.

project.[49] Because OTs have no prescribed format or statutory definition, they are often defined in terms of what they are not (e.g., OTs are not FAR-based procurement contracts, grants, cooperative agreements, or cooperative research and development agreements).[50] Other transaction authority has existed in the Federal Government since 1958 (first being granted to NASA) and in the DoD since 1989.[51] Eleven federal agencies now have some manner of statutory OTA, though only the DoD, NASA, and the National Institutes of Health had OTA before 1996.[52] The scope and purpose of each agency's OTA varies, but they all provide for exemption from the FAR and other procurement contract requirements.[53] Other transaction authorities' use in the DoD (both in number and value) has increased significantly in recent years.[54]

Simultaneous with the growth of OTs, the DoD's focus has shifted from counterterrorism and counterinsurgency to great power competition.[55]

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[49] 10 U.S.C. § 4022(f). Production OTs are permitted as a follow-on to prototype OTs that were competitively awarded and successfully completed. *See id.* See DOD OTA GUIDE, *supra* note 46, at 7, for further explanation of the differences between the three types of OTs.

[50] *See id.* at 5.

[51] *See* HEIDI M. PETERS, CONG. RSCH. SERV., R45521, DEPARTMENT OF DEFENSE USE OF OTHER TRANSACTION AUTHORITY: BACKGROUND ANALYSIS, AND ISSUES FOR CONGRESS 1–2, 21–35 (2019) (explaining the history and evolution of OTAs in NASA and the DoD).

[52] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-209, FEDERAL ACQUISITIONS: USE OF 'OTHER TRANSACTION' AGREEMENTS LIMITED AND MOSTLY FOR RESEARCH AND DEVELOPMENT ACTIVITIES 35 (2016). The eleven agencies with OTAs are the DoD, NASA, the National Institutes of Health, the Department of Energy, the Advanced Research Projects Agency—Energy, the Department of Health and Human Services, the Department of Homeland Security, the Domestic Nuclear Detection Office, the Transportation Security Administration, the Department of Transportation), and the Federal Aviation Administration. *See id.*

[53] *Compare* 49 U.S.C. § 5312 (providing the Department of Transportation with OTA to "advance public transportation research and development"), *and* 51 U.S.C. § 20113(e) (providing NASA with OTA "as may be necessary in the conduct of its work and on such terms as it may deem appropriate"), *with* 10 U.S.C. § 4022 (providing the DoD with OTA to "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel" and supporting systems).

[54] In FY 2016, the DoD awarded 34 new prototype OTs and took 214 actions, including modifications and orders, related to prototype OTs, with total obligations of $1.4 billion. GAO OTA REPORT, *supra* note 46, at 9. In FY 2018, the DoD awarded 173 new prototype OTs and took 445 other actions related to prototype OTs, with total obligations of $3.7 billion. *Id.* Thus, prototype OT awards increased 500% and obligations increased 260% in the span of 3 years.

[55] *See* U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1 (2018) [hereinafter 2018 NDS] ("Inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security.").

Prioritizing near-peer nation-states (i.e., China and Russia) as the greatest threats to U.S. national security requires ensuring the DoD has the tools and weapon systems to match these competitors' investment in and commitment to technological advancements.[56] For example, China has adopted a whole-of-nation regime dubbed "military-civil fusion" that applies commercial and academic developments to military uses.[57] To ensure the United States does not lose ground in this battle for technological superiority, the 2018 *National Defense Strategy* directs DoD members to "deliver performance at the speed of relevance" and "organize for innovation."[58] Because OTs are not subject to many of the laws governing procurement contracts, they provide an innovative pathway to acquire new and unique technologies and quickly adapt them for military use.

1. What Laws Apply to Other Transactions?

Procurement-specific statutes and regulations generally do not apply to OTs.[59] Most significantly, this includes the FAR and its supplements.[60] Additionally, OTs are presumably exempt from procurement-specific

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[56] *See id.* at 3 ("New technologies include advanced computing, 'big data' analytics, artificial intelligence, autonomy, robotics, directed energy, hypersonics, and biotechnology—the very technologies that ensure we will be able to fight and win the wars of the future.").
[57] *See Military-Civil Fusion and the People's Republic of China*, U.S. DEP'T OF STATE, https://www.state.gov/wp-content/uploads/2020/05/What-is-MCF-One-Pager.pdf (last visited Aug. 24, 2022); *see also* DANIEL KLIMAN ET AL., CTR. FOR A NEW AM. SEC., FORGING AN ALLIANCE INNOVATION BASE 7 (2020) (contrasting China's mandatory collaboration between its commercial and national defense sectors with the U.S. technology industry's reluctance to engage with the DoD in part due to the speed and difficulty of Government contracting).
[58] 2018 NDS, *supra* note 55, at 10.
[59] *See* 32 C.F.R. § 3.2 (2020) ("'Other transactions' are generally not subject to the Federal laws and regulations limited in applicability to contracts, grants or cooperative agreements.").
[60] *Id.* The FAR, codified at 48 C.F.R. Parts 1 through 53, is a 1,992-page federal regulation (plus agency supplements) that provides guidance to federal agencies on every stage of the acquisition process, including contract solicitation, award, and performance. *See* ERIKA K. LUNDER ET AL., CONG. RSCH. SERV., R42826, THE FEDERAL ACQUISITION REGULATION (FAR): ANSWERS TO FREQUENTLY ASKED QUESTIONS 7 (2015).

statutes, including the CICA,[61] Truth in Negotiations Act,[62] Cost Accounting Standards,[63] Contract Disputes Act,[64] and the Bayh-Dole Act.[65] However, DoD OTA statutes do not explicitly enumerate what laws are inapplicable to OTs, creating ambiguity and forcing practitioners to conduct close reviews of OTs' specific terms to determine which laws apply, a threshold question not typically at issue in procurement contract protests and disputes.[66]

Furthermore, GAO bid protest review is generally unavailable for OTs, with a limited exception that allows narrow review of an agency's decision to use an OTA where the protestor alleges the federal agency is improperly using the applicable authority.[67] Thus, the GAO will not examine an OT's solicitation terms, proposal evaluations, or award decisions.[68] This

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[61] Competition in Contracting Act of 1984, Pub. L. No. 98-369, §§ 2701–2753, 98 Stat. 494, 1175–1203 (codified as amended in various sections of 10 U.S.C. and 41 U.S.C., among others). The CICA prescribes a statutory default for full and open competition for procurements of property or services. *See* 10 U.S.C. § 3201(a)(1); 41 U.S.C. § 3301(a).

