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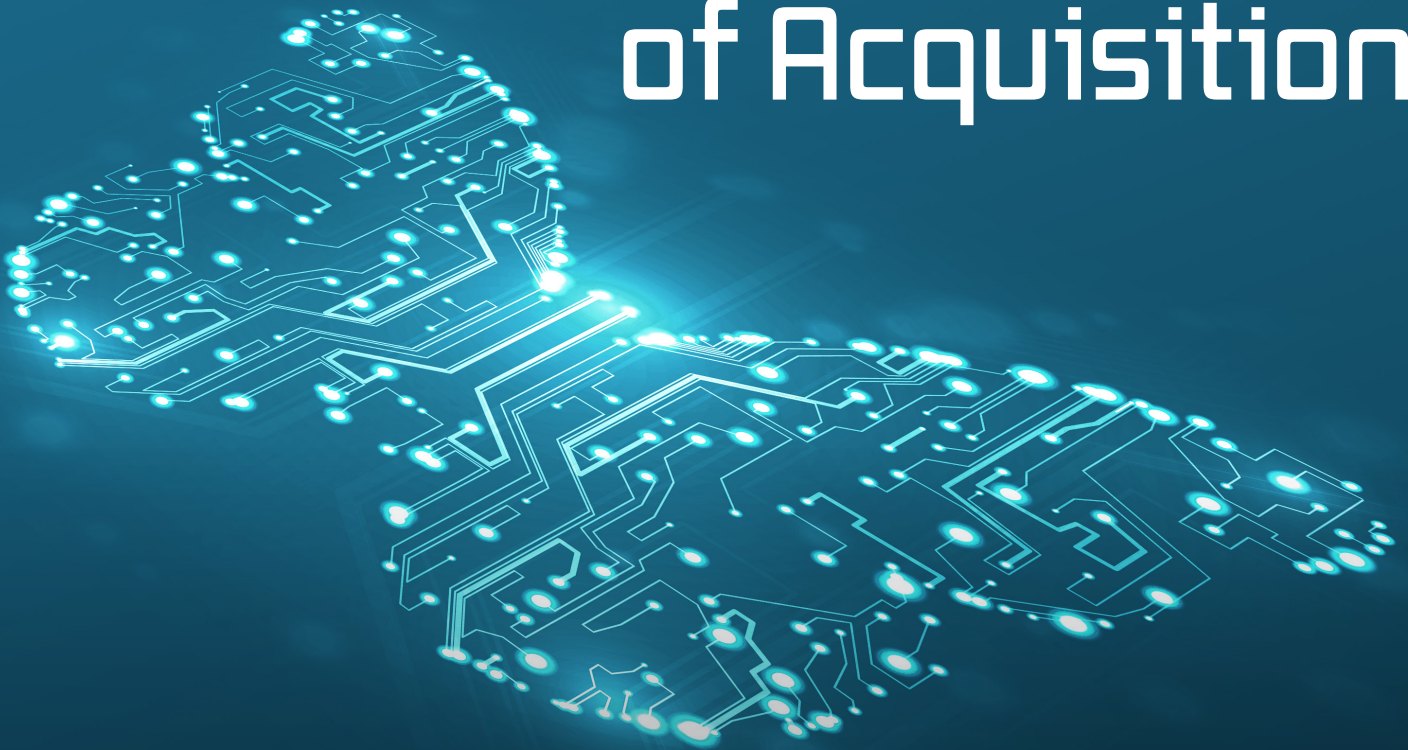


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## COUNSEL COMMENTARY

# The OTA Protest Jurisdiction Divide

Conflicting decisions create uncertainty about the proper forum for resolving bid protests involving other transaction agreements.

