

10 U.S.C. 2373: The Forgotten Authority for Experimental Purpose (EP) Acquisitions

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With the exponential rise in the use of other transaction authority, it's time to discuss its sister authority and agreement type—EP authority and EP agreements.

The recently rediscovered “other transaction” (OT) authority has made a lot of news in the procurement world over the last few years.¹ As the increase in the number of OT awards suggests, the government has shown some considerable excitement about the prospect of making acquisitions that can avoid the routine of its standard process² and industry has cautiously followed suit.³

This is not particularly surprising. After all, OTs are not like traditional government contracts, grants, or cooperative agreements.⁴ OTs are not subject to the rules of those arrangements – including most traditional procurement laws and regulations, such as the *Federal Acquisition Regulation (FAR)* and its supplements⁵ – and allow both parties to obtain terms that are more flexible than would typically bind the two otherwise.⁶

Yet a lot about the limits of OT authority and agreements remains unknown. The patchwork of guidance and regulations that addresses OTs still leaves a lot of details open to interpretation.⁷

You've Heard of OTs, but What About EPs?

Buried in many of these guidance documents, however, is a reminder that the three forms of OT authority

that most are familiar with (research, prototypes, and follow-on production)⁸ are not the only authorities that permit the government to conduct certain acquisitions in a nontraditional way. Nor is the better-known OT authority even the most flexible. In fact, that honor goes to a statute that most procurement practitioners probably have never even heard of: 10 U.S.C. § 2373, “Procurement for Experimental Purposes.”

This statute allows the Department of Defense (DOD) to procure for experimental purposes (EPs).⁹ Further, in the National Defense Authorization Act (NDAA) for Fiscal Year 2018,¹⁰ Congress included a call to action for DOD to establish a preference for the use of *both* OTs *and* EPs. Therefore, it's about time the acquisition community tried to address any knowledge gaps concerning EPs.¹¹

EP Authority, Defined

So, what does 10 U.S.C. § 2373 actually do? And what does it say? Thankfully, the statute is relatively short:

(a) Authority. –

The Secretary of Defense and the Secretaries of the military departments may each buy ordnance, signal, chemical activity, transportation, energy, medical, space-flight, telecommunications, and aeronautical supplies, including parts and accessories, and designs

thereof, that the Secretary of Defense or the Secretary concerned considers necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense.

(b) Procedures. –

Purchases under this section may be made inside or outside the United States and by contract or otherwise. Chapter 137 of this title applies only when such purchases are made in quantities greater than necessary for experimentation, technical evaluation, assessment of operational utility, or safety or to provide a residual operational capability.¹²

But again, what does that actually mean? And what does an agreement type based on this authority, or “EP,” look like and how does it function?

EPs, Explained

Much like its sister agreement, the OT, the EP is best defined by what it is *not*. That is because, like OTs, EPs have not been defined by the *FAR* or any other regulation. Those who have addressed this unique authority, however, have somewhat defined EPs as something other than a traditional government contract, grant, cooperative agreement, or OT agreement.¹³ The statute itself allows for any resultant EP awards to be made as either a “contract or otherwise.”¹⁴ So, hypothetically speaking, an EP award might even result in an OT-like transaction, but the resulting EP will have to comply with different requirements than a typical OT.¹⁵ Therefore, EPs can offer a more flexible approach in certain circumstances, while in others their

use may be very difficult or wholly inappropriate.

As its name suggests, the EP authority exists explicitly for the purpose of allowing acquisitions for “experimental or test purposes in the development of the best supplies that are needed for the national defense.”¹⁶ The EP authority permits the government to make such acquisitions in nine broad, but also specific, categories:

- ▶ Ordnance,
- ▶ Signal,
- ▶ Chemical activity,
- ▶ Transportation,
- ▶ Energy,
- ▶ Medical,
- ▶ Space-flight,
- ▶ Telecommunications, and
- ▶ Aeronautical supplies.¹⁷

(Further, as the statute states, this authority extends to include “parts and accessories and designs thereof” for each category.)