[62] 10 U.S.C. §§ 3701–3708. The Truth in Negotiations Act requires current and prospective contractors to give the Government cost or pricing data related to their contracts in specific circumstances. *See id.*

[63] 41 U.S.C. §§ 1501–1506; FAR pt. 30 (2019). Cost accounting standards are rules relating to measuring and allocating costs in Government contracts. *See* NICHOLAS SANDERS, ACCOUNTING FOR GOVERNMENT CONTRACTS: COST ACCOUNTING STANDARDS § 3.03 (2020).

[64] 41 U.S.C. §§ 7101–7109. The Contract Disputes Act establishes the COFC as the sole judicial body to hear cases involving claims against the government related to contract performance. *See id.* § 7104.

[65] 35 U.S.C. §§ 200–212. This act provides rules on ownership rights in federally funded inventions. *See* Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 563 U.S. 776, 782–83 (2011).

[66] *See* PETERS, *supra* note 51, at 4–5. The 2002 version of the *DoD OTA Guide* listed twenty-one statutes inapplicable to OTs. *See* U.S. DEP'T OF DEF., "OTHER TRANSACTIONS" (OT) GUIDE FOR PROTOTYPE PROJECTS 41–42 (2002). The current DoD OTA Guide omits any such enumerated list. *See* DOD OTA GUIDE, *supra* note 46, at 38–39 ("Generally, the statutes and regulations applicable to acquisition and assistance do not apply to OTs. . . . Laws and regulations that are unrelated to the acquisition or assistance process will still apply to OTs.").

[67] *See* Oracle Am., Inc., B-416061, 2018 CPD ¶ 180, at 11 (Comp. Gen. Dec. May 31, 2018); *see also* Rocketplane Kistler, B-310741, 2008 CPD ¶ 22, at 3 (Comp. Gen. Dec. Jan. 28, 2008) ("We will review . . . a timely protest that an agency is improperly using a non-procurement instrument . . . where a procurement contract is required . . . ."). See generally Major William T. Wicks, *Looking into the Crystal Ball: Examining GAO's* Oracle America *Ruling*, ARMY LAW., no. 1, 2020, at 59, for an in-depth discussion of GAO jurisdiction over OTAs.

[68] *See* MD Helicopters, Inc., B-417379, 2019 CPD ¶ 120 (Comp. Gen. Dec. Apr. 4, 2019).

forecloses the GAO's review of OTs for the most common bases for procurement protests.[69]

Other non-procurement-specific laws do apply to OTs. These include the Trade Secrets Act,[70] Economic Espionage Act,[71] and Antideficiency Act.[72] The DoD OTA statutes expressly apply two laws to OTs: the Freedom of Information Act[73] and the Procurement Integrity Act.[74] Although many procurement-specific laws do not apply to OTs, they are binding legal contracts between the Federal Government and non-federal entities,[75] which suggests that some forum should exist to adjudicate disputes and issues that arise relating to OTs in this ambiguous legal framework. Other transactions' insulation from most procurement statutes and regulations, as well as the uncertainty created by the applicability of other laws to them, confers them with both advantages and risks.

2. Other Transactions: Advantages and Risks

As demonstrated by the significant increase in the DoD's use of OTAs, many DoD officials—and private companies—are sanguine about their utility, citing several advantages over FAR-based contracts.[76] First, OTs allow for flexibility in their structure, giving the DoD and the other party

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[69] *See supra* note 15 and accompanying text.

[70] 18 U.S.C. § 1905. The Trade Secrets Act criminalizes a Federal Government employee's disclosure of trade secrets (i.e., confidential or proprietary information of private parties) obtained during the course of federal employment. *See id.*

[71] *Id.* §§ 1831–1839. The Economic Espionage Act criminalizes anyone's theft of trade secrets. *See id.*

[72] 31 U.S.C. § 1341. The Antideficiency Act prohibits federal employees and agencies from obligating federal funds in excess of or in advance of an appropriation. *See id.*

[73] 5 U.S.C. § 552. However, certain information is expressly exempt from Freedom of Information Act release for five years. *See* 10 U.S.C. § 4021(i).

[74] 41 U.S.C. §§ 2101–2107. As its name implies, the Procurement Integrity Act is a procurement-specific statute that prohibits disclosing or obtaining contractor bid or proposal information. *See id.* However, the DoD prototype OTA specifically treats prototype OTs as procurement contracts for purposes of the Procurement Integrity Act. *See* 10 U.S.C. § 4022(h).

[75] *See* DOD OTA GUIDE, *supra* note 46, at 38.

[76] In 2018 testimony to Congress, the Assistant Secretaries for Acquisition for the Army, Navy, and Air Force each praised their respective service's increasing employment of OTAs. *See Assessing Military Service Acquisition Reform: Hearing Before the H. Comm. on Armed Servs.*, 115th Cong. 30–32, 60, 68, 78 (2018).

freedom to negotiate specific terms that the FAR would preclude.[77] Second, proponents contend that OTAs lead to more DoD agreements with NDCs (e.g., small-business startup companies).[78] These NDCs are often involved in niche emerging technologies with dual use by both the DoD and commercial industry, incentivizing innovation and increasing the DoD's pool of suppliers.[79] Finally, OTAs may accelerate the overall acquisition process, getting needed supplies and improvements to the warfighter sooner.[80]

Conversely, there are several risks associated with OTs. Because they are exempt from procurement laws intended to provide oversight and protect taxpayer interests, OTs are less transparent and potentially more susceptible to fraud, waste, and abuse.[81] Additionally, the flexibility to negotiate OTs gives contractors the ability to obtain more favorable terms than would be available under the FAR, such as by limiting the Government's data rights or more broadly defining reimbursable costs.[82] This all frustrates an agency's ability to accurately assess the reasonableness of a potential

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[77] *See* PETERS, *supra* note 51, at 3; DOD OTA GUIDE, *supra* note 46, at 2 ("The OT authorities were created to give DoD the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments."). Example terms that could be freely negotiated in an OT include cost sharing, intellectual property, data rights, and payments.