BY STEPHEN L. BACON

During the past decade, the Department of Defense (DoD) has significantly increased its use of other transaction agreements (OTAs). That growth is poised to continue under the Trump administration, which is determined to accelerate the use of OTAs as part of a broader initiative to streamline and expedite the acquisition process.<sup>1</sup>

Despite the rapid growth of OTAs, the question of where these agreements can be protested remains deeply unsettled. Earlier this year, two judges on the U.S. Court of Federal Claims (COFC) issued diverging opinions in *Raytheon Co. v. United States* and *Telesto Group, LLC v. United States* regarding the jurisdiction of the COFC to resolve bid protests involving OTAs.<sup>2</sup>

While Judge Bonilla's decision in *Raytheon* declared the COFC as the "de facto forum" for OTA bid protests, Judge Hertling's decision just months later in *Telesto* articulated a much more limited boundary for the COFC's jurisdiction.<sup>3</sup> Most notably, the *Telesto* decision

identifies an "effective jurisdictional blackout" that prohibits COFC challenges to agency evaluations during the critical prototype phases of an OTA project.<sup>4</sup>

These decisions have real and immediate implications for contractors that are pursuing an increasing number of acquisitions conducted under DoD's statutory OTA authority. Indeed, if Judge Hertling's more limited view of the COFC's jurisdiction prevails, challenges to OTA prototype evaluations would have to be filed in federal district court before a judge who almost certainly has no prior experience with bid protests.

The split jurisdictional decisions in *Raytheon* and *Telesto* underscore the urgent need for the U.S. Court of Appeals for the Federal Circuit or Congress to provide clarity on where contractors can file bid protests involving OTAs. Until this issue is resolved, contractors will face difficult and uncertain choices when considering an OTA challenge.

## The Jurisdiction Puzzle

The Government Accountability Office (GAO) has very limited jurisdiction over OTA protests under the Competition in Contracting Act. GAO will not decide challenges to an agency's evaluation and award of an OTA but will resolve timely pre-award protests that an agency is improperly using its statutory OTA authority.<sup>5</sup>

Given GAO's limited jurisdiction, contractors have turned to either the COFC or federal district courts to resolve protests concerning the evaluation and award of OTAs.

Under the Tucker Act, the COFC has jurisdiction "to render judgment on an action by an interested party [1] objecting to a solicitation by a federal agency for bids or proposals for a proposed contract or [2] to a proposed award or the award of a contract or [3] any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."<sup>6</sup>

COUNSEL COMMENTARY CONT'D

Because OTAs are, by definition, not “contracts,” there is broad consensus that prongs (1) and (2) of the Tucker Act do not grant COFC jurisdiction over bid protests involving OTAs.

The unsettled question is whether and to what extent the COFC has authority to decide OTA protests under prong (3) of the Tucker Act. Although OTAs are not traditional “procurement” contracts, OTAs may be considered sufficiently connected to a procurement or proposed procurement to fall within the COFC’s jurisdiction.

DoD statutory OTA authority allows agencies to award a sole-source, follow-on production contract or transaction to participants that successfully complete

a prototype OTA project.<sup>7</sup> Agencies may invoke this authority if they used competitive procedures to award the prototype OTA and “provide for” the possibility of a follow-on contract in the prototype OTA.<sup>8</sup>

It is not surprising that a substantial majority of prototype OTAs do “provide for” a potential follow-on contract because that allows agencies to benefit from the OTA statute’s unique sole-source authority.<sup>9</sup>

Prior to *Raytheon* and *Telesto*, several COFC judges and at least one federal district court have grappled with the question of where a protest involving a prototype OTA must be filed.<sup>10</sup> In some of these cases, the courts ruled that the COFC has jurisdiction where the prototype OTA

at issue contemplates the possibility of a follow-on production contract.

These decisions are premised on the conclusion that there is an adequate connection between the prototype OTA and a future “procurement” because the prototype OTA awards limit the pool of competitors that are eligible for the eventual production contract.<sup>11</sup>

**Raytheon v. United States**

This case involved a Missile Defense Agency (MDA) program to develop a new Glide Phase Interceptor (GPI) to defend against hypersonic missile threats. MDA initially awarded prototype OTAs to three companies, including Raytheon and Northrop Grumman.

MDA subsequently issued a request for prototype proposals (RPP) to Raytheon and Northrop to continue technology development. After evaluating proposals from both companies, MDA selected Northrop to continue GPI development. In making that decision, MDA noted that Northrop’s effort was “expected to lead to a follow-on development and production contract.”<sup>12</sup>

Raytheon filed a bid protest in the COFC to challenge MDA’s evaluation of prototype proposals and its decision to select Northrop. In response, the government moved to dismiss Raytheon’s protest on several grounds, including that it did not fall within the bid protest jurisdiction of the COFC under the Tucker Act.