The common interpretation of these categories has been intentionally expansive.¹⁸ For instance, the statute does not explicitly address software and robotics, but likely encompasses them within the permitted categories.¹⁹ Indeed, it is probable that the statute does not provide an explanation of what qualifies as a “signal” acquisition, for example, specifically in order to afford the government with some flexibility in its use.²⁰

It is worth pointing out that the EP authority permits the government to acquire a broad range of “supplies” as well.²¹ That is, the statute arguably applies to acquisitions of full systems, foreign items, and expressly extends to any components, parts, and acces-

sories, and designs thereof.²²

Of course, the EP authority is not without its limits.

The Limits of an EP

The most succinct description of the statutory limits for an EP acquisition probably comes from the Government Accountability Office (GAO). In the first and currently only GAO decision that has ever addressed this authority,²³ GAO explained that the “use of the [EP] statute is limited in three primary ways”:

- ▶ **By domain** – i.e., “ordnance, signal, chemical activity, transportation, energy, medical, space-flight, telecommunications, and aeronautical supplies, including parts and accessories, and designs thereof”;
- ▶ **By purpose** – i.e., “necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense”; and
- ▶ **By quantity** – i.e., “the quantities needed for experimentation, technical evaluation, assessment of operational utility, or safety or to provide a residual operational capability.”

Thus, the statute requires an EP that exceeds the permitted quantities, for example, to contain aspects of a traditional government contract (e.g., *FAR* clauses) as well.²⁴

In addition, DOD has set its own limits on the use of the EP authority for awards.²⁵ As an example, DOD requires that a “determination & finding” (D&F) be executed for any EP award.²⁶ The D&F for an EP must address several specific points, such as:

- ▶ A description of the item(s) to be purchased and dollar amount of purchase,
- ▶ A description of the method of test/experimentation,
- ▶ The quantity to be tested, and
- ▶ A definitive statement that the use of the EP authority is determined to be appropriate for the acquisition.²⁷

Some departments also require a legal review or a senior contracting officer’s approval (e.g., the U.S. Air Force for \$1.5 million actions and above) for any EP award.²⁸ The statute itself does not contain those requirements, however.

Do the *FAR* or Its Supplements Apply to EPs?

Although many commentators assert that neither the *FAR* nor its supplements apply to EPs, the author of this article observes that the statute itself only excludes Chapter 137 of Title 10, “Procurement Generally.”²⁹ And it is true, of course, that Chapter 137 of Title 10 incorporates the Armed Services Procurement Act, which is one of the fundamental laws the *FAR* implements, among numerous other statutes. As such, while this article will not go through them in detail, there are likely portions of the *FAR* and its supplements that may apply to at least some of these agreements. The author suggests that one such example includes the Restrictions on Obtaining and Disclosing Certain Information statute.³⁰

That said, EP authority certainly does allow for the avoidance of more regulatory requirements (e.g., requirements for formalized competition) than those that do apply.