[78] *See* PETERS, *supra* note 51, at 6, 12–13. The DoD prototype OTA statute requires that one of four conditions be met: (1) at least one NDC or nonprofit research institution participates to a significant extent; (2) all significant participants are small businesses or NDCs;(3) at least one-third of the project is paid by a source other than the Federal Government; or (4) the agency's senior procurement executive determines exceptional circumstances exist. 10 U.S.C. § 4022(d)(1). The data corroborates success in this regard: 88% of the 1,250 new prototype OTA awards between FYs 2016 and 2018 had at least one NDC or non-profit research institution participating to a significant extent. GAO OTA REPORT, *supra* note 46, at 11–12.

[79] *See* PETERS, *supra* note 51, at 6, 12–13. Congress explicitly endorsed this goal for OTAs when making them a permanent DoD authority in the FY 2016 National Defense Authorization Act. *See* H.R. REP. NO. 114-270, at 703 (2015) (Conf. Rep.) ("The conferees believe that expanded use of OTAs will support Department of Defense efforts to access new source[s] of technical innovation, such as Silicon Valley startup companies and small commercial firms.").

[80] *See* PETERS, *supra* note 51, at 16. Other transactions could be faster to execute than traditional contracts because they are subject to fewer statutory and regulatory requirements, but they could also take longer because all terms are negotiable, allowing for a more protracted negotiation process. *See id.* A lack of comprehensive data to compare timelines prevents accurate empirical assessment of these competing hypotheses at this time. *See id.*

[81] *See* Amey, *supra* note 2.

[82] *See id.*

contractor's OT price/costs, for example, or to evaluate which of competing proposals best meets the agency's needs. Furthermore, OTs are not subject to the socioeconomic policies applicable to FAR-based contracts, such as supporting U.S. and small businesses, designed to promote desirable public policies.[83] Finally, the exemption of OTs from the CICA means they may feature less competition, potentially increasing the Government's price and providing another potential source of fraud or waste.[84] These risks support the premise that a specialized judicial forum well-versed in Government contract law—but able to assess the differences between FAR-based contracting and OT contracting—should have jurisdiction to consider and resolve concerns stemming from OT solicitations and awards.

Bid protests alleviate many of these concerns in the traditional Government procurement process by holding agencies accountable for flaws in their solicitation, proposal evaluation, and award process. Because bid protests provide a forum for potential or unsuccessful contractors to present these concerns to a neutral arbiter, the Government knows it must comply with applicable rules, contractors can trust those rules will be enforced, and the public is assured of a watchdog function over these contracts totaling billions of dollars of taxpayer funds annually. However, bid protests' current ability to serve these functions in the OT realm is diminished due to ambiguity over the appropriate forum to hear such challenges.

III. Current State of Other Transaction Authority Judicial Protest Law

Despite their growing use and value, protests of OTs in federal courts have been rare. The current lack of OT bid protests in federal court may be a function of the uncertainty related to the correct bid protest forum, rather than contractors' lack of desire to protest the billions of OT dollars awarded annually by the DoD. The COFC appears to have only considered two cases

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[83] *See* PETERS, *supra* note 51, at 9.

[84] *See id.* at 15–16. However, the Congressional Research Service did find that 89% of new prototype OTs between FY 2013 and FY 2017 were "competed in some fashion." *Id.* at 16. Although exempt from CICA, prototype OTs require "competitive procedures" be used "[t]o the maximum extent practicable," though the statute does not define "competitive procedures." 10 U.S.C. § 4022(b)(2). Also, follow-on production OTs may be awarded without using competitive procedures if the original prototype OT involved competitive procedures. *See* 10 U.S.C. § 4022(f)(2).

involving an OTA: *SpaceX*[85] and *Kinemetrics, Inc. v. United States*.[86] In *SpaceX*, the COFC found that it did not have jurisdiction over the case because the OT at issue was not "in connection with a procurement or a proposed procurement," resulting in that case's transfer to federal district court.[87] Conversely, the COFC determined in *Kinemetrics* that it did have jurisdiction because the OT solicitation there used the authority of 10 U.S.C. § 2371 but included a FAR-based delivery order and resulted in a standard indefinite delivery, indefinite quantity contract, so it was "in connection with" a procurement.[88] Meanwhile, in *MD Helicopters Inc. v. United States*, the District Court for the District of Arizona determined that the OT in that case *was* "in connection with a procurement or a proposed procurement," meaning it lacked jurisdiction under the Tucker Act, and dismissed the case.[89]

The result of these three cases is that the COFC has jurisdiction over challenges that are "in connection with a procurement" or that involve a procurement solicitation or award.[90] If not, the complainant must turn to federal district court under the APA.[91] However, a closer read of *SpaceX* and *MD Helicopters* leaves confusing guidance on when an OT is "in connection with a procurement" for Tucker Act jurisdiction to attach.[92] This article will first analyze how COFC found no "connection with a procurement" in *SpaceX*, then turn to how the Arizona district court reached an apparently contradictory result in *MD Helicopters*.[93]

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[85] Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019).
[86] Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777 (2021).
[87] *See Space Expl. Techs. Corp.*, 144 Fed. Cl. at 446.
[88] *See Kinemetrics, Inc.*, 155 Fed. Cl. at 784–85.
[89] *See* MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020).
[90] 28 U.S.C. § 1491(b)(1).
[91] *See* discussion *infra* Section III.A.1.b.
[92] 28 U.S.C. § 1491(b)(1).
[93] Since no party contested jurisdiction in *Kinemetrics, Inc.* and the OT solicitation in that case explicitly expected to result in a FAR-based procurement contract, it provides a situation with a clear "connection with a procurement" and thus does not warrant deeper analysis. *See Kinemetrics, Inc.*, 155 Fed. Cl. at 784–85. Such a clear jurisdictional result is unlikely to occur with many OTs, however, as evidenced by the more ambiguous solicitations and results in *SpaceX* and *MD Helicopters*.

