

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 11

NUMBER 7

July 2025

Editor's Note: The False Claims Act
Victoria Prussen Spears

601

The False Claims Act: Review and Outlook
Scott F. Roybal and Jennifer N. Le

603

**Justice Department's National Security Division Issues Second Declination Since
Issuance of Revised Corporate Enforcement Policy**
Craig R. Heeren, Peter W. Baldwin and Christopher B. Monahan

622

**Court of Federal Claims Deems Itself "De Facto Forum" for Other Transaction
Agreement Protests**
Roza Sheffield, Christian B. Nagel, Bailey Carolyn McHale and Holly A. Roth

627

In the Courts
Steven A. Meyerowitz

635

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:

Julie Chee at 1-800-306-5230
Email: Julie.Chee@lexisnexus.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
LexisNexis® Support Center <https://supportcenter.lexisnexus.com/app/home/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (518) 487-3385

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt)

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2025 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2017

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexus.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

ERIC S. CRUSIUS

Partner, Hunton Andrews Kurth LLP

PABLO J. DAVIS

Of Counsel, Dinsmore & Shohl LLP

MERLE M. DELANCEY JR.

Partner, Blank Rome LLP

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFcoat

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

KEITH SZELIGA

Partner, Sheppard, Mullin, Richter & Hampton LLP

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2025 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, the editor(s), RELX, LexisNexis, Matthew Bender & Co., Inc, or any of its or their respective affiliates.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Court of Federal Claims Deems Itself “De Facto Forum” for Other Transaction Agreement Protests

*By Roza Sheffield, Christian B. Nagel, Bailey Carolyn McHale
and Holly A. Roth**

In this article, the authors discuss a decision by the U.S. Court of Federal Claims holding that it has jurisdiction over a protest challenging an other transaction agreement award.

Judge Armando Bonilla of the U.S. Court of Federal Claims (COFC or Court) has weighed in on the ongoing debate about jurisdiction over protests of other transaction agreements (OTAs). The *Raytheon Co. v. United States* decision is intended to “streamline the litigation of these jurisdictional issues in future cases.”¹

Judge Bonilla’s opinion is not binding on other judges. However, the decision clarifies the Court’s jurisdiction over OTAs and represents progress in addressing the previously uncertain landscape of OTA jurisdiction. This decision, coupled with a March 6, 2025, U.S. Department of Defense (DOD) memorandum titled “Directing Modern Software Acquisition to Maximize Lethality” (SecDef Memo)² from Defense Secretary Pete Hegseth, has significant implications for contractors engaging in OTAs with DOD. In light of OTA funding increases in recent years, contractors should understand their ability to protest OTA awards.

THE FACTS OF *RAYTHEON*

The case before the COFC concerned a DOD Missile Defense Agency’s OTA for the development of missile defense capabilities.³ In 2021, the agency awarded OTAs for Phase I of the program to three defense contractors, then reduced the awardees to two in 2022 (Northrup Grumman and Raytheon).⁴ In

* The authors, attorneys with Holland & Knight LLP, may be contacted at roza.sheffield@hklaw.com, christian.nagel@hklaw.com, bailey.mchale@hklaw.com and holly.roth@hklaw.com, respectively.

¹ *Raytheon Co. v. United States*, No. 24-1824C (Fed. Cl. Feb. 24, 2025).

² “Directing Modern Software Acquisition to Maximize Lethality,” Sec. of Def., Dep’t of Def. (March 7, 2025), available at <https://media.defense.gov/2025/Mar/07/2003662943/-1/-1/1/DIRECTING-MODERN-SOFTWARE-ACQUISITION-TO-MAXIMIZE-LETHALITY.PDF>.

³ *Raytheon*, *supra*.

⁴ *Id.*

2023, the agency began Phase II; on Sept. 25, 2024, following a prototype test, the agency chose to move forward with only Northrup Grumman and discontinue Raytheon's participation in the program.⁵ Raytheon brought a bid protest to the Court on Nov. 6, 2024, challenging the agency's decision to eliminate Raytheon from the competition.⁶ The government moved to dismiss, arguing that OTAs are not "in connection with a procurement or a proposed procurement," as required under the Tucker Act, and do not qualify as a solicitation for a proposed contract.

