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Court of Federal Claims Announces Itself as the "De Facto Forum" for Bid Protests Involving Other Transaction Agreements

By Sonia Tabriz, Stuart W. Turner, Kyung Liu-Katz and Nicole A. Williamson*

In this article, the authors review a decision announcing that the Court of Federal Claims has exclusive jurisdiction over bid protests involving an other transaction agreement (OTA) insofar as the OTA is "an acquisition instrument . . . intended to provide the government with a direct benefit in the form of products or services."

On February 24, 2025, Judge Armando O. Bonilla issued an opinion that—by its own terms—seeks to "break the Sisyphean cycle" of determining the scope of Court of Federal Claims (COFC) jurisdiction over bid protests involving other transaction agreements (OTAs). Because OTAs are not procurement contracts, various courts over the past several years have reached different, fact-specific conclusions regarding whether the COFC has jurisdiction over bid protests involving OTAs under the Tucker Act. In *Raytheon Company v. United States*, Judge Bonilla recognized the need for "a predictive forum selection standard" and stated plainly his conclusion that the COFC is "the de facto forum" for bid protests involving OTAs.[1]

"At a minimum," Judge Bonilla announced, he wishes for the opinion to "streamline the litigation of these jurisdictional issues in future cases" until such time as Congress or the U.S. Court of Appeals for the Federal Circuit provides resolution or critical guidance, and in furtherance of that, offers a fulsome overview of the court's bid protest jurisdiction under the Tucker Act and the various cases that have sought to assess if and how that authority applies to OTAs. Following this examination, Judge Bonilla rejected the various arguments advanced by the government for why OTAs fall outside of the COFC's jurisdiction. The court then announced that the COFC has exclusive jurisdiction over bid protests involving an OTA insofar as the OTA is "an acquisition instrument . . . intended to provide the government with a direct benefit in the form of products or services."

As to the circumstances presented in *Raytheon*, Judge Bonilla applied this standard to conclude that Raytheon Company's (Raytheon) challenge to the

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[1] Raytheon Co. v. United States, 175 Fed. Cl. 281 (2025).

award of an OTA for development of prototype missile defense capabilities to another offeror "easily falls within the Court's bid protest jurisdiction."

OVERVIEW OF RAYTHEON'S BID PROTEST AND THE UNDERLYING OTA

As with several other agencies, the Department of Defense (DOD) is statutorily vested with the authority to enter into transactions other than procurement contracts, cooperative agreements, and grants to carry out research and development and prototype projects enhancing mission effectiveness and military platforms.[2] DOD's "other transaction" authority allows the agency to conduct such projects more quickly and flexibly without many of the requirements imposed by procurement statutes and regulations, including the Federal Acquisition Regulation (FAR).

The *Raytheon* case involved the award of an OTA by the DOD's Missile Defense Agency (MDA or the Agency) to develop capabilities for detecting and intercepting hypersonic and intercontinental ballistic missiles. The MDA conducted the OTA in phases. First, the Agency invited companies to submit concept white papers on research related to missile defense technologies. Based on the white papers submitted, the Agency selected Raytheon and Northrop Grumman Systems Corporation (Northrop Grumman) to analyze various solutions. After submitting their respective solutions, both companies advanced to Phase II, during which the hardware and software for each potential prototype were built and tested.

The OTA subsequently proceeded to Option Period 2C+ for technical maturation, for which the MDA issued a request for prototype proposal. After requesting that Raytheon submit data regarding its technology, the Agency selected only Northrop Grumman to perform and discontinued Raytheon's participation in the missile interceptor development program. Following this decision, the Agency in a press release stated that the OTA for Option Period 2C+ is "expected to lead to a follow-on development and production contract" for missile interceptor capabilities.

Raytheon filed a bid protest with the COFC to challenge the MDA's decision to eliminate Raytheon from Option Period 2C+. In response, the government moved to dismiss, arguing that OTAs do not qualify as a solicitation for bids or proposals for a proposed contract and are not otherwise "in connection with a procurement or a proposed procurement," as required under the Tucker Act. The court ultimately rejected this assertion as a "narrow and oversimplistic view of OT awards." The court also rejected the government's standing and administrative exhaustion arguments.