A. *SpaceX*: An Other Transaction for Launch Service Agreements

The OT solicitation in *SpaceX* involved a multi-phase Air Force Space and Missile Systems Center (SMC) program for launch service agreements (LSAs) as part of the National Security Space Launch (NSSL) Program.[94] Phase One was a competitive OTA award to develop space launch vehicle prototypes under 10 U.S.C. § 2371b,[95] and Phase Two was a follow-on FAR-based requirements contract for launch services that was open to all interested offerors.[96] Simply put, the NSSL Program sought to develop domestic rocket manufacturers that would launch U.S. satellites and spacecraft into space. After bidding on (but not receiving) a Phase One award, SpaceX filed a post-award bid protest in the COFC.[97]

1. Court of Federal Claims: Launch Service Agreements Are Other Transactions Not Subject to the Tucker Act

The COFC first held that the LSAs themselves were not procurements.[98] Neither SpaceX nor the Government argued that the LSAs themselves were procurement contracts, so the COFC reached this conclusion with minimal analysis, emphasizing that the LSAs were entered into pursuant to the DoD's OTA, and the LSAs were not subject to federal procurement laws and regulations.[99] Though it left open the possibility other OTs could constitute procurements for Tucker Act purposes, the COFC provided no guidance on when that may be the case.[100]

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[94] *See* Evolved Expendable Launch Vehicle (EELV) Launch Service Agreement (LSA): Request for Proposals Under Other Transaction (OT) Agreement, Solicitation No. FA8811-17-9-0001 (Oct. 5, 2017), https://sam.gov/api/prod/opps/v3/opportunities/resources/files/e2c583b4a02911ba7f59eff384b38664/download.

[95] The DoD OTA prototype statute at the time, now located at 10 U.S.C. § 4022. *See supra* note 10.

[96] Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 436–38 (2019).

[97] *Id.* at 438.

[98] *See id.* at 442.

[99] *See id.* at 441–42.

[100] *See id.* at 442 n.4 ("The Court does not reach the issue of whether other transactions generally fall beyond the Court's bid protest jurisdiction under the Tucker Act."). However, all DoD OTs will have the non-procurement characteristics referenced by the court: authority from the DoD OT authorizing statutes (10 U.S.C. § 4021 or § 4022) and exemption from procurement-specific laws.

The court then explained although the Phase One LSAs were "related to" a procurement, they were not "in connection with a procurement," foreclosing Tucker Act jurisdiction.[101] While part of the same multi-phase NSSL Program, Phase One and Phase Two involved separate solicitations, different acquisition strategies, and distinct goals.[102] Furthermore, a likely dispositive fact from *SpaceX* was that disappointed offerors that did not win a Phase One OT could still compete—and be awarded—procurement contracts in Phase Two.[103] Finally, the Phase One LSA competition "did not involve the procurement of any goods or services by the Air Force," but instead provided funding for prototype vehicles that the Air Force was not purchasing or owning.[104]

As a result of this conclusion (i.e., Phase One LSAs were not *in connection with* a procurement contract), the COFC dismissed the case from for lack of jurisdiction. At the same time, the court transferred the case to the District Court for the Central District of California, [105] as SpaceX alleged non-frivolous claims regarding the Air Force's award decisions that, if true, could be unreasonable and in violation of federal law under an APA review.[106]

2. District Court: Air Force's Actions Were Not Arbitrary, Capricious, or an Abuse of Discretion

After transfer from the COFC, the district court ruled on the merits, denying SpaceX's complaint. [107] The court considered SpaceX's

[101] *See id.* at 443.
[102] *See id.* at 443–44 (stating the goal of Phase One was to increase the available pool of launch vehicles, whereas the goal of Phase Two was to procure launch services).
[103] *See id.* In fact, the Air Force Space and Missile Systems Center ultimately awarded one of two Phase Two contracts to SpaceX on 7 August 2020 while the Phase One litigation was still pending in district court. *See Space Force Awards National Security Space Launch Phase 2 Launch Service Contracts to United Launch Alliance, LLC (ULA) and Space Exploration Technologies Corporation (SpaceX)*, U.S. SPACE FORCE (Aug. 7, 2020), https://www.spaceforce.mil/News/Article/2305278/space-force-awards-national-security-space-launch-phase-2-launch-service-contra.
[104] Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 445 (2019).
[105] Both SpaceX's principal place of business and the Air Force Space and Missile Systems Center are located within the Central District of California. *Id.* at 445.
[106] *See id.* at 446.
[107] *See* Judgment, Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW (C.D. Cal. Oct. 2, 2020); Order Denying Plaintiff's Motion for Judgment on the Certified

allegations under the APA's deferential standard, which requires a reviewing court to uphold agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[108] Although the LSA competition was not a procurement, or "in connection with" a procurement, the court devoted twenty-six of its thirty-six-page order analyzing the LSA request for proposals and SMC's cost evaluations and risk assessments in determining whether SMC complied with the APA, ultimately finding that it did.[109] Thus, the court's reasoning is rooted in analysis remarkably similar to what the COFC ordinarily conducts in its bid protest cases (i.e., reviewing an agency's proposal evaluation and contract award decision). For example, the court rejected SpaceX's arguments that SMC improperly evaluated the Phase One proposals and relied on evaluation criteria that were unstated in the request for proposals,[110] both common bases for procurement bid protests.[111] The desire to confer such Government contract-specific analysis to a specialized court (i.e., the COFC), was the exact impetus behind the ADRA's sunset of concurrent district court-COFC bid protest jurisdiction.[112]

The *SpaceX* district court had the benefit of the COFC's decision, in which the COFC agreed the district court had jurisdiction.[113] In contrast, in *MD Helicopters*,[114] the District Court for the District of Arizona considered its jurisdiction of an OT post-award protest without the benefit of a prior jurisdictional ruling from the COFC.

B. *MD Helicopters*: An Other Transaction Not Subject to District Court Jurisdiction

The district court in *MD Helicopters* concluded it lacked jurisdiction and dismissed the case because, in the court's assessment, the OT at issue

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Administrative Record at 35–36, Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW, 2020 WL 7344615, at *19 (C.D. Cal. Sept. 24, 2020) [hereinafter SpaceX Order].

[108] 5 U.S.C. § 706(2)(A).

