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Court of Federal Claims Specifies “Jurisdictional Blackout” During OT Prototype Phase and Applies *Blue & Gold* Waiver Rule

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

The U.S. Court of Federal Claims (COFC) issued an opinion in Telesto Group, LLC v. United States that reflects an ongoing effort to clarify the scope of the COFC’s jurisdiction over bid protests involving other transactions (OTs), which are not traditional procurement contracts. The authors discuss the decision and note that because the jurisdictional inquiry remains unsettled, contractors should be prepared for any OT challenge—and especially those relating to the conduct of the prototype phase—to be met with a dismissal request.

Judge Richard A. Hertling of the U.S. Court of Federal Claims (COFC) has issued an opinion in *Telesto Group, LLC v. United States* that reflects an ongoing effort to clarify the scope of the COFC’s jurisdiction over bid protests involving other transactions (OTs).¹ OTs are not traditional procurement contracts and thus, judges at the COFC continue to reach varying conclusions regarding whether the COFC has jurisdiction over protests involving OTs under the Tucker Act.

In *Telesto*, Judge Hertling recognized that “there is no present definitive answer to the jurisdictional puzzle presented by protests of OTs.” He acknowledged that “[t]he jurisdiction of the Court of Federal Claims to resolve challenges to OT projects remains uncertain,” given that several COFC judges “have found jurisdiction to exist, but the Federal Circuit has not squarely resolved the issue.”² For example, in *Raytheon Company v. United States*, Judge Bonilla recognized the need for “a predictive forum selection standard,” announced that the COFC has exclusive jurisdiction over bid protests involving an OT that is “an acquisition instrument . . . intended to provide the government with a direct benefit in the form of products or services,” and

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¹ *Telesto Group, LLC v. United States*, No. 24-1784 (Fed. Cl. June 2, 2025).

² The decision cites the following COFC decisions involving OTs: *Space Exploration Tech. v. United States*, 144 Fed. Cl. 433 (2019); *Kinematics, Inc. v. United States*, 155 Fed. Cl. 777 (2021); *Hydraulics Int’l, Inc. v. United States*, 161 Fed. Cl. 167 (2022); *Ind. Rough Terrain Center, LLC v. United States*, 172 Fed. Cl. 250 (2024); and *Raytheon Co. v. United States*, 175 Fed. Cl. 281 (2025).

applied that standard to conclude that the pending protest fell within the COFC's jurisdiction.³ With this opinion, Judge Bonilla stated his conclusion that the COFC is "the de facto forum" for bid protests involving OTs.

Telesto involves the Enterprise Business System-Convergency (EBS-C) program, which was initiated by the U.S. Army under its OT authority. With the EBS-C program, the Army sought to develop a solution to consolidate five Army business systems and improve their efficiency. Telesto Group, LLC (Telesto) challenged the manner in which the Army conducted the prototype phase of the OT, which preceded a potential follow-on production contract for the solution developed, as arbitrary and capricious.

Judge Hertling concluded that while the EBS-C program contemplated a follow-on procurement, the COFC lacked jurisdiction over elements of Telesto's protest challenging the prototype phase. Judge Hertling held that while the COFC "may review an OT project that has reached the end of the prototyping phase for any violation of statute or regulation . . . , there is no authority to review an agency's conduct of the prototyping phase or the agency's evaluations of the participants' performance at various stages of that phase." Judge Hertling described this as an "effective jurisdictional blackout" during "the performance of the prototyping phase of an OT." According to Judge Hertling, an OT is only in connection with a proposed procurement, and thus subject to COFC jurisdiction under the Tucker Act, when "the prototype process is completed successfully, and the agency decides to move forward to procure the prototype." Judge Hertling observed that his conclusion departs from Judge Bonilla's in *Raytheon*: Judge Bonilla ultimately accepted jurisdiction over a protest of the conduct of an OT prototype phase, while Judge Hertling disclaimed it.

Judge Hertling additionally applied the *Blue & Gold* waiver rule—which requires protesters to timely raise challenges to solicitation errors prior to the close of the bidding process, and which is traditionally applied to Federal Acquisition Regulation (FAR)-based procurements—to dismiss an argument over which the COFC exercised jurisdiction.

The *Telesto* decision demonstrates that the question of when the COFC has jurisdiction over OT bid protests remains unsettled. The growing use of OTs by federal agencies and the administration's urging for expanded use of such agreements underscores the need for either legislative action by Congress or appellate review by the Federal Circuit to resolve the current uncertainty.