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[2] 10 U.S.C. §§ 4021, 4022.

JUDGE BONILLA'S ANALYSIS OF STATUTORY AUTHORITY AND RECENT DECISIONS TO ANNOUNCE STANDARD FOR COFC JURISDICTION OVER BID PROTESTS INVOLVING OTAS

Judge Bonilla first reviewed the court's jurisdiction by assessing the relevant statutory authority. Under the Tucker Act, the COFC has exclusive jurisdiction over bid protests challenging the solicitation or award of "a contract . . . in connection with a procurement or a proposed procurement."[3] The Federal Circuit has broadly defined "procurement" to include "all stages of the process of acquiring property or services," from determining the government's need to contract closeout, and the Federal Circuit has explained that disputes "in connection with a procurement" are broad enough to include those "arising during the course of the procurement process."[4] Statutes such as the Federal Grant and Cooperative Agreement Act have defined "procurement" to refer to circumstances in which "the principal purpose of the instrument is to acquire . . . property or services for the direct benefit or use of the United States."[5] Judge Bonilla also examined the "statutory scheme" and "legislative history behind the grant of OT authority," determining that "nothing [therein] suggests that Congress intended to exempt awards under these contracting vehicles from judicial scrutiny."

From there, Judge Bonilla canvassed recent decisions involving bid protest jurisdiction over OTAs. Judge Bonilla began by summarizing one of the COFC's earliest decisions on the subject—the 2019 case *Space Exploration Technologies Corp. v. United States* (*SpaceX*), where SpaceX challenged the Air Force's decision not to select the company for award of an OTA.[6] Through that OTA, the Air Force sought to provide funding for the development of space launch vehicles that would eventually be available for use in both the private and public sectors. The ultimate goal was to create a domestic market to end United States reliance on Russian-made rocket engines.

In *SpaceX*, the COFC ruled that the OTA was not "in connection with a procurement" as required for the court to exercise bid protest jurisdiction under the Tucker Act. The court relied on three primary factors in reaching this decision:

(1) The OTA prototype development agreement competition and any

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[3] 28 U.S.C. § 1491.

[4] Distributed Sols., Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008); Ramcor Servs. Group, Inc. v. United States, 185 F.3d 1286 (Fed. Cir. 1999).

[5] 31 U.S.C. § 6303.

[6] 144 Fed. Cl. 433 (2019).

follow-on, FAR-based competition would involve separate solicitations;

(2) The acquisition strategies and goals of the OTA competition and the FAR-based competition were different; and

(3) The Air Force did not seek to acquire any goods or services through the OTA—i.e., the Air Force was only funding development of the prototypes and was not purchasing or owning those prototypes.

After analyzing the *SpaceX* decision, Judge Bonilla noted that courts have "look[ed] beyond the label of the contracting vehicle" in determining that not all OTAs fall outside of the Tucker Act bid protest jurisdiction.

Citing *MD Helicopters Inc. v. United States*, Judge Bonilla observed that the federal district court in that case found that the COFC had exclusive jurisdiction under the Tucker Act because an OTA for a military helicopter prototype development had a "direct link" to the follow-on purchase contact—only the successful prototype program participants would be able to compete for the production contract.[7]

Judge Bonilla went on to discuss *Kinemetrics, Inc. v. United States*, in which the government required companies to submit a complete bid containing technical and cost information in a competition for an OTA involving seismic equipment, rather than calling for high-level white papers on related technology. In that case, the COFC determined that the substance of the acquisition resembled a procurement solicitation, which was more important than its form as an OTA.[8]

Further, Judge Bonilla cited to *Hydraulics International, Inc. v. United States*, where the COFC held that an OTA tailored to determining the Army's need for upgraded equipment was in fact the first stage of a federal contracting acquisition process, thus rendering the OTA "in connection with a procurement" under the Tucker Act.[9] Judge Bonilla finally noted the COFC's most recent decision in *Independent Rough Terrain Center v. United States*, where the court exercised jurisdiction over a pre-award challenge to a follow-on production contract.[10]

Considering the series of cases examining jurisdiction over bid protests involving OTAs, Judge Bonilla determined that the relevant inquiry is on a

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[7] 435 F. Supp. 3d 1003 (D. Ariz. 2020).