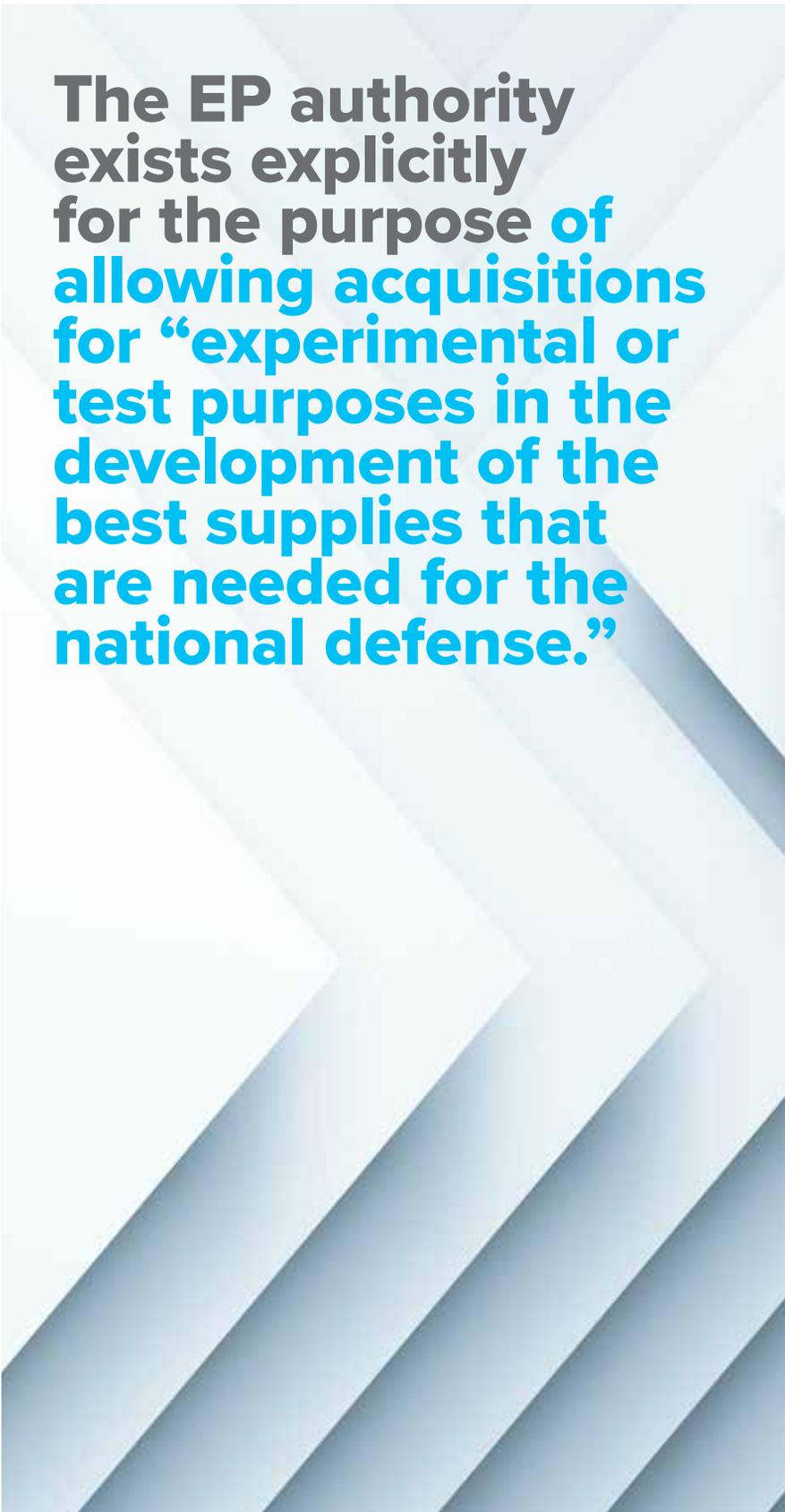
Is an EP Award Subject to Protest?

It depends. Although there is some contrary commentary on this matter, the author of this article points out that EPs appear to be protestable under certain circumstances. This is particularly true in the context of EP acquisitions by “contract.”

As previously mentioned, GAO recently addressed the EP authority in one case.³¹ In that decision, GAO held that it has the jurisdiction under the Competition in Contracting Act³² to decide protests of EP acquisitions by “contract,” as part of its right to “review the government’s actions for compliance with the applicable statute, 10 U.S.C. § 2373.”³³ However, GAO acknowledged that due to the language of the statute, its “review of such a procurement is generally limited to determining whether the purchase complies with the requirements of the statute.”³⁴ Consistent with the predicament that many disappointed OT bidders find themselves in,³⁵ the GAO also noted that it may not have jurisdiction over EP award protests if the government instead chose to award the EP by a “noncontract” method.³⁶

The takeaway here is that GAO has *some* jurisdiction to review EP awards – when they are done by contract. EP “contract” awardees may have broader rights in front of the Court of Federal Claims as well. After all, the Court of Federal Claims has consistently found itself to have jurisdiction over bid protests of “procurement solicitations and contracts.”³⁷

However, it is also apparent, based on the case law as it stands today, that those who receive EP awards con-



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ducted “otherwise” are likely to face a tougher road in either of the two usual fora (GAO and the Court of Federal Claims).³⁸ However, as the number of OT and EP cases increases and the law addressing protests of nontraditional agreements develops, those awardees may finally be able to obtain jurisdiction in district courts or in certain other instances.