[109] *See* SpaceX Order, *supra* note 107, at 8–34.

[110] *See id.* at 10–17.

[111] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 15.

[112] *See* discussion *infra* Section IV.C.

[113] *See* Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 446 (2019).

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

was "in connection with a procurement."[115] Because this decision came after the COFC's in *SpaceX*, the Arizona court was able to distinguish the LSAs in *SpaceX* from the OT in *MD Helicopters*, which involved the Army's Future Attack Reconnaissance Aircraft Competitive Prototype (FARA CP) Program.

As the Army's program for a new attack helicopter, the FARA CP Program is a multi-phased prototype OT, using the DoD's prototype OTA, previously at 10 U.S.C. § 2371b.[116] The multi-phased approach allowed the Army to award multiple OTs for preliminary designs, with down-selection of awardees in subsequent phases for actual prototypes and later potential for follow-on production OTs.[117] MD Helicopters submitted a proposal for Phase One of the FARA CP Program but was not selected for award, prompting it to file a protest at the GAO.[118] After the GAO dismissed its bid protest for lack of jurisdiction, MD Helicopters filed suit in federal district court under the APA, alleging that the Army acted arbitrarily and capriciously in not selecting MD Helicopters.[119]

Before considering the merits of the protest, the district court examined its jurisdiction to hear the case.[120] The court concluded the FARA CP solicitation was "in connection with a procurement" and therefore outside its jurisdiction per the Tucker Act, citing several reasons this solicitation differed from the LSAs.[121] First, the FARA CP solicitation stated the Army had a present need for a suitable aircraft, which to the court meant it related more directly to a procurement than the *SpaceX* Phase One solicitation, the primary purpose of which was to develop suitable commercial technology for future use.[122] Also, the FARA CP Program involved down-selection at

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[115] *See id.* at 1013–14.
[116] *See id.* at 1006, 1013; 10 U.S.C. § 4022.
[117] *See MD Helicopters Inc.*, 435 F. Supp. 3d at 1006.
[118] *See* MD Helicopters, Inc., B-417379, 2019 CPD ¶ 120 (Comp. Gen. Dec. Apr. 4, 2019) (holding that the GAO lacked jurisdiction over the OT award at issue because the MD Helicopters protest concerned the Army's proposal evaluations and OT award decisions, not improper use of its OTA). *See generally supra* note 67 (discussing the GAO's OT protest jurisdiction).
[119] *See MD Helicopters Inc.*, 435 F. Supp. 3d at 1005.
[120] *See id.* at 1007. Although neither MD Helicopters nor the United States challenged the district court's jurisdiction, the intervenors (i.e., the successful awardees) asserted a lack of subject-matter jurisdiction in federal district court, and the court acknowledged that an inquiry into jurisdiction was its first duty in any case regardless of the parties' agreement on the question. *See id.*
[121] *See id.* at 1013.
[122] *See id.*

each subsequent stage, so only awardees at the initial solicitation stage could be eligible for the potential follow-on procurement anticipated by the Army.[123] Finally, *SpaceX* involved two distinct solicitations—Phase One for investing in industry to develop their capabilities and Phase Two for actual launch services—whereas FARA CP was a single multi-phased solicitation.[124] Thus, the court concluded the FARA CP solicitation, unlike the LSAs, *was* in connection with a procurement.

C. The Problem: Whither Does a Protestor Go?

As a result of the disparate jurisdictional holdings between the COFC in *SpaceX* and the District Court of Arizona in *MD Helicopters*, Government agencies and contractors face a preliminary question in resolving challenges involving OTA solicitations and awards: Which federal court is the correct forum with jurisdiction to hear these cases? Per the COFC in *SpaceX*, the answer is the district court.[125] Per the district court in *MD Helicopters*, the answer is the COFC.[126] Both cases involved time, labor, and expense by the Government, protestors, and intervenors (almost two-fold in the case of *SpaceX* as a result of having to litigate in both the COFC and district court) that could have been mitigated with a clearer jurisdictional framework.[127]

Reconciling these two cases' holdings, a multi-step jurisdictional test appears to have emerged for OT protests. For pre-award protests, the court must consider whether the solicitation is for a procurement contract, notwithstanding the solicitation's characterization and use of an OTA. For post-award protests, the court must consider whether the actual OT is a procurement contract, again notwithstanding the terms and authority cited. If the answer is "yes" to the appropriate question above, the COFC has jurisdiction and the analysis ends. If the answer is "no," the court must then consider whether the OT or proposed OT is "in connection with a

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[123] *See id.*; *cf.* Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 438 (2019) ("The Phase 2 Procurement is open to all interested offerors.").
[124] *See MD Helicopters Inc.*, 435 F. Supp. 3d at 1013.
[125] *See Space Expl. Techs. Corp.*, 144 Fed. Cl. at 446.
[126] *See MD Helicopters Inc.*, 435 F. Supp. 3d at 1014.
[127] Although the jurisdictional answer was relatively easy in *Kinemetrics* because of the explicit reference to a FAR-based delivery order in that OT solicitation, Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 784–85 (2021), such a scenario is likely to be the exception rather than the norm with OTs, as the agency may not want to get forced into a particular future acquisition strategy at the OT solicitation phase.

procurement" for purposes of the Tucker Act.[128] If so, the COFC has jurisdiction; if not, it lacks jurisdiction, and the protestor's only recourse is federal district court. This multi-step test requires a careful, fact-specific analysis of the solicitation and OT. The more an OT *looks like* or is *related to* a contract for the acquisition of a good or service, the more likely it will be "in connection with" a procurement and subject to the COFC's jurisdiction.

No clear line exists to delineate when an OT is "in connection with" a procurement in any given case, nor can such a line exist. In some cases, such as *Kinemetrics*,[129] the answer may be relatively easy because the agency in its OT solicitation explicitly states a FAR-based contract is expected to result from the initial OT. In many cases, however, such as both *SpaceX* and *MD Helicopters*, no clear answer is readily discernable, potentially leading to the protestor having to make its best guess, litigation on jurisdiction before any discussion of the actual merits, dismissal of the case from the original forum, and in the case of *SpaceX*, litigation in both the COFC and federal district court prior to a decision on the merits. Against this backdrop, the actual requiring activity at the DoD agency is left in limbo, either because of a preliminary injunction or because the agency voluntarily halted OT award and performance so it could more easily start over if the protest were sustained in whatever judicial forum ultimately had jurisdiction.

