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Seeking Connection (to a Procurement or Proposed Procurement): The Jurisdictional Hook for OTA Protests

By Nicholas T. Solosky and Keeley A. McCarty*

As federal agencies increasingly rely on Other Transaction Authority (OTA) to speed innovation and bypass traditional procurement hurdles, legal challenges to OTA awards are also on the rise. But where can contractors turn when they believe an OTA award is unfair or unlawful? In this article, the authors provide a timely, in-depth analysis of OTA bid protest jurisdiction across the U.S. Court of Federal Claims (COFC), the Government Accountability Office, and federal district courts. Geared toward federal contractors, the authors offer strategic insights into protest viability, jurisdictional traps, and the legal gray zone between nontraditional acquisitions and traditional procurement oversight.

The federal government has fallen in love with the OTA, short for Other Transaction Agreement. For the government, OTAs are attractive as an agile alternative to traditional procurements. They are equally appealing to federal contractors who see the upside of avoiding the red tape common to competitive procurements. Unsurprisingly, the value offered by OTAs has led to increased competition, including the desire to protest OTA awards when contractors are shut out.

Attempting to protest OTA-related actions can be frustrating, however, as the case law surrounding OTA disputes is still taking shape. Notably, litigants have struggled to establish jurisdiction in the usual federal forums. The Government Accountability Office (GAO), the venue where many contractors choose to bring procurement protests, is largely unavailable for OTA challenges. The U.S. Court of Federal Claims (COFC or Court) has proven to be the best protest venue when an OTA is involved, but the Court's case law on which OTA challenges it will adjudicate (and why) remains murky.

One thing appears to be sure: Any legal challenge to an OTA must start by understanding the connection between the OTA and a follow-on procurement (or proposed procurement). Moving forward without an understanding of that connection will likely leave your firm on the outside looking in.

OTA BACKGROUND AND GROWING SIGNIFICANCE

OTA authority first arose as an avenue for agencies like the Department of Defense (DoD), National Aeronautics and Space Administration (NASA), and

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the Department of Homeland Security (DHS) to bypass traditional procurement rules for research and development. In the intervening years, it has expanded into a flexible contracting mechanism that can also be used to accelerate innovation and collaboration with non-traditional government vendors.

Key drivers behind the proliferation of OTA authority include:

- *Flexibility and Speed*: Unlike traditional procurement contracts, OTAs are not bound by the rigid rules of the Federal Acquisition Regulation (FAR), allowing agencies to negotiate terms, pricing, and intellectual property rights more freely.
- *Attracting Non-Traditional Contractors*: OTAs enable agencies to work with startups, tech firms, and research institutions that might otherwise avoid the burdens of doing business in the traditional federal procurement system.
- *Prototyping and Innovation*: OTAs are especially popular for rapid prototyping efforts (notably AI), cybersecurity, medical technology, and battlefield systems, with follow-on production options for successful prototypes.

The surge in OTA use has raised significant questions about transparency and competition for these often lucrative deals. Although OTAs are not traditional "procurements," there is increasing recognition of the need for jurisdictional guardrails to govern OTA disputes—especially when follow-on production contracts are involved.

Decisions over the past few years have made two things clear:

1. The U.S. Court of Federal Claims is the "de facto forum" for litigating OTA bid protests; and
2. Jurisdiction at the Court requires a showing by the protester that the challenged agency action is "in connection with a procurement or proposed procurement."

BID PROTEST BASICS: JURISDICTIONAL OVERVIEW

Bid protests challenging federal contracting decisions can be brought in two primary forums—the GAO or the Court. OTAs, however, are not procurements as defined by the FAR. As a result, jurisdiction in both forums is limited and often hotly contested.

Bid protest jurisdiction at the COFC derives from 28 U.S.C. § 1491(b), also known as the Tucker Act, which applies to alleged agency violations of law "in connection with a procurement or a proposed procurement." The Court has

interpreted this statute to mean that COFC jurisdiction is limited to procurements of goods or services and does not extend automatically to OTA awards or related decisions. However, the COFC has also declared itself the de facto forum when a protestor can show that an OTA is, in substance, a procurement contract or part of a procurement process (such as a prototype OTA tied to a follow-on production contract).

By contrast, bid protest jurisdiction at the GAO arises out of the Competition in Contracting Act (CICA), which authorizes protests of solicitations and awards of procurement contracts—agreements subject to the FAR. Because OTAs exist outside procurement statutes and regulations (including CICA), the GAO has consistently held that it lacks jurisdiction to review protests challenging the award or terms of a stand-alone OTA.