What Have EPs Been Used for So Far?

The new governmentwide point of entry (<https://beta.sam.gov/>) suggests that there have been fewer than 50 EP awards from 2004 to present. The awards have ranged from everything from an award for a radar system to items for the development of an autopilot capability. While the total number of these awards is still small, it is bound to increase given Congress’ previously-described preference for their use and the increasing interest in alternative authorities exemplified by the massive growth in OTs.³⁹

Further, some have suggested that the primary reason for the rare use of EPs is the lack of guidance and regulation on the topic.⁴⁰ Although, as one frequent commentator on the topic points out, “[there] is no government-wide requirement for the issuance of regulations as a precondition for entering into government contracts.”⁴¹

Who Has the Authority to Award EPs?

At the present moment, the EP authority extends only to the “Secretary of Defense and the Secretaries of the military departments” – or, in other words, just DOD.⁴² However, it is not

hard to envision that Congress could extend the authority to other agencies in the future.

That said, each buying office within DOD must obtain a specific delegation of EP authority to award EPs.⁴³ Unsurprisingly, there are not many offices that have sought or obtained such delegations so far. More specifically, there are documented uses of EPs by the Defense Advanced Research Projects Agency (DARPA), some by the U.S. Air Force, and at least one by a U.S. Army division that supports the Defense Innovation Unit (DIU).⁴⁴ Other divisions could certainly obtain EP authority if necessary.

There is even some flexibility to the individuals that DOD can designate to perform these awards, since EPs can be awarded by “contract” or “otherwise.”⁴⁵ In fact, both contracting officers and agreement officers can obtain the authority to issue these awards.⁴⁶ The appropriate type of awarding agent for these agreements will depend more on the kind of EP that the division plans to release – i.e., “contract”-based or “otherwise.”⁴⁷

What Benefits do EPs Offer?

EPs offer numerous benefits to the government. Most significantly, of course, is that they provide the speed and flexibility the government needs for innovative research and development (R&D)⁴⁸ – and indeed, EPs often give the government even more flexibility than OTs. In fact, the government can go as far as combining its

EP authority with its OT authority in certain instances, such as, for example, as a predecessor or a follow-on to an OT.⁴⁹ That being said, the government must always remember that its EP authority has limits and it must act accordingly to work within them.

Ultimately, any potential for successful uses of this authority does not rest with the government alone. The surefire way to foreclose any potential application of EPs in the future is to abuse the existing authority today. As such, it is worth remembering that there is less for the government to fear from the existing regulations or protest rights than misuse of any flexibility to act creatively that it currently has. **CM**

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The views expressed in this article, and especially those that might prove to be in error, are solely those of the author. Mr. Gorelik would like to note that this article, and likely any future work on the EP authority, would not be possible without the existing contributions of many others, particularly Ms. Lorna Tedder and Mr. Richard Dunn, who have been instrumental in the effort to bring this authority to the mainstream.