THE COURT EXAMINES KEY PRECEDENT

The Court began its analysis by considering other decisions related to OTA jurisdiction. The Court examined the *Space Exploration Technologies Corp. v. United States (Space X)* decision, where a post-award bid protest of OTAs was ultimately transferred from the COFC to the appropriate U.S. district court.⁷ In *Space X*, the COFC limited its conclusions to the facts of the case. It attempted to distinguish between the agency's decisions that were "in connection with a procurement," therefore under the jurisdiction of the Tucker Act,⁸ and agency decisions that merely "related to" a procurement.⁹ The *Space X* court ultimately concluded the agency's decision regarding this prototype development agreement "did not involve the procurement of goods or services" and that the Tucker Act did not grant jurisdiction over this protest.¹⁰

In subsequent cases in 2021 and 2022, the Court found jurisdiction over post-award bid protests of OTAs and declined to transfer the cases to a district court. In *Kinemetrix, Inc. v. United States*, the Court "rejected the application of *Space X*" to the facts of that case and found the instant solicitation that requested a technical and cost proposal was directly connected with a contract award; the Court found jurisdiction over this protest because it was "in connection with a procurement."¹¹ In *Hydraulics International, Inc. v. United States*, the Court found a post-award bid protest of an OTA award was "in connection with a procurement or proposed procurement" because, unlike

⁵ Id.

⁶ Id.

⁷ Id. (citing *Space Expl. Techs. Corp. v. United States*, 144 Fed. Cl. 433 (2019)).

⁸ The Tucker Act, 28 U.S.C. § 1491, grants the Court of Federal Claims authority over bid protests.

⁹ Id.

¹⁰ Id.

¹¹ Id. (citing *Kinemetrix, Inc. v. United States*, 155 Fed. Cl. 777, 780–81 (2021)).

Space X, the prototype being developed was “specifically tailored” to the U.S. Army’s needs.¹²

Most recently, in 2024, the Court again considered its jurisdiction in *Independent Rough Terrain Ctr., LLC v. United States (IRTC)*.¹³ The *IRTC* Court considered that OTAs may themselves be procurements, not just decisions “in connection with a procurement” because the government was seeking goods or services.¹⁴

Raytheon builds off these key decisions, affirming the Court’s jurisdiction over OTAs.

OTA TREATMENT IN THE LAST DECADE

The government’s use of OTAs has undisputedly increased over time. The DOD has noted this trend by documenting “the number of actions increasing from 496 in FY 2017 to 4,391 in FY 2022 and total dollars obligated increasing from \$2.2 billion in FY 2017 to a peak of \$16.02 billion in FY 2020” (crediting the COVID-19 pandemic with high-dollar other transactions (OTs) in 2020).¹⁵

As the use of OTAs has evolved over the last decade, so, too, has the treatment of protests of OTA awards. Indeed, the DOD’s Guide to OTs in November 2018 states “bid protests are rare for [other transactions (OTs)]” with regard to the U.S. Government Accountability Office (GAO) because (1) “GAO has limited jurisdiction to review OT decisions and protests to GAO regarding OT awards are rare,” and (2) “[p]rotests to the U.S. Court of Federal Claims are also possible but are a rare occurrence.”¹⁶ The recent *Raytheon* decision will alter this 2018 assessment.

Perhaps the best case study for the treatment of OTAs by the GAO and federal district courts is the *MD Helicopters Inc. v. United States of America* cases.

¹² Id. (citing *Hydraulics Int’l, Inc. v. United States*, 161 Fed. Cl. 167, 171 (2022), appeal dismissed, No. 22-2287, (Fed. Cir. March 31, 2023)).

¹³ Id. (citing *Indep. Rough Terrain Ctr., LLC v. United States*, 172 Fed. Cl. 250, 257 (2024)).

¹⁴ Id.

¹⁵ Report to Congress On the Use of Other Transaction Authority for Prototype Projects In FY 2022, Dep’t of Def., Off. of the Under Sec. of Def. for Acquisition and Sustainment (April 2023).