[8] 155 Fed. Cl. 777 (2021).

[9] 161 Fed. Cl. 167 (2022).

[10] 172 Fed. Cl. 250 (2024).

spectrum. On the one end is *SpaceX*, in which the government sought only to develop a technology that would benefit the government and private sectors alike. On the other end are cases in which the OTA "charted a more direct and interlinked path from research, to development, to production, to government purchase" so as to be "in connection with a procurement." From this observation, Judge Bonilla ruled that OTAs involving "an acquisition instrument other than a traditional procurement vehicle intended to provide the government with a direct benefit in the form of products or services" fall within the COFC's bid protest jurisdiction.

APPLICATION OF THE ANNOUNCED STANDARD TO RAYTHEON'S BID PROTEST

Applying this standard to the circumstances presented in the *Raytheon* case, Judge Bonilla found that the COFC had jurisdiction over the bid protest challenging the MDA's decision to exclude Raytheon from Option Period 2C+. According to the opinion, the fact that the Agency "had not yet formally committed to purchasing an end product" arising out of the OTA was not dispositive. Rather, the MDA manifested "every intention of awarding a follow-on production contract" for the solution proven to be effective through the OTA. Further, the court stated that the government's intent to obtain a direct benefit through an OTA is particularly pronounced where, as here with the missile defense solutions, "the products or services to be developed and acquired are unique to the federal government and otherwise ill-suited for acquisition and use by the general public."

In addition to exercising bid protest jurisdiction, the COFC ruled that Raytheon had standing as an interested party "whose direct economic interest would be affected by the award of the contract or by failure to award the contract."[11] The court found that Raytheon made adequate claims of economic harm to establish standing—Raytheon had been performing prior phases of the OTA, and the company's exclusion from Option Period 2C+ "effectively eliminate[d] the company's ability to compete for the anticipated follow-on production contract reportedly worth billions of dollars." Lastly, the COFC rejected the government's argument that Raytheon failed to exhaust administrative remedies including the dispute resolution procedures prescribed in the OTA. The court explained that under the Tucker Act, exhaustion of administrative remedies cannot serve as a condition precedent to filing a bid protest.

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[11] 31 U.S.C. § 3551(2).

IMPLICATIONS OF THE *RAYTHEON* DECISION ON OTA BID PROTESTS

The *Raytheon* case marks another decision in the prevailing trend of recognizing the COFC's jurisdiction over bid protests involving OTAs. To be sure, protesters still must demonstrate that the OTA is "in connection with a procurement or a proposed procurement," as required by the Tucker Act. But in an effort to "streamline" the court's assessment of jurisdiction over such bid protests, Judge Bonilla's opinion offers a succinct standard that protesters may consider leveraging when seeking to establish jurisdiction as to a particular challenge—that the OTA is "an acquisition instrument . . . intended to provide the government with a direct benefit in the form of products or services." It must be noted, however, that Judge Bonilla's opinion is not binding on other judges and until the Federal Circuit rules definitively on this point, the COFC judges remain free to craft nuanced approaches to these questions.[12]

A "predictive forum selection standard" is particularly welcome now, as the current political environment may accelerate the increasing use of OTAs if the government shifts away from traditional procurement. As agencies like DOD pursue contracts that are not subject to the requirements imposed by procurement statutes and regulations, companies may have a clearer path now than before to challenge OTAs at the COFC—drawing more bid protests to the court's already-active docket.

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[12] See, e.g., Telesto v. United States, No. 24-1784 (Fed. Cl. June 2, 2025) (denying jurisdiction over several claims regarding agency actions in the prototype phase of an other transaction (OT) project, while retaining jurisdiction over challenges to alleged violation of OT statute: "The jurisdiction of the Court of Federal Claims to resolve challenges to OT projects remains uncertain.").