

Gov't Contracts Group Of The Year: Mayer Brown

By **Christopher Cole**

Law360 (February 14, 2019, 5:05 PM EST) -- Mayer Brown LLP leveraged its legal team's expertise in the contracting world to tackle major bid controversies, including winning a key protest of the U.S. Army's entry into a noncompetitive cloud migration deal, earning the firm recognition as a Law360 Government Contracts Group of the Year.

In a groundbreaking win, the firm successfully represented Oracle America Inc. in what Mayer Brown called a rare protest challenging the Army's entry into a \$950 million, noncompetitive, follow-on production "other transaction agreement" with REAN Cloud.

No protest had ever been sustained against the use of an OTA versus a procurement contract, even though OTAs have been authorized for technology development for several years, the firm pointed out.

Issues like the growing use of OTAs by the U.S. Department of Defense present challenges for companies and lawyers advising clients in the contracting space that Mayer Brown says it is well-equipped to handle. Marcia Madsen, chair of the firm's government contracts practice, described it as a constant tug and pull among different priorities.

"You've got the oversight community that says 'look, we need to protect the taxpayer,' and then you've got other parts of the community, particularly at DOD, that are of the view that we just have to do this faster. That's what this case was about, this push and pull to acquire commercial technologies," said Madsen, who also co-chairs the national security practice. "But Congress of course put some limitations on the use of OTAs even with the expansion. It's illustrative of the tension in the space."

The Army OTA would have allowed any Department of Defense agency to obtain cloud migration services without a competitive opening for bidders, according to Mayer Brown. The protest asserted that the agency didn't properly exercise its OTA authority.

The U.S. Government Accountability Office sustained the protest in May after finding that the agency did not comply with statutory conditions on a follow-on production OTA.

Mayer Brown considers the challenge significant, because OTAs are authorized only for purposes of technology development — not to be used in place of procurement contracts — but the government is



continuing to use OTAs to acquire goods and services for the government worth billions of dollars.

In another key achievement, a Mayer Brown team represented Sikorsky Aircraft Corp. in a 2018 pre-award bid protest at the GAO regarding a U.S. Air Force procurement to replace the UH-1N helicopter.

That case is notable because, according to the firm, DOD agencies are trying to secure greater rights in intellectual property through contracts than are permitted by law. The case was the first to address the DOD's new emphasis on acquiring greater rights in technical data and software.

Along with requiring data and software delivery, the agency initially interpreted the solicitation to require offerors to relinquish rights in certain data and software developed at private expense. Sikorsky challenged the agency position as inconsistent with the law.

While the protest was pending, the agency decided to change its position and clarify that it would not require relinquishment of the rights.

"The Air Force position has been 'you've got to give us everything.' So the question was, 'isn't that limiting of competition?'" Madsen said. "That was a pre-award challenge to the RFP, that it was too broad-brush."

In another high mark, Mayer Brown client AT&T was selected to operate, maintain and technically evolve a host of IT services in three service areas for an intelligence agency, a contract valued at \$2.6 billion. The GAO was notified of a protest to the contract award, and after extensive evaluation, the GAO denied the protest in January 2018.

And Mayer Brown represented Lockheed Martin Corp. on a multibillion-dollar foreign military sale involving the preparation of financing opinions for financial institutions.

The firm also represented Veterans Care/Veterans Choice entities in three protests against the U.S. Department of Veterans Affairs regarding health care services.

Mayer Brown said several members of its national security practice in Washington maintain high-level government security clearances, allowing the firm to effectively represent clients in high-stakes security litigation. The firm believes it is one of the few U.S. law firms that can offer that.

"We've been doing this kind of work for 40 years, so we're pretty conversant with the legislation and the policymakers and the policies and the regs and how they affect people in industry," Madsen said.

"We've very much attuned to these changes and our clients are attuned to these changes.

But Madsen said the firm's work relies on knowing more than just the law.

"We understand the policymaking process, we understand how the statutes work, we understand how the regulations work, how they fit together, we understand where they come from. And we work with these agencies, so we understand institutionally how they work," she said.

--Additional reporting by Daniel Wilson. Editing by Nicole Bleier.