After synthesizing the existing OTA bid protest jurisprudence, Judge Bonilla attempted to develop a “predictable jurisdictional framework” and “working definition” for determining whether an OTA falls within the COFC’s Tucker Act jurisdiction.<sup>13</sup>



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Under that definition, the COFC has jurisdiction to decide protests challenging OTAs that constitute “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.”<sup>14</sup>

Judge Bonilla’s framework focuses on “the federal agency’s immediate endgame” and whether it is “seeking to acquire a specific product or service and directing or otherwise facilitating its generation and production.”<sup>15</sup>

Critically, it did not matter for purposes of determining jurisdiction that “MDA had not yet formally committed to purchasing an end product from Northrop Grumman or any other successful prototype developer.”<sup>16</sup>

Instead, the COFC determined that it had jurisdiction to decide Raytheon’s protest based on MDA’s “demonstrated intent, actions to date, and intentions moving forward,” all of which suggested that it planned to award a follow-on production contract to Northrop if its solution was successfully proven.<sup>17</sup>

#### **Telesto Group, LLC v. United States**

The *Telesto* decision involved a challenge to the Army’s Enterprise Business System-Convergence (EBS-C) program initiated under DoD’s OTA authority. The prototype phase of the EBS-C program was conducted through a series of seven competitive steps after which the successful participant could receive a follow-on production contract.

Telesto was eliminated after phase six and the Army invited only Accenture Federal Services, LLC to proceed to the seventh and final step of the prototype phase. Telesto subsequently challenged

various aspects of the Army’s conduct of the prototype phase that led to Accenture’s selection.

First, Telesto alleged that the Army failed to detect that Accenture “faked a key component of its technological demonstration at step 4.”<sup>18</sup>

Second, Telesto claimed that “the Army changed the requirements for the key technological demonstrations at step 5,” making it easier for Accenture to meet the new requirements.<sup>19</sup>

Finally, Telesto alleged that the Army violated the OTA statute because Accenture’s team did not include “at least one nontraditional defense contractor ... participating to a significant extent in the prototype project.”<sup>20</sup>

Unlike Judge Bonilla in *Raytheon*, Judge Hertling concluded that “[i]t is not enough that the agency contemplates a follow-on procurement at the outset of an OT for that project to be a proposed procurement subject to [the COFC’s] jurisdiction.”<sup>21</sup>

In Judge Hertling’s view, “that stage is reached only when the prototype process is completed successfully, and the agency decides to move forward to procure the prototype.”<sup>22</sup>

Thus, “[d]uring the performance of the prototyping phase of an OT,” Judge Hertling determined that “there is an effective jurisdictional blackout” at the COFC.<sup>23</sup> This meant that the COFC had no authority to decide Telesto’s allegation

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that Accenture faked the demonstration at step 4. The COFC did, however, find that it had jurisdiction to resolve Telesto's second and third claims.

The COFC reasoned that the EBS-C program became "a procurement or, at least, a proposed procurement" when the Army successfully completed the prototyping process and decided that it would acquire a prototype through a follow-on production contract. As a result, the COFC ruled that it could hear "challenges to the Army's compliance with applicable statutes."<sup>24</sup>

This included Telesto's challenge to the Army's compliance with the participation requirement for non-traditional defense contractors (NDCs). The COFC also held that it had authority to

decide Telesto's allegation that the Army violated the terms of the Prototype Project Opportunity Notice (PPON), which set the ground rules for the competition.

The Army's alleged violation of the "PPON and other program-related documents" was within COFC's jurisdiction "because these documents are integral to the statutory and regulatory integrity of the OT."<sup>25</sup>

Judge Hertling opined that, "[w]hen the agency alters the terms of the competitive process during the OT, a court may review revisions and changes to ensure that they do not eliminate competitive procedures, and that the OT remains compliant with the applicable statutes and regulations."<sup>26</sup>

Ultimately, Telesto did not prevail on its claims. The COFC ruled that the Army reasonably concluded that NDCs participated to a "significant extent" in Accenture's prototype project as required under 10 U.S.C. § 4022(d)(1)(A). And, as to the claim that the Army violated the PPON by changing the requirements of step five, the COFC concluded that Telesto waived its claim by waiting until after the completion of step six to challenge those changes.

