Measuring The Scope Of COFC's Telesto Bid Protest Ruling

By **John Prairie and Jonathan Clark** (June 30, 2025)

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The U.S. Court of Federal Claims' June 2 decision in Telesto Group LLC v. U.S. marks the latest entry in the evolving landscape of bid protest jurisdiction over other transaction agreements.[1]

As the federal government continues expanding OTA use, more disappointed offerors will likely turn to the courts to challenge these awards, and judges will continue to attempt to more clearly define the limits of the COFC's OTA jurisdiction.

Several recent decisions have suggested the court's willingness to expand its exercise of jurisdiction over OTAs.

But Telesto takes a more restrictive approach, holding that the timing of an agency's procurement commitment — rather than the nature of goods or services being acquired — determines whether an OTA can be protested.

Although Telesto characterizes this as a modest departure from other recent decisions finding jurisdiction over certain OTAs, the departure is more pronounced and, to the extent adopted in future protests at the COFC, provides a clear road map for agencies seeking to insulate OTA awards from protest.

Telesto likely will not be the final word on the matter. As the COFC continues grappling with whether and in what contexts OTAs are subject to protest, a definitive answer will require intervention from the U.S. Court of Appeals for the Federal Circuit.

Increased OTA Use in Federal Acquisition

The federal government's use of OTAs has reached unprecedented levels. Between fiscal year 2015 and fiscal year 2020, U.S. Department of Defense OTA annual obligations surged from $700 million to $16 billion — a 2,185% increase.

Although obligations trended slightly down to approximately $14 billion in fiscal year 2024, OTA awards will likely resume an upward trend after Congress passes its fiscal year 2026 budget.

Recent executive actions have further enshrined a strong federal preference for OTAs.

A March DOD memorandum on directing modern software acquisition to maximize lethality designated commercial solutions openings and OTAs as the default for capability acquisitions. And the April Executive Order No. 14265 on modernizing defense acquisitions and spurring innovation established a first preference for commercial solutions and a general preference for OTAs.

These policy initiatives represent a coordinated push toward more streamlined, commercially oriented procurement processes by the DOD and will inevitably result in the award of more OTAs.

This continued expansion of the use of OTAs creates corresponding questions for contractors regarding when and under what circumstances disappointed bidders can protest agency decisions to award OTAs. The U.S. Government Accountability Office has consistently held that it lacks jurisdiction to hear OTA protests, except in cases challenging whether an agency is properly exercising its authority to use an OTA for a particular procurement.

In contrast, the COFC, which has broader jurisdiction to hear protests in connection with a procurement or proposed procurement, has increasingly found that it has bid protest jurisdiction over the award of OTAs in certain circumstances.

Court of Federal Claims Jurisdiction

The COFC derives its bid protest jurisdiction from the Tucker Act.[2] Under Title 28 of the U.S. Code, Section 1491(b)(1), the court has jurisdiction to render judgment on actions by interested parties objecting to:

- A solicitation by a federal agency for bids or proposals for a proposed contract;
- A proposed award or the award of a contract; or
- Any alleged violation of statute or regulation in connection with a procurement or proposed procurement.

Congress explicitly defined "OTAs" as legal instruments that are "not a contract, cooperative agreement or grant," but rather legal instruments other than contracts subject to the Federal Acquisition Regulation.

Because the Tucker Act grants the COFC jurisdiction over protests related to contracts or proposed contracts, this statutory distinction has generally insulated OTAs from judicial review under the first two prongs of Section 1491(b)(1).

But courts have interpreted the third prong — "in connection with a procurement or proposed procurement" — more broadly. The thinking goes that because Congress also provided jurisdiction over procurements or proposed procurements, this must be referring to something other than FAR-based contracts and proposed contracts.

Unfortunately, Congress did not define "procurement" for purposes of the Tucker Act, or specify whether or when OTAs constitute procurements, leaving open whether the court's bid protest jurisdiction encompasses OTAs.

Prior Decisions: IRTC and Raytheon

Two recent COFC decisions answered that question in the affirmative. In Independent Rough Terrain Center LLC v. U.S,[3] IRTC challenged a U.S. Army OTA award for developing specialized rough-terrain forklifts.

Although the Army awarded the OTA under a prototype OTA, IRTC argued the arrangement was functionally a procurement contract because the Army was directly acquiring the forklifts under the agreement.

The IRTC court adopted a function-over-form view, focusing on whether the government was acquiring goods or services rather than whether the agency conducted the acquisition under OTA or FAR authority. In July 2024, the court found that despite being labeled an

OTA, the primary purpose of the agreement was to acquire specific products for military use.

The Army intended to use the developed forklifts operationally, not merely for research or as prototypes. This functional analysis led the court to conclude that the OTA was "for goods and services, and nothing in the OTA statutes expressly removes OT[A] follow-on contracts from the purview of this Court's jurisdiction." Accordingly, the court found that it had jurisdiction over IRTC's protest.

The court reached a similar conclusion in February in Raytheon Co. v. U.S.[4] Raytheon challenged its exclusion from the Missile Defense Agency's Glide Phase Interceptor prototype OTA program. The Raytheon court introduced a direct-benefit test to determine when OTAs fall within the COFC's bid protest jurisdiction.

Under this test, OTAs intended to directly provide the government with specific products or services constitute "procurements" for jurisdictional purposes, distinguishing such agreements from pure research grants designed to benefit the public generally. The critical factor for the Raytheon court was whether the OTA delivered direct benefits to the government through prototype development, testing and eventual acquisition.