³ 175 Fed. Cl. 281 (2025).

OVERVIEW OF THE ARMY'S PROTOTYPE PHASE AND TELESTO'S BID PROTEST

The *Telesto* case involves the Army's EBS-C program. In November 2022, the Army issued a Statement of Need and Prototype Project Opportunity Notice (PPON) under its OT authority, which announced a complex, three-phase process from prototype development to a limited deployment of the prototype to full deployment. The Army announced that the successful participant could receive a follow-on production contract for the solution developed during the prototype phase.

The prototype phase involved a multi-step evaluation. Telesto and defendant-intervenor Accenture Federal Services, LLC (Accenture) were among several participants that began the process. The Army eliminated Telesto, leaving only Accenture to proceed to limited deployment, i.e., a trial production of its prototype to demonstrate capability to proceed to a production contract award.

Telesto filed a bid protest at the COFC challenging aspects of the prototype phase. First, Telesto claimed that Accenture faked the effectiveness of a component of its technology during a required demonstration, and the Army failed to reasonably evaluate those results. Second, Telesto alleged that the Army unreasonably changed the technical requirements in the middle of the prototype phase to Accenture's advantage. These errors, according to Telesto, improperly affected the Army's decision to eliminate Telesto and invite only Accenture to proceed. Telesto also argued that the Army violated the statutory requirement that OT projects include at least one nontraditional defense contractor (NDC) participating to a significant extent under 10 U.S.C. § 4022.

The Army and Accenture both moved to dismiss, arguing that the COFC lacked jurisdiction over Telesto's bid protest and that Telesto had waived its challenge to the Army's midstream amendment by waiting until its elimination to object. Both defendants further moved for judgment on the administrative record.

The court dismissed Telesto's allegation that the Army unreasonably evaluated Accenture during the prototype phase. The court did exercise jurisdiction over Telesto's allegation that the Army violated the statutory NDC requirement, ultimately denying this aspect of Telesto's protest on the merits. Finally, the court found that Telesto had waived its challenge to the Army's amendment to the Statement of Need and PPON under the *Blue & Gold* waiver rule.

JUDGE HERTLING'S ANALYSIS OF COFC JURISDICTION OVER THE OT PROTOTYPE PHASE

Judge Hertling's decision in *Telesto* begins with the statutory source of the COFC's bid protest jurisdiction. The Tucker Act distinguishes between

jurisdiction over protests relating to a “contract” and those arising from a “procurement.” Regarding contracts, the Tucker Act grants jurisdiction over protests of solicitations and awards. Regarding procurements, the Tucker Act grants jurisdiction only over protests of “any alleged violation of statute or regulation in connection with a procurement or proposed procurement.”⁴

Judge Hertling explained that Congress has defined an OT as something other than a “contract” in the context of the Tucker Act. Thus, the COFC would have jurisdiction only over arguments where Telesto has alleged the plausible existence of a violation of statute or regulation in connection with a procurement or proposed procurement.

As to Telesto’s bid protest, Judge Hertling concluded that the EBS-C program became one “in connection with . . . a proposed procurement,” but only after the Army completed the prototype phase and determined that the process was successful and that it would acquire the successful prototype through a follow-on production contract. Judge Hertling stated that the COFC may review an OT upon conclusion of the prototype phase for any violation of statute or regulation, “but there is no authority to review an agency’s conduct of the prototyping phase or the agency’s evaluations of the participants’ performance at various stages of that phase.” For Judge Hertling, the fact that Accenture’s “continued successful prototype performance may lead to a follow-on production contract” was not dispositive. Rather, he noted that the Army, in eliminating Telesto and leaving Accenture as the last participant, had not awarded Accenture a contract, but had only allowed Accenture to continue performance of the prototype phase.

Upon reaching this conclusion, Judge Hertling noted that it “departs modestly” from the holdings of Judge Bonilla’s *Raytheon* decision from earlier this year and a 2022 decision by Judge Holte in *Hydraulics International, Inc. v. United States*.⁵ The COFC found that it had jurisdiction over elements of a prototype evaluation in both of those cases. In *Raytheon*, for instance, the COFC exercised jurisdiction over a protest alleging that the Missile Defense Agency (MDA) “improperly evaluated . . . proposals using unstated selection criteria” during the prototype process. Judge Bonilla held that jurisdiction existed because, while the MDA “had not yet formally committed to purchasing an end product,” the MDA had manifested “every intention of awarding a follow-on production contract” if the surviving participant’s “proposed solution is proven.”