Thus, challenges involving OTA agreements often involve a threshold jurisdictional analysis. Protestors must demonstrate that the agency's action has a sufficient connection to a procurement (or a proposed procurement) to tether its jurisdictional claim. When an agency transitions from a prototype OTA to a follow-on production contract, the analysis shifts, too.

The result is a complex and evolving area of the law where even recent decisions from the COFC can appear at odds with each other. Potential protesters must carefully assess whether the transaction at issue has crossed into the realm of procurement or risk chasing an OTA challenge that was doomed from the start.

OTA PROTEST JURISDICTION AT THE COFC

Because jurisdiction at the COFC is limited to agency actions "in connection with a procurement or proposed procurement," the Court has spent considerable effort in recent years analyzing what such a connection might or should look like. It has yet to settle on a clear standard. Just this year, the Court has issued two decisions articulating two different methods for analyzing the issue, *Raytheon Co*. and *Telesto Group*.

The Court has explained that the Tucker Act framework guides the Court's review of OTA jurisdiction. As a rule, the Court first evaluates whether the OTA is in substance a procurement contract itself, in which case the inquiry into jurisdiction is simple. However, in the almost certain event that the OTA is not itself a procurement, the Court moves to considering whether it is "in connection with a procurement or proposed procurement."

Where an OTA is not clearly intertwined with a procurement, the Court has held that it lacks jurisdiction to hear the protest. For example, where an OTA and procurement are conducted in parallel, and eligibility to compete in the procurement does not depend on success under the OTA, the Court has held

that there is no connection between the OTA and procurement to confer bid protest jurisdiction on the Court. This is true even if the OTA and procurement share a common mission and are centered on the same products or services.

While there are nuanced differences among the Court's opinions, one common thread is crystal clear: to persuade the Court to exercise jurisdiction over an OTA-related action, protesters must demonstrate a connection to a procurement or proposed procurement. Recent decisions by the Court are helpful in understanding the threshold considerations that contractors must evaluate when considering whether to protest an OTA award.

HYDRAULICS INTERNATIONAL

In 2022, the Court seemed to take a more expansive view of its jurisdiction over OTAs in *Hydraulics International, Inc. v. United States*.[1] The case concerned an OTA for one Aviation Ground Power Unit prototype used to service military helicopters. The Army's solicitation contemplated the potential for (but did not guarantee) two follow-on efforts: an additional prototype stage acquiring 10 prototype units, and if that was successful, an award for the procurement of 150 units without competitive procedures.

The protester was eliminated from the competition and alleged that the potential future procurement of 150 units was a procurement; thus, the OTA was in connection with a procurement or proposed procurement.

The Court held that the potential follow-on procurement of 150 units placed the OTA award within the Court's Tucker Act jurisdiction. In finding jurisdiction over the protest, the Court cited the Federal Circuit's decision in *Distributed Solutions, Inc. v. United States*,[2] which held that the Tucket Act "does not require an actual procurement" and "explicitly contemplates the ability to protest . . . pre-procurement decisions by vesting jurisdiction in the Court of Federal Claims over 'proposed procurements.' " Thus, whether the follow-on production procurement ever actually occurred was beside the point. The Court found it material that the OTA award at issue had the effect of disqualifying the plaintiff from any future award of the production contract, were it to occur.

RAYTHEON CO.

Earlier this year, Judge Bonilla sought to reduce the jurisdictional uncertainty surrounding OTAs in his decision in *Raytheon Co. v. United States*,[3] holding that the Court is the "de facto forum" for OTA challenges. The Court

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[1] Hydraulics International, Inc. v. United States, 161 Fed. Cl. 167 (2022).

[2] Distributed Solutions, Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008).

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

acknowledged the need for "critical guidance" from either Congress or the Federal Circuit on the issue but nonetheless set out to articulate a usable standard for evaluating jurisdiction over OTAs.

The Court synthesized its prior OTA protest decisions by finding that the OTAs at issue fell along a spectrum. On one end of the spectrum, a procurement could involve an arrangement in which the government simultaneously helps develop a technology for the public and private sectors, where the OTA and a simultaneous procurement are not connected. On the other end of the spectrum, cases like *Hydraulics* involve OTAs with a more direct and interconnected progression from research, to development, to production, to procurement.

The Court looked to definitions in the Federal Grant and Cooperative Agreement Act (FGCAA) to inform its analysis. It focused on the FGCAA's contemplation of a "procurement contract" where "the principal purpose of the instrument is to acquire . . . property or services for the direct benefit or use of the United States Government." Ultimately, the Court arrived at a "working definition" of OTAs that fall within the Court's bid protest jurisdiction: those 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."