Congress has expressed an intent that the DoD make greater use of its OTAs.[130] As clarity and predictability is a hallmark of any effective procurement system, the current legal morass regarding OT protest jurisdiction gives both the Government and contractors reason to pause before engaging in OTs. Government agencies may fear delays in OT award and performance, as well as a lack of clear standards.[131] Contractors fear expending time and money bidding on OTs, then expending additional time and money if they perceive errors in the award process, only to be told they have to start over in another court, if they have a legal remedy at all.[132]

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[128] *See* 28 U.S.C. § 1491(b)(1).
[129] *Kinemetrics, Inc.*, 155 Fed. Cl. 777.
[130] *See supra* note 1 and accompanying text.
[131] *See, e.g.*, John Krieger & Richard Fowler, *Aesop's Guide to Litigating Under Other Transactions*, DEF. ACQUISITION, May–June 2020, at 38.
[132] *See, e.g.*, Fernand A. Lavalee, *OT Protesters Looking for a Place to Land*, JONES DAY, https://www.jonesday.com/en/insights/2020/02/ot-protesters-looking-for-a-place-to-land (last visited Aug. 24, 2022) ("Protesters may want to plan for a multiphased approach in which they first attempt to gain jurisdiction at GAO, then COFC, then, as a last resort, seek transfer to a federal district court.").

Rather than counsel and courts having to conduct complicated, fact-specific jurisdictional analysis in every OT solicitation or award dispute—under penalty of the parties having to start over and re-litigate in a different court if they get the analysis wrong—legislation providing a clear answer to this problem will best allow OTs to achieve their full potential.

IV. Providing Clarity: Give the Court of Federal Claims Exclusive Jurisdiction over DoD Prototype and Production Other Transactions

New statutory language in 10 U.S.C. § 4022 conferring on the COFC exclusive jurisdiction over protests involving DoD prototype and production OTs would best resolve the current district court versus COFC OT protest jurisdictional quagmire. This change will limit the COFC's clear OT jurisdiction to the OTs that are most connected to and most closely resemble a procurement contract, while leaving the door open for other OTs (e.g., research OTs) that are frequently better suited for federal district court under the APA because they are not "in connection with" a procurement. After explaining the DoD's unique OT landscape, this section addresses why OTs should not simply be exempt from judicial review and then explains why the COFC is the best forum to conduct that review.

A. Focus on DoD Prototype and Production Other Transactions

The statutory change this article proposes—to confer on the COFC bid protest jurisdiction over certain DoD OTs—should be limited to the DoD's prototype and production OTs under 10 U.S.C. § 4022. Most prototype and production OTs seek the DoD's acquisition of a good or service; even if not, they are the most likely to be related to, if not "in connection with," a procurement.[133] They are not grants, cooperative agreements, cooperative research and development agreements, or research OTs, none of which primarily seek to provide the Federal Government with a specific product or service.[134] Prototype OTs typically contemplate some kind of proof of

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[133] *See supra* note 48.

[134] *See supra* note 47. Grant agreements are used when the principal purpose is to assist a recipient "to carry out a public purpose of support or stimulation" rather than the U.S. Government acquiring property or services for its direct benefit or use, and substantial involvement by the executive agency using the grant is *not* expected. 31 U.S.C. § 6304.

concept or model output that can then be leveraged into a production OT or FAR-based procurement contract.[135] In contrast, research OTs typically involve investment in novel technologies, but the only outputs are reports or studies rather than an actual prototype that the DoD can use.[136] Thus, because their desired end is typically some kind of concrete product, prototype and production OTs are more likely to look like a procurement and involve protest-like challenges compared to research or other OTs. Jurisdiction of research and other OTs can appropriately be left to district court review under the APA, like grants and cooperative agreements, because they do not have the similar goals or structure of procurement contracts. Altering only 10 U.S.C. § 4022 to mandate COFC jurisdiction would provide a clear protest path for only the most procurement-like OTs—prototypes and follow-on productions.

Although other agencies have OTAs,[137] the DoD's use is the most significant and in need of immediate clarity. As DoD leadership has recognized,[138] OTs are a critical tool for flexible, agile acquisition, enabling the DoD to "deliver performance at the speed of relevance"[139] and keep pace with the advances made by near-peer competitors.[140] Although the FAR makes some accommodation for this, such as with the unusual and compelling urgency and national security exceptions to full and open competition,[141] FAR-based contracting still imposes rigid constraints, such as those involving solicitation publication timelines,[142] data rights,[143] and cost accounting standards.[144] Although not a panacea for all issues related

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Cooperative agreements are used in the same situations as grant agreements, except that substantial involvement between the executive agency and the recipient *is* expected. *Id.* § 6305.

[135] *See* DOD OTA GUIDE, *supra* note 46, at 8, 31 (discussing how the DoD awarded a prototype OT for a proof of concept software application for scheduling air refueling operations, and then awarded a follow-on production OT for that software after successful completion of the prototype).

[136] *See OTA Today – Research Other Transactions*, DEF. ACQUISITION UNIV. (Mar. 18, 2021), https://media.dau.edu/media/OTA+Today+-+Research+Other+Transactions/1_zyfb5212.

[137] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 52 (finding that eleven total federal agencies have OTAs).

[138] *See supra* note 76.

[139] *See* 2018 NDS, *supra* note 55, at 10.

[140] *See* discussion *supra* Section II.B.2.

[141] *See* 10 U.S.C. § 3204(a); FAR 6.302 (2019).

[142] *See* FAR 5.203.

[143] *See id.* 27.4.

[144] *See id.* pt. 30.

to Government acquisition,[145] OTs' flexibility in enabling Government agencies to determine and negotiate the specific terms of their agreement with private contractors has led to the rapid growth of OT use in the DoD. As the DoD becomes more comfortable with using OTs, and consequently uses them more frequently, a single forum to address alleged legal errors in the OT solicitation and award process—especially those seeking a specific end product for the DoD's use as in prototype and product OTs—becomes increasingly important.