Telesto's Modest Departure

The court adopted a different approach in Telesto Group v. U.S. Telesto protested its elimination from the Enterprise Business Systems-Consolidation OTA program. Through this OTA, the Army sought to create software through a seven-phase prototype project that would modernize warfighting capabilities by enabling integrated and auditable sustainment operations.

The prototype project planned to merge five defense business systems into a unified finance-logistics transactional core to address existing integration inefficiencies.

After being eliminated from the competition, Telesto challenged the Army's evaluation methodology during Steps 4 and 5 of the prototyping phase, alleging that the Army's evaluation process was arbitrary and capricious, and violated various statutory requirements.

Although the request for proposals contemplated the award of a separate follow-on production contract, the COFC dismissed the protest, holding it lacked jurisdiction over claims related to the OTA's prototype phase. The court explained that determining jurisdiction required an analysis of the program's principal purpose.

If the OTA's primary aim is to advance the government's acquisition strategy by securing specific products or services, then the agreement is a procurement. On the other hand, if the focus is on broader research and development that benefits the public or enhances technological innovation without an intent to acquire specific products or services, it is not a procurement.

For the Enterprise Business Systems-Consolidation program, the court concluded that the OTA was not a procurement because the program lacked a definitive commitment to award follow-on production contracts, and the agency eliminated Telesto during the prototyping phase rather than the follow-on production phase.

The court noted that the agency's decision whether to proceed with or forego a follow-on contract will vary from case to case, and for the Telesto court, that distinction provided the

critical difference between a procurement and not a procurement.

The court emphasized that its jurisdiction under Title 28 of the U.S. Code, Section 1491(b)(1), extends only to actions "in connection with a procurement or proposed procurement."

Because the Army had not committed to any specific procurement outcome and Telesto's elimination occurred during what the court characterized as pure prototype activities, the claims were "too remote from any procurement" to establish the necessary Tucker Act nexus.

The court concluded that its decision represented a modest departure from prior decisions finding OTA bid protest jurisdiction. In the Telesto court's view, it is not enough that the agency merely contemplates a follow-on procurement at the outset of an OTA for the project to be a procurement.

Rather, the procurement or proposed procurement stage is reached — and the court's Tucker Act jurisdiction is triggered — only when the prototype process is completed successfully and the agency decides to move forward to procure the prototype.

The court thus concluded that an OTA may be challenged at the outset for compliance with the OTA statutes, regulations and other generally applicable laws, or after the agency has announced that it intends to award a follow-on contract.

But challenges to an agency's conduct during the prototyping phase are outside the COFC's protest jurisdiction until the prototyping phase is concluded and the agency decides to acquire the prototype. As the court described it, during the prototyping phase of an OTA, there is a jurisdictional blackout that precludes judicial review.

Notably, however, the court left open the possibility that federal district courts might have jurisdiction to hear challenges during this jurisdictional blackout period. As the court explained, "[i]f the OT lacks a procurement, jurisdiction lies with a district court under the APA."

Implications for OTA Bid Protests

Although described by the court as a modest departure from prior decisions, the court's holding represents a significant shift in several respects.

First, as a practical matter, it could be difficult to distinguish between scenarios in which an OTA acquisition merely contemplates a follow-on procurement versus one where the agency has made a definitive commitment to proceed with an award.

An agency contemplating acquiring a product through a follow-on procurement is engaged in essentially the same activity as an agency that has committed to making such an acquisition: The agency is evaluating competing offerings with the goal of identifying whether and which prototype meets its needs and should receive a follow-on production award.

Second, the court's decision would appear to give agencies a clear road map for insulating OTA competitions from protests.

Under Telesto's reasoning, if an agency says that it is contemplating, rather than intending to make, follow-on awards; ensures down-selection occurs during designated prototyping

phases; and delays any formal decision about planned contract awards until after the prototype phases conclude, the agency's evaluation of competing offers during the prototype phase would appear to be insulated from protest by a disappointed offeror.

Moreover, OTA participants may not have standing to protest after the agency makes its ultimate award decision either.

Under Title 10 of the U.S. Code, Section 4022(f), a follow-on production contract may be awarded to transaction participants "without the use of competitive procedures" so long as competitive procedures were used for the selection of parties for participation in the transaction and the participants successfully completed the prototype project.

Accordingly, an agency could announce an OTA competition without explicitly notifying participants about the potential for a follow-on production contract, select offerors to participate in a prototyping effort using competitive procedures, down-select to a single offeror during the prototyping phase, and then subsequently decide to award a follow-on production contract to the sole remaining contractor without the use of competitive procedures.

Applying the Telesto framework to this situation, it appears that none of these agency actions would be subject to judicial review.

Conclusion

The Telesto decision marks another step in the evolution of OTA bid protest jurisdiction at the COFC. As agencies increasingly embrace OTAs as their preferred acquisition vehicles, continued judicial refinement of these jurisdictional concepts appears inevitable.

The decision's practical impact will likely depend on how agencies structure future OTA programs and whether other COFC judges adopt similar approaches to this jurisdictional analysis. Until the Federal Circuit — or perhaps Congress — steps in, it seems unlikely that contractors will have a definitive answer on whether OTAs are subject to bid protests.

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[1] Telesto Group, LLC v. United States, No. 1:24-cv-01784, 2025 WL 1551279 (Fed. Cl. June 2, 2025).

[2] 28 U.S.C. § 1491.

[3] Independent Rough Terrain Center, LLC v. United States, 172 Fed. Cl. 250, 257 (2024).

[4] Raytheon Company v. United States, 175 Fed.Cl. 281 (2025).