Even though the COFC had jurisdiction to decide a challenge to the PPON changes, Judge Hertling held that Telesto filed its claim too late under the *Blue & Gold* doctrine. That doctrine generally requires offerors to challenge the terms of a solicitation before the deadline for receipt of proposals instead of after award.

**The Uncertain Road Ahead**

There is no dispute that OTAs are subject to judicial review. The only question is where such challenges must be filed: COFC or federal district court. The split between *Raytheon* and *Telesto* creates precisely the type of forum uncertainty that Congress sought to eliminate when it terminated federal district court jurisdiction over bid protests in 2001.

Congress made the COFC the exclusive bid protest forum "to develop a uniform national law on bid protest issues and end the wasteful practice of shopping for the most hospitable forum."<sup>27</sup> That rationale should apply with equal force to OTA protests.

Contractors and agencies benefit from uniform, predictable rules and procedures administered by judges with specialized expertise in government contracts law. But if a "jurisdictional blackout" exists at





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the COFC during the prototype phases of OTA projects, federal district courts across the country will begin to decide an increasing number of OTA bid protests.

Under framework adopted in *Telesto*, it is even conceivable that the same prototype OTA project could be subject to some bid protest allegations in the COFC and others in federal district court. This is not a workable long-term solution for judicial oversight of prototype OTA evaluations and awards.

Until the Federal Circuit or Congress provides definitive guidance, contractors face difficult strategic choices. The weight of existing authority favors COFC jurisdiction, at least where the prototype OTA contemplates the possibility of a follow-on production contract. However, contractors should prepare for the possibility that other judges may follow Judge Hertling's more restrictive approach to COFC jurisdiction during the OTA prototyping phase.

Contractors also must act timely to challenge prototype OTA ground rules to avoid waiver under *Blue & Gold*. If a PPON or similar document establishing the terms of the competition is somehow defective, contractors should file their challenge in the pre-award phases before any deadline to submit prototype proposals. **CM**

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*The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.*

#### ENDNOTES

- 1 E.O. 14265, Modernizing Defense Acquisitions and Spurring Innovation in the Defense Industrial Base, § 3(a).
- 2 Raytheon Co. v. United States, 175 Fed. Cl. 281 (2025); Telesto Group, LLC v. United States, No. 24-1784, 2025 WL 1551279 (Fed. Cl. 2025).
- 3 Raytheon, 175 Fed. Cl. at 284; Telesto, 2025 WL 1551279, at \*14.
- 4 Telesto, 2025 WL 1551279, at \*14.
- 5 MD Helicopters, Inc., B-417379, Apr. 4, 2019, 2019 CPD ¶ 120 at 2; ACI Technologies, Inc., B-417011, Jan. 17, 2019, 2019 CDP ¶ 24 at 3.
- 6 28 U.S.C. § 1491(b)(1).
- 7 10 U.S.C. § 4022(f).
- 8 10 U.S.C. § 4022(f)(2).
- 9 Office of the Under Secretary of Defense for Acquisition and Sustainment, *Report to Congress on the Use of Other Transaction Authority for Prototype Projects In FY 2022*, at 3, 8 (April 2023).
- 10 See, e.g., Space Exploration Technologies Corp. v. United States, 144 Fed. Cl. 433 (2019); Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777 (2021); Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167 (2022); MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020).
- 11 See MD Helicopters, 435 F. Supp. 3d at 1012-13; Hydraulics Int'l, 161 Fed. Cl. at 176-77.
- 12 Raytheon, 175 Fed. Cl. at 287.
- 13 Id. at 293.
- 14 Id.
- 15 Id.
- 16 Id. at 294.
- 17 Id.
- 18 Telesto, 2025 WL 1551279, at \*1.
- 19 Id.
- 20 10 U.S.C. § 4022(d)(1)(A).
- 21 Telesto, 2025 WL 1551279, at \*14.
- 22 Id.
- 23 Id.
- 24 Id. at 15.
- 25 Id. at 16.
- 26 Id. at 20.
- 27 142 CONG. REC. S6155-01, S6156, 1996 WL 315422 (daily ed. June 12, 1996) (statement of Sen. William Cohen); see also H.R. Conf. Rep. No. 104-841, at 10 (1996).

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