⁴ 28 U.S.C. § 1491(b)(1).

⁵ 161 Fed. Cl. 167 (2022).

In *Telesto*, Judge Hertling stated that “[i]t is not enough that the agency contemplates a follow-on procurement at the outset of an OT for the project to be a proposed procurement subject to this court’s jurisdiction.” “Rather,” as Judge Hertling explained, “that stage is reached only when the prototype process is completed successfully, and the agency decides to move forward to procure the prototype.” According to Judge Hertling: “During the prototyping phase of an OT, there is an effective jurisdictional blackout.”⁶

Applying this standard, Judge Hertling concluded that the court only had jurisdiction over two of Telesto’s challenges. First, he considered Telesto’s claim that the Army violated the statutory requirement at 10 U.S.C. § 4022 for significant NDC participation, eventually denying that claim on the merits. Second, he considered Telesto’s claim that the Army’s midstream revision of the Statement of Need and PPON in Accenture’s favor violated its obligations, dismissing this claim as untimely—as discussed further below. Regarding the prototype evaluation challenges, Judge Hertling applied the “jurisdictional blackout” and denied jurisdiction over Telesto’s claim that the Army arbitrarily and capriciously evaluated Accenture’s allegedly fake technology demonstration.

THE COURT APPLIED THE *BLUE & GOLD* WAIVER RULE TO A CLAIM ARISING DURING THE OT PROTOTYPE PHASE

As noted, Judge Hertling held that the COFC had jurisdiction over Telesto’s claim that the Army failed to comply with the terms of the Statement of Need and PPON when it revised the evaluation criteria during the prototype phase. Telesto argued that the revision lowered the requirements for certain elements, making it easier for Accenture to receive an acceptable score. Both the Army and Accenture invoked the Federal Circuit’s decision in *Blue & Gold Fleet, L.P. v. United States*, arguing that Telesto had waived its ability to bring this protest by waiting to challenge this amendment until after it was eliminated.⁷

Judge Hertling explained that in a traditional FAR-based procurement, *Blue & Gold* requires a party “who has the opportunity to object to the terms of a government solicitation containing a patent error” to bring a protest prior to the close of the bidding process; otherwise, that party waives the ability to raise the challenge subsequently. Judge Hertling explained that although *Blue & Gold* “is a bid protest decision and therefore is not strictly applicable to an OT protest,” the purpose of the rule is nevertheless to reduce inefficiencies. He therefore held that “[t]he underlying principle supporting the waiver rule

⁶ Judge Hertling noted that if an OT bid protest does not fall within the COFC’s jurisdiction under the Tucker Act, jurisdiction “lies with a district court under the APA.”

⁷ 492 F.3d 1308 (Fed. Cir. 2007).

established by *Blue & Gold* applies with equal force to this project” and “if a plaintiff is to avail itself successfully of the court’s limited jurisdiction under section 1491(b)(1) to consider a protest of an OT, it must also accept the pitfalls that accompany the exercise of that jurisdiction; the waiver rule is one of those pitfalls.”

Thus, after exercising jurisdiction over this argument in Telesto’s bid protest, the court dismissed the argument as untimely, finding that despite the differences between OTs and traditional procurement contracts, the rationale of *Blue & Gold* still applied: “Telesto took its chances and passed up an opportunity to lodge a timely objection to see if it would [be invited to proceed to the next phase]. Only when it did not receive that invitation, did Telesto raise an objection challenging the alleged misstep in this judicial protest.”

CONCLUSION

Judge Hertling’s decision in *Telesto* reflects the court’s ongoing effort to clarify the scope of the COFC’s jurisdiction over bid protests involving OTs. Because the jurisdictional inquiry remains unsettled, contractors should be prepared for any OT challenge—and especially those relating to the conduct of the prototype phase—to be met with a dismissal request on this front, involving a fact-specific analysis of the agency’s plan for awarding a follow-on production contract. Contractors should also take note that certain challenges may be subject to the *Blue & Gold* waiver rule, as the *Telesto* decision signals that the COFC will apply that rule to an OT bid protest over which the court has jurisdiction. An early and ongoing assessment of a potential bid protest involving an OT against the varied COFC decisions to date may help mitigate the risk of dismissal arguments, as raised by the agency or a defendant-intervenor.