

**In the United States Court of Federal Claims**

BID PROTEST  
No. 19-742C

Filed Under Seal: August 26, 2019  
Reissued: August 28, 2019\*

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SPACE EXPLORATION	)		
TECHNOLOGIES CORP.,	)		
	)		
Plaintiff,	)		Post-Award Bid Protest; Motion to
	)		Dismiss; Rule 12(b)(1); Other
v.	)		Transactions; 10 U.S.C. §§ 2371 and
	)		2371b.
THE UNITED STATES,	)		
	)		
Defendant,	)		
	)		
v.	)		
	)		
BLUE ORIGIN, LLC, <i>et al.</i> ,	)		
	)		
Defendant-Intervenors.	)		
<hr/>		)	

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\* This Memorandum Opinion and Order was originally filed under seal on August 26, 2019 (docket entry no. 75). The parties were given an opportunity to advise the Court of their views with respect to what information, if any, should be redacted from the Memorandum Opinion and Order. The parties filed a joint status report on August 27, 2019 (docket entry no. 76) indicating that no redactions are necessary. And so, the Court is reissuing its Memorandum Opinion and Order, dated August 26, 2019 as the public opinion.

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## **MEMORANDUM OPINION AND ORDER**

GRIGGSBY, Judge

### **I. INTRODUCTION**

In this post-award bid protest matter, Space Exploration Technologies Corp. (“SpaceX”) challenges the United States Air Force Space and Missile Systems Center’s (the “Air Force”) evaluation and portfolio award decisions for a request for proposals to provide space launch services for national security missions, issued pursuant to the Department of Defense’s (“DoD”) authority to enter into other transaction agreements. *See generally* Compl. The government has moved to dismiss this matter for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”). *See generally* Def. Mot. SpaceX has also moved to transfer this matter to the United States District Court for the Central District of California. *See generally* Pl. Resp. For the reasons discussed below, the Court: (1) **GRANTS** the government’s motion to dismiss; (2) **GRANTS** SpaceX’s motion to transfer venue; and (3) **DISMISSES** the complaint.

### **II. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

#### **A. Factual Background**

SpaceX provides space launch services to the United States Government and to commercial customers. Compl. at ¶ 90. In this post-award bid protest matter, SpaceX

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<sup>1</sup> The facts recited in this Memorandum Opinion and Order are taken from the complaint (“Compl.”); the corrected administrative record (“AR”); and the government’s motion to dismiss (“Def. Mot.”). Except where otherwise noted, the facts stated herein are undisputed.

challenges the Air Force’s evaluation and portfolio award decisions for launch service agreement (“LSA”) request for proposal, Solicitation No. FA8811-17-9-001 (the “LSARFP”), to facilitate the development of launch systems in the United States. Compl. at 1. As relief, SpaceX requests, among other things, that the Court: (1) declare the Air Force’s portfolio award decision to be contrary to Congress’s mandate for assured access to space; (2) enjoin any further investment in the launch service agreements awarded by the Air Force; (3) enjoin further performance by the awardees; and (4) require the Air Force to reevaluate proposals. *Id.* at 78.

### 1. DoD’s Authority To Use Other Transaction Agreements

As background, Congress granted the Department of Defense the authority to enter into other transactions (“OT”). 10 U.S.C. §§ 2371(a) and 2371b(a). OTs are agreements that are not procurement contracts, cooperative agreements, or grants. *See, e.g.*, 10 U.S.C. § 2371(a) (authorizing “transactions (other than contracts, cooperative agreements, and grants)"); 32 C.F.R. § 3.2 (defining “other transactions” as “transactions other than contracts, grants or cooperative agreements”); *see also* United States Department of Defense, Other Transactions Guide (2018), at 5 (“OT Guide”), [https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20\(OT\)%20Guide.pdf](https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf) (defining OTs as “NOT: a. FAR-based procurement contracts; b. Grants; c. Cooperative Agreements; or d. Cooperative Research and Development Agreements (CRADAs)”).

While not defined by statute, the Government Accountability Office (“GAO”) has defined OTs as follows:

An ‘other transaction’ agreement is a special type of legal instrument used for various purposes by federal agencies that have been granted statutory authority to use ‘other transactions.’ GAO’s audit reports to the Congress have repeatedly reported that ‘other transactions’ are ‘other than contracts, grants, or cooperative agreements that generally are not subject to federal laws and regulations applicable to procurement contracts.’

