

POTENTIAL PATH TO PROTEST OTHER TRANSACTION AUTHORITY AGREEMENTS AT THE COURT OF FEDERAL CLAIMS

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The Court of Federal Claims (“COFC”) recently released a decision where it declined to dismiss (for lack of jurisdiction) a protest of a \$648 million award for an Other Transaction Authority (“OTA”) contract from the Defense Department Missile Defense Agency. *Raytheon Co. v. United States and Northrop Grumman Sys. Corp.*, No. 24-1824C (Fed. Cl. February 24, 2025). The Court reviewed the history of OTAs, discussed earlier jurisdictional rulings, and concluded that the bid protest fell squarely within the COFC working framework adopted in this decision, and declined to dismiss the protest for lack of jurisdiction.

The Tucker Act, 28 USC § 1491 vests the COFC with subject matter jurisdiction to adjudicate pre-and post-award bid protests. The decision notes that the intention of Congress, as stated in the relevant conference report, was “to give the COFC exclusive jurisdiction over the full range of procurement protest cases previously subject to review in the federal district courts and the COFC. The Tucker Act does not define the terms “procurement” or “proposed procurement.” However, in the Federal Grant and Cooperative Agreement Act, Pub. Law. No. 95-224 (1978), a “procurement contract” is meant for situations where “the principal purpose is to “acquire...property or services for the direct benefit or use of the U.S. Government.”

The first OTAs were authorized in 1958, in the National Aeronautics and Space Act of 1958, for use by the National Aeronautics and Space Administration. Congress, 30 years later, extended the authorized use of other transactions to the Department of Defense (“DOD”). 10 USC § 4021 and 10 USC § 4022 (research project and prototype projects). Use of the OTA contract has increased significantly in recent years.

The COFC noted there is a strong but rebuttable presumption of judicial review of agency action, and there was nothing in the statutory scheme or legislative history behind the grant of OTA authority suggesting that Congress intended to exempt awards under these contracting vehicles from judicial scrutiny. However, in *Space Exploration Tech. Corp. v. United States*, 144 Fed. Cl. 433 (2019), a bid protest of OTAs awarded by the Air Force to develop space launch vehicles that would serve both the public and private sectors, the COFC concluded it did not have jurisdiction and transferred to the case to a District court. In *Kinemetrix, Inc. v. United States*, the COFC rejected the application of Space Exploration to a bid protest of an OTA to acquire seismic equipment to monitor nuclear proliferation treaty compliance—accepting jurisdiction. Another bid protest was considered and not dismissed on jurisdictional grounds by the COFC in *Hydraulics Int’l Inc. v. United States*, 161 Fed. Cl. 167 (2022). In *Indep. Rough Terrain Ctr. v. United States (“IRTC”)*, 172 Fed. Cl. 250 (2024) the COFC maintained that the relevant inquiry was whether the government was seeking to acquire actual property or services. Since in IRTC the government sought to acquire vehicles for Army use, the COFC maintained its jurisdiction. The COFC therefore placed *SpaceX* at one end of the spectrum, and *IRTC* at the other end. An actual government purchase was deemed within COFC’s jurisdiction. Here is what the Court said:

[T]he undersigned proffers the following working definition of OTs and OTAs falling within this Court’s exclusive bid protest jurisdiction under the Tucker Act: 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.

(It should also be noted that the Government Accountability Office (“GAO”) has consistently held that it had no jurisdiction over protests of OTAs. See, e.g., *Sys. Architecture Info Tech*, 2020 CPD ¶ 184 (June 20, 2020) and *MD Helicopters*, 2019 CPD ¶ 120, (April 4, 2019)).

The COFC held that the OT authority exercised by the Missile Defense Agency and the OTAs awarded and then extended for Northrop Grumman, but simultaneously discontinued for Raytheon (and gave rise to this bid protest) fell “squarely within the working jurisdictional framework adopted today.” Accordingly the COFC declined to dismiss the protest on jurisdictional grounds as argued by the government and Northrop Grumman.

Takeaway: It remains to be seen if this case is appealed to the Federal Circuit for clarification or if the reasoning adopted in this case will prevail, granting jurisdiction to the COFC where there is a direct benefit to the government in the form of products or services. However, subsequent to this case, a different COFC judge issued *Tedesco Group, LLC v. United States*, No. 24-1784, 2025 WL 1551279. Tedesco held that “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.” (Raytheon had found jurisdiction over the prototyping phase). So there remains considerable uncertainty about COFC’s bid protest jurisdiction over OTAs, that must be clarified by one or more higher courts.

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