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ENDNOTES

- 1 See Bob Tuohy, "What to Expect from Other Transaction Authorities in 2019," Nextgov (December 21, 2018), available at www.nextgov.com/ideas/2018/12/what-expect-other-transaction-authorities-2019/153713/.
- 2 Armani M. Vadiee and Todd M. Garland, "The Federal Government's 'Other Transaction' Authority," *Briefing Papers* 18, no. 5 (April): 1.
- 3 See Tom Temin, "DOD Says 'OTA,' Industry Says 'Oy,'" Federal News Network (October 30, 2018), available at www.federalnewsnetwork.com/tom-temin-commentary/2018/10/dod-says-ota-industry-says-oy/.
- 4 See Christoph Mlinarchik and Jason Myers, "Other Transaction Authority: Acquiring Innovative Technology and Research by Avoiding the Regulatory Burden of Traditional Government Contracting," *Contract Management Magazine* (October 2016): 68–72.
- 5 *Ibid.*
- 6 *Ibid.*
- 7 See Nathaniel E. Castellano, "'Other Transactions' Are Government Contracts, And Why It Matters," *Public Contract Law Journal* 48, no. 3 (Spring 2019): 485, 489.
- 8 See Moshe Schwartz and Heidi Peters, "Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress," Congressional Research Service Report R45521 (Washington, DC: Congressional Research Service, 2019), available at <https://fas.org/sgp/crs/natsec/R45521.pdf>.
- 9 10 USC § 2373.
- 10 *Pub. L.* 115-91, § 867.
- 11 See, generally, Richard L. Dunn, "Viewpoint: Pentagon Takes Big Step to Clarify Other Transaction Authority Rules," *National Defense* (December 7, 2018), available at <https://www.nationaldefensemagazine.org/articles/2018/12/7/viewpoint-pentagon-takes-big-step-to-clarify-other-transaction-authority-rules>.
- 12 10 USC 2373.
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- 14 10 USC 2373(b).
- 15 See Lorna Tedder, "Dr. Griffin Can Procure More of His Christmas List!" *Disrupting Acquisitions* (blog) (September 16, 2019), available at <https://aida.mitre.org/blog/2019/09/16/dr-griffin-can-procure-more-of-his-christmas-list/>.
- 16 10 USC 2373(a).
- 17 *Ibid.*
- 18 See Dunn, note 13.
- 19 *Ibid.*
- 20 *Ibid.*
- 21 *Ibid.*
- 22 *Ibid.* See also Benjamin McMartin, *Acquisition Innovation Essentials* (October 2019) (unpublished presentation).
- 23 *Air Tractor, Inc. v. Department of the Air Force*, B-418244 (February 10, 2020).
- 24 Tedder (2019), see note 15.
- 25 See "Procurement for Experimental Purposes - 10 USC 2373, Adaptive Acquisition Framework," Contracting Cone, Defense Acquisition University (2020).
- 26 *Ibid.*
- 27 *Ibid.*
- 28 See Lorna Tedder, "10 U.S.C. 2373: The Cool 'New' Tool for Rapid Acquisition," *Agile Acquisition* (blog) (May 21, 2018), available at <http://www.agileacquisition.com/10-usc-2373-the-cool-new-tool-for-rapid-acquisition/>.
- 29 10 USC 2373(b).
- 30 41 USC Chapter 21 (formerly known as the Procurement Integrity Act). (See 41 USC 2101(4).)
- 31 *Air Tractor, Inc. v. Department of the Air Force*, see note 23.
- 32 31 USC 3552.
- 33 *Air Tractor, Inc. v. Department of the Air Force*, see note 23.
- 34 *Ibid.*
- 35 Editor's Note: Generally, the legal authority of protest venues, such as GAO, to hear and render decisions on protests applies only to "procurements." As GAO and nearly every other protest venue has ruled, OTs are not "procurements"; thus, nearly all protest venues have determined that they have no (or little) authority to hear protests of OT awards. (See Mary Beth Bosco and Eric Crusius, "The Question of 'Other Transaction' Protest Jurisdiction: Recent Decision Forecloses Yet Another Bid Protest Venue," Counsel Commentary, *Contract Management Magazine* (April 2020).)
- 36 *Air Tractor, Inc. v. Department of the Air Force*, see note 23.
- 37 See *Space Exploration Technologies Corp. v. United States*, 144 Fed.Cl. 433, 442 (2019).
- 38 See John Krieger and Richard Fowler, "Determining Litigation Fora Under the FAR and Under Other Transaction Authority," *Briefing Papers* 19, No. 11 (October): 1, 7–9.
- 39 See W. Jay DeVecchio, "FEATURE COMMENT: Here Is How You Actually Negotiate IP Rights in Other Transactions," *Government Contractor* 62: 1 (2019).
- 40 Memorandum from Richard L. Dunn on the Scope of Section 845 Prototype Authority (October 24, 1996) (on file with author).
- 41 *Ibid.*
- 42 See 10 USC 2373.
- 43 Tedder (2019), see note 15.
- 44 McMartin, see note 22.
- 45 Tedder (2019), see note 15.
- 46 *Ibid.*
- 47 *Ibid.*
- 48 See Tedder (2018), note 28.
- 49 See Tedder (2019), note 15.



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