*MorphoTrust USA, LLC*, B-412711, 2016 WL 2908322, at \*4 (Comp. Gen. May 16, 2016). The DoD’s OT Guide also provides that OTs are intended “to give DoD the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments.” OT Guide at 4. And so, OTs are “generally not subject to the Federal laws and regulations limited in applicability to contracts, grants or cooperative

agreements” and these agreements are “not required to comply with the Federal Acquisition Regulation (FAR) and its supplements.” 32 C.F.R. § 3.2.

Pursuant to 10 U.S.C. § 2731b, DoD may use its other transaction authority to “carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.” 10 U.S.C. § 2731b(a).<sup>2</sup> But, DoD may only use this authority if one of the four conditions set forth below have been met:

(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 (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. [§] 638)) 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.

10 U.S.C. § 2371b(d)(1); *see also* OT Guide at 13-14; 32 C.F.R. § 3.5. In addition, Congress has required that, “[t]o the maximum extent practicable, competitive procedures shall be used when entering into [OT] agreements to carry out the prototype projects.” 10 U.S.C. § 2371b(b)(2).

## **2. The National Security Space Launch Program**

The National Security Space Launch program—previously known as the EELV program (the “Program”)—is charged with procuring launch services to meet the government’s national security space launch needs. AR Tab 19 at 786. The Program has an overarching need through

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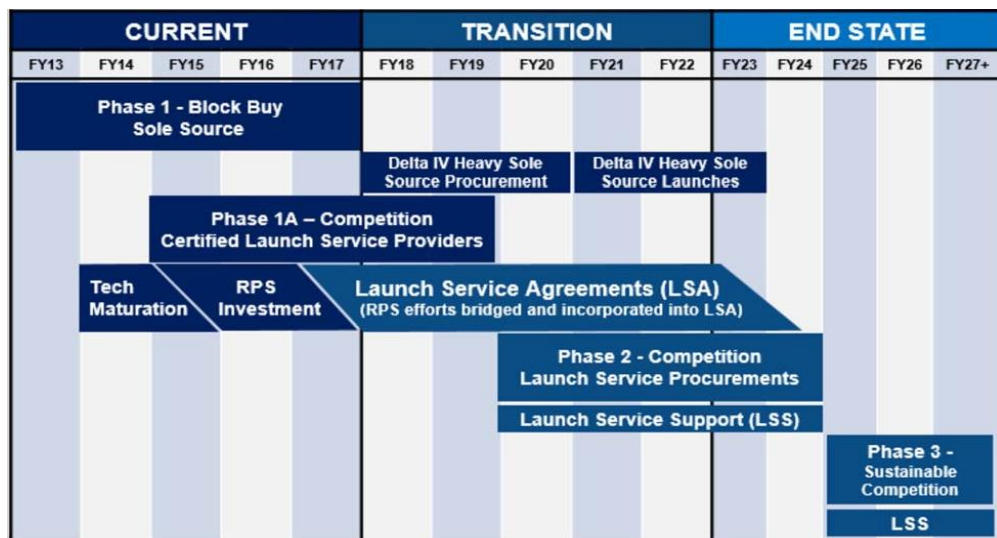
<sup>2</sup> Title 10, United States Code, section 2358 authorizes DoD to “engage in basic research, applied research, advanced research, and development projects.” 10 U.S.C. § 2358(a).

FY30 to address the challenges of maintaining affordability and assured access to space, which requires the Air Force to sustain the availability of at least two families of space launch vehicles and a robust space launch infrastructure and industrial base. *Id.* at 787; *see also* 10 U.S.C. § 2273(b). The actions necessary to ensure continued access to space have been defined by Congress to include:

- (1) the availability of at least two space launch vehicles (or families of space launch vehicles) capable of delivering into space any payload designated by the Secretary of Defense or the Director of National Intelligence as a national security payload
- (2) a robust space launch infrastructure and industrial base; and
- (3) the availability of rapid, responsive, and reliable space launches for national security space programs to—
  - (A) improve the responsiveness and flexibility of a national security space system;
  - (B) lower the costs of launching a national security space system; and
  - (C) maintain risks of mission success at acceptable levels.

10 U.S.C. §2273(b).

As shown below, the Program involves a multi-phase strategy that will be implemented by the Air Force between FY 2013 and FY 2027 to accomplish the aforementioned actions. AR Tab 19 at 788.



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