Furthermore, contract litigation involving the DoD frequently consumes more time, effort, and docket space than contract litigation with all other federal agencies combined. For example, protests against the DoD at the COFC typically outnumber protests against all other Government agencies combined.[146] At the GAO, DoD-related protests outnumbered non-DoD protests every year between 2008 and 2016, sometimes by hundreds of protests in a given year.[147] Providing a specific forum for DoD production and prototype OT protests can provide speedy resolution and prevent lengthy jurisdictional battles from playing out in multiple fora while no OT actually gets awarded or performed for the innovative work initially sought under the OT.

Thus, DoD OTs are arguably the most urgent type of OT and the most likely to need a forum to resolve complaints, due to their potential impact to national security and their increasing employment and value.[148]

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[145] *See supra* Section II.B.2 (discussing OTs' pros and cons).

[146] *See* ARENA ET AL., *supra* note 16, at 44 (finding more DoD protests than non-DoD COFC protests in five of nine years between 2008 and 2016).

[147] *Id.* at 25.

[148] As a practical matter, Congress has previously shown a willingness to enact DoD-specific protest changes as pilot programs. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 827, 131 Stat. 1283, 1467 (2017) (initiating a pilot program for the DoD to recoup protest-related costs from unsuccessful protestors at the GAO). Congress could similarly implement the proposed change here (temporarily or permanently) in a National Defense Authorization Act as a test case to assess the resulting impact to the COFC, Department of Justice, and the DoD before potentially expanding to other agencies' OTAs.

B. Minimize the Risks: The Need for Protests in Other Transactions[149]

Although making OTs completely protest-proof might maximize their speed and provide Government personnel the greatest freedom of maneuver, judicial review of OT solicitations and awards will help ensure OTAs are utilized properly. Other transactions' exemption from most procurement laws already provides a greater risk for fraud, waste, and abuse than do FAR-based contracts.[150] The best way to mitigate this risk is to allow potential OT bidders to serve a watchdog function and complain to an independent body when they identify an alleged flaw in the solicitation or award process. Protests serve an important role in holding agencies accountable for complying with procurement laws, conforming to the terms of their solicitations, and accurately evaluating proposals.

For OTs, where fewer laws apply and DoD acquisition professionals may have less experience, a neutral arbiter of the DoD's OTA usage serves as an important check on this powerful acquisition authority tool. The GAO has already indicated that it lacks jurisdiction to weigh in on most issues involving OTs, other than verifying that the agency properly used the authority.[151] Although Congress could amend the GAO's purview to include substantive protest review of OTAs,[152] such a change could potentially make OT protests too easy and frequent for parties with tenuous legal claims. For example, GAO protestors can file their protest pro se, and there is no specific form or format for filing a protest.[153] In contrast, the COFC prescribes specific standards, forms, formats, and

[149] This article proposes conferring on the COFC blanket DoD prototype and production OT protest jurisdiction. However, one possible alteration to this proposal is to set a minimum dollar threshold for COFC OT protest jurisdiction to attach; OTs below that threshold would be protest-proof. A minimum dollar threshold could help to prevent lengthy, costly protests of relatively low-value OTs. This alteration recognizes the competing interests of providing a forum for judicial review of OTs, and ensuring OTs can achieve their goal of enabling the DoD's ability to innovate at the speed necessary for great power competition. An analogous contract type where Congress has already enacted minimum dollar thresholds are for GAO bid protest review of task and delivery orders. 10 U.S.C. § 3406(f) ($25 million for DoD task or delivery orders); 41 U.S.C. § 4106(f) ($10 million for non-DoD task or delivery orders).
[150] *See* discussion *supra* Section II.B.2.
[151] *See* Oracle Am., Inc., B-416061, 2018 CPD ¶ 180, at 11 (Comp. Gen. Dec. May 31, 2018); Rocketplane Kistler, B-310741, 2008 CPD ¶ 22, at 3 (Comp. Gen. Dec. Jan. 28, 2008).
[152] Gabby Sprio, *A Careful Balance: Creating Jurisdiction Without Hindering the Effectiveness of Other Transaction Agreements*, 72 ALA. L. REV. 959, 971 (arguing for full GAO jurisdiction of OT protests as the fastest, least expensive forum to resolve bid protests).
[153] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7, at 6–8.

methods for protests before its court,[154] and those filings and other appearances before the court must be performed by an attorney specifically admitted to practice before the COFC.[155] While a forum should exist to serve as a check against federal agency fraud, waste, abuse, or overreach in the realm of OTs, this must be balanced against the risk of protests becoming a tool for dissatisfied private parties to inhibit the speed OTs were designed to possess.[156] This balance is best struck by maintaining the status quo for GAO OT protest jurisdiction (i.e., the limited ability to determine whether an agency improperly used its OTA in lieu of a procurement contract) while requiring a more thorough, considered weighing of the equities before a company can protest the actual terms or rationale behind a prototype or production OT solicitation or award.

Congress's intent has long been to provide for judicial review of federal agency error in its contracting decisions.[157] The COFC has served as the forum of review for standard procurement contracts for years, and its expertise is now needed in the developing law of OTs.

C. Avoid Confusion: A Single Body of Law from the Most Experienced Court on the Subject

Although forum certainty could also be established by conferring exclusive jurisdiction on district courts, the COFC's expertise makes it the appropriate judicial body to handle prototype and production OT protests. Congress has already made the COFC the sole judicial forum for procurement bid protests[158] and contract performance claims.[159]

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[154] *See* U.S. FED. CL. Rs. 3–16.
[155] *See id.* R. 83.1.
[156] *See, e.g.*, Jason Miller, *2-Year Suspension for Serial Protestor After Continued 'Incoherent, Irrelevant, Derogatory and Abusive' Filings*, FED. NEWS NETWORK (Dec. 4, 2017, 4:36 AM), https://federalnewsnetwork.com/reporters-notebook-jason-miller/2017/12/two-year-suspension-for-serial-protester-after-continued-incoherent-irrelevant-derogatory-and-abusive-filings (detailing how one company, Latvian Connection, filed so many frivolous bid protests that the GAO took the unusual step of suspending it from filing further protests for two years).
[157] *See* S. REP. NO. 95-1118, at 12 (1978) ("The rationale of the Tucker Act, which greatly limited the doctrine of sovereign immunity, was that the Government subjects itself to judicial scrutiny when it enters the marketplace, and should not be the judge of its own mistakes nor adjust with finality any disputes to which it is a party.").
[158] *See* 28 U.S.C. § 1491(b)(1).
[159] *See* 41 U.S.C. § 7104(b)(1).