TELESTO GROUP

Most recently, the Court decided *Telesto Group, LLC v. United States*,[4] building upon *Raytheon* but complicating the analysis. In answering the threshold question of whether the OTA was in connection with a procurement or proposed procurement, the Court relied on what it referred to as a "principal purpose test," harkening back to the language in the FGCCA defining procurement contracts.

To determine whether the agency's program related to a procurement or proposed procurement, the Court endeavored to determine whether the principal purpose of the OTA was to ultimately procure goods or services for the government. Where the principal purpose of an OTA is to develop a prototype alone, the Court found that the OTA would not satisfy the principal purpose test. On the other hand, if the agency knows from the outset of the OTA that it plans to award a procurement contract based on a successful prototype, then some aspects of the agency's decision-making would be subject to the Court's jurisdiction. This aligns somewhat with the framework in *Raytheon* and some earlier cases.

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[4] Telesto Group, LLC v. United States, No. 24-1784 (Fed. Cl. June 2, 2025).

However, the Court went a step further, holding that not every aspect of the OTA process would fall under the Court's jurisdiction, even where the agency anticipated issuing a follow-on contract from the outset. In almost every case, the government's decision to use an OTA rather than some other type of agreement is a procurement-related decision subject to challenge at the Court. But after the initial decision to use an OTA, the Court held there was "an effective jurisdictional blackout," where none of the agency's actions would be open to challenge at the Court or any other venue. The Court explained that an OT prototype project becomes a "proposed procurement" subject to protest only after the successful prototyping phase when the agency determines that it will award a follow-on contract. Thus, there can be no jurisdiction during the performance of the prototyping phase.

While admitting that "[p]erhaps the court has complicated the jurisdictional issue beyond what is necessary or appropriate," the Court stated that the principal purpose test requires a case-by-case analysis of the evidence of each agency's determination process.

OTA PROTEST JURISDICTION AT GAO

OTA bid protest jurisdiction at GAO is much more straightforward than at the COFC, but also much more limited. GAO consistently holds that it lacks jurisdiction to consider bid protests involving OTA agreements with the exception of pre-award protests challenging an agency's decision to use an OTA rather than some other agreement type.

As already discussed, OTAs are legally distinct from traditional federal procurement contracts and are not governed by the FAR or other standard procurement statutes (CICA). They therefore fall outside GAO's scope (protests of solicitations and procurement awards).

Perhaps the plainest statement of GAO's rejection of jurisdiction to hear protests regarding OTA award decisions appears in *MD Helicopters Inc.*[5] The case concerned a small business's claim that the U.S. Army Futures Command erroneously refused to enter into an OTA "for the development of a future attack reconnaissance aircraft competitive prototype."

The GAO declared its lack of jurisdiction, stating that, while it may review "a timely pre-award protest that an agency is improperly using its other transaction authority to procure goods or services," it cannot hear protests concerning "the agency's evaluation of proposals and award decision, which are not within [GAO's] bid protest jurisdiction" without statutory authority. GAO

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[5] MD Helicopters Inc., B-417379, 2019 CPD ¶ 120 (Comp. Gen. Apr. 4, 2019).

further grounded its holding in its own regulation,[6] which states that "GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts."

In an interesting aside, the *MD Helicopters* case eventually found its way to a federal district court in Arizona. Informed by GAO's dismissal, the protester now argued that the government's OTA award was arbitrary and capricious and, accordingly, a violation of the Administrative Procedures Act (APA). The district court, too, refused jurisdiction, holding that the Tucker Act vested exclusive jurisdiction in the COFC for disputes involving "a solicitation by a Federal agency for bids or proposals for a proposed contract."[7]

For contractors disappointed by any aspect of an OTA, these cases reinforce that the COFC almost certainly offers the correct forum. Other than the very narrow exception for pre-award protests carved out at the GAO by *MD Helicopters*, all other possible venues avoid claiming any OTA jurisdictional authority and ceded to the COFC's de facto status.

STRATEGIC CONSIDERATIONS FOR CONTRACTORS

OTAs are here to stay. The legal challenges will continue to get more nuanced—and potentially valuable to disappointed competitors.

In this environment, federal contractors should adopt a proactive approach, including understanding how and when OTAs are used and recognizing the value and limitations of the available legal remedies. Careful planning and informed legal counsel can help position contractors to protect their competitive interests, even where jurisdictional questions are unclear.

Many disputes will fall outside traditional protest mechanisms altogether. This increases the importance on staying agile and maintaining agency touchpoints. However, for viable protests, contractors should consider the COFC the de facto venue and evaluate the "connection to a procurement or proposed procurement" with counsel early in the process.

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[6] 4 C.F.R. § 21.5(m).

[7] 435 F. Supp. 3d 1003, 1011 (D. Ariz. 2020) (quoting 28 U.S.C. § 1491).