Consequently, the COFC has become the court with the most Government contracts experience.[160] Conferring on the COFC exclusive jurisdiction of the DoD's prototype and follow-on production OTs will allow that court to use its Government contracts jurisprudence to inform its decisions in those OT protest cases while remaining mindful of the procurement-specific laws that do not apply to OTs. For example, the COFC could analyze whether the DoD had sufficiently employed "competitive procedures"[161] by analogizing to (without being strictly constrained by) the FAR's competition requirements.[162] By contemplating the acquisition or development of some product or service, prototype and production OTs have similarities with the federal procurement system, unlike other OTs (e.g., research OTs). For this reason, the COFC's experience in procurement protests and cases will be directly relevant in properly adjudicating questions for these kinds of OTs. Furthermore, as OTs become more complex and contain multiple phases, an individual OT may have elements or phases that are "in connection with" a procurement, and other elements or phases that are merely "related to" a procurement. Having all of these issues heard in one court promotes judicial economy, as opposed to having different aspects of a single OT protested in different fora.

Consolidation of prototype and production OT protests in a single court will create a uniform, predictable body of OT protest law, providing both jurisdictional and precedential clarity in this complicated, growing area of the law. Maintaining the status quo or enacting legislation that clearly confers on district courts OT protest jurisdiction risks forum shopping, different legal standards in different circuits, and inefficiency in having to rely on district court judges less experienced with Government contracting's unique rules and principles. This is the exact situation Congress sought to avoid when it eliminated district courts' procurement bid protest jurisdiction in the 1996 ADRA amendments to the Tucker Act: "Providing district courts with jurisdiction to hear bid protest claims has led to forum shopping and the fragmentation of Government contract law."[163] Instead,

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[160] *See* 142 Cong. Rec. S6156 (daily ed. June 12, 1996) [hereinafter ADRA Debate] (statement of Sen. William Cohen) (citing the COFC's "substantial experience and expertise . . . in the Government contracting area" as reasons to remove district court bid protest jurisdiction in the 1996 ADRA amendments to the Tucker Act); S. REP. NO. 95-1118, at 10 ("[The COFC] historically has been the court of greatest expertise in Government contract claims.").

[161] 10 U.S.C. § 4022(b)(2), (f)(2)(A).

[162] *See* FAR pt. 6 (2019).

[163] ADRA Debate, *supra* note 160, at S6156 (statement of Sen. William Cohen).

just as Congress gave the COFC and its appellate court, the Federal Circuit, exclusive jurisdiction of bid protests to create a uniform national law for FAR-based contracts, a similar result will emerge from this proposed change.[164] Protestors will have a better understanding of whether they have a colorable legal theory to challenge a prototype or production OT in the first place, and agency counsel can more accurately conduct risk assessments by focusing on COFC and Federal Circuit jurisprudence. A single controlling body of law from the COFC will prevent protestors from seeking the friendliest district court and prevent different interpretations of OT terms and clauses in different parts of the country.

V. Conclusion

Other transaction authorities are a useful tool in the DoD acquisition professional's toolbox. By removing the voluminous requirements and mandatory clauses of the FAR and statutes governing federal procurements, OTs provide a powerful opportunity to work with NDCs that may lack the resources and experience to comply with those myriad procurement laws, or who might feel handcuffed by provisions mandated by the FAR. At a time when the DoD is increasing its use of OTs, challenges regarding the DoD's proper use, evaluation, and interpretation of OT solicitations, proposals, and awards is likely to increase.

Bid protests serve an important oversight role in the federal procurement system generally, ensuring federal agencies are transparent, accountable, and efficient in their use of public funds. Current case law leaves no clear venue for who provides that oversight role for OTs. Statutory reform vesting the COFC with exclusive jurisdiction over protests of DoD prototype and production OTs will provided needed clarity to the DoD and its contractors. This will lead to a clearer set of rules surrounding OTs, in turn enabling agreements that get more emerging technologies from innovative nontraditional defense contractors to the warfighter faster.

President Biden's *Interim National Security Strategic Guidance* states, "We will streamline the processes for developing, testing, acquiring, deploying, and securing [cutting-edge] technologies."[165] Air Force Chief

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[164] *See id.* ("Consolidation of jurisdiction in [the COFC] is necessary to develop a uniform national law on bid protest issues and end the wasteful practice of shopping for the most hospitable forum.").

[165] WHITE HOUSE, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 14 (2021).

of Staff General Charles Q. Brown, Jr. constantly emphasizes the need to "accelerate change or lose" in modernizing and adapting to twenty-first century great power competition.[166] Modernization by acquiring weapons systems that are more agile, lethal, resilient, and sustainable is one of the Army's four lines of effort in *The Army Strategy*.[167] Other transactions provide one vehicle for accelerating that needed change and acquiring cutting-edge technologies by enabling partnerships with innovative NDCs who are put off by the FAR's strict, costly requirements. The DoD recognizes the utility in OTs and has increasingly turned to them for prototype and production contracts. With this increased use comes the increased potential for misuse of these authorities as well as grievances by private companies who want to work with the DoD but perceive a flaw in the OT solicitation or award process.

Other transactions are already protestable in federal court. The problem is that the law currently requires a fact-specific, ad hoc analysis to determine the correct protest forum for each and every OT. Congress's explicit conferral of exclusive jurisdiction of DoD prototype and production OTs on the COFC would resolve the current ambiguous jurisdictional landscape and allow the judicial body with the greatest experience in Government contracts to establish a uniform, predictable jurisprudence for these increasingly utilized authorities.

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[166] GENERAL CHARLES Q. BROWN, JR., ACCELERATE CHANGE OR LOSE (2020).
[167] GENERAL MARK A. MILLEY & MARK T. ESPER, THE ARMY STRATEGY 2, 6–8 (2018).