¹⁶ Other Transactions Guide, Dep’t of Def., Off. of the Under Sec. of Def. for Acquisition and Sustainment (Nov. 2018); see also Other Transactions Guide, Dep’t of Def., Off. of the Under Sec. of Def. for Acquisition and Sustainment (Jul. 2023) (This DOD guide no longer indicates that protests are rare or discusses GAO jurisdiction. Instead, DOD directs agreement officers to “immediately confer with legal counsel” after a protest is raised.).

The GAO reiterated its rejection of jurisdiction over OTAs in its 2019 decision in *MD Helicopters*, which states “agreements issued by the agency under its ‘other transaction’ authority ‘are not procurement contracts,’ and therefore we generally do not review protests of the award or solicitations for the award of these agreements under our bid protest jurisdiction.”¹⁷ The case was eventually filed in a federal district court. The plaintiff argued this federal district court had jurisdiction under the Administrative Procedure Act (APA). This plaintiff claimed that the government’s OTA award decision was arbitrary and capricious, therefore a violation of the APA. Relying on the COFC’s *Space X* decision, the *MD Helicopters* Court found that the Administrative Dispute Resolution Act (ADRA) limited its jurisdiction.¹⁸ It further asserted that the protestor was “objecting to a solicitation” and that ADRA authorized only the COFC jurisdiction over such a matter.¹⁹ Because the GAO and federal district courts claimed to not have jurisdiction over OTA protests, the ability to protest OTAs at the COFC is crucial for judicial review of OTA award decisions.

THE COURT FINDS AUTHORITY TO REVIEW PROTESTS OF OTAS

In *Raytheon*, the Court concluded that the Tucker Act grants it authority over OTA bid protests. The Court does not go as far as the *ITRC* decision to consider the OTA a procurement, but settles on well-tread ground that “at a minimum,” the agency’s solicitation demonstrates that the OTA award decision was “in connection with a procurement or proposed procurement.”²⁰ Indeed, the novelty of the Court’s reasoning in this decision was its proposition of a “working definition” of OTAs as “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.”²¹

The fact the Court found most persuasive was the agency’s “demonstrate[d] intent” to award a follow-on production contract if “the proposed solution is proven.”²² The Court also found relevant the nature of products under development. The Court distinguished the facts *Raytheon* from *Space X* because

¹⁷ MD Helicopters Inc., B-417379, 2019 CPD ¶ 120 at 2 (Comp. Gen. Apr. 4, 2019) (citing Blade Strategies, LLC, B-416752, Sept. 24, 2018, 2018 CPD ¶ 327 at 2; Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22 at 3).

¹⁸ MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003, 1013 (D. Ariz. 2020).

¹⁹ Id. at 1011.

²⁰ Raytheon.

²¹ Id.

²² Id.

in *Raytheon*, the products being developed were “unique to the federal government” without broad commercial applications.²³ The Court found this case’s missile development program to be more similar to the military vehicle development programs in *Hydraulics International* and *IRTC* because the prototypes were tailored for government use. It was this similarity to *Hydraulics International* and *IRTC* that formed the basis for the Court to grant jurisdiction.²⁴ In consideration of the facts of *Raytheon* and the distinction from the facts in *Space X*, the Court dismissed the jurisdictional challenges to the protest.

THE FUTURE OF OTAS AND OTA LITIGATION

The Court opined on the predictability resulting from the *Raytheon* decision. Pointedly, the Court stated that it would be “the *de facto* forum for bid protests involving [OTs and OTAs].”²⁵ The Court’s express goal was to “articulat[e] a predictive forum selection standard” and “streamline the litigation of these jurisdictional issues in future cases.”²⁶ The precedent of this decision likely will result in fewer motions challenging venue or jurisdiction succeeding, thus reducing the barrier to entry to OTA protests.

Because it is more predictable, the COFC should be prepared for more OTA bid protest litigation. Additionally, OTA bid protest litigation could be more prevalent simply as a result of the increased use of OTA and protests in general.

Procurement trends have historically shown an increase in OTAs.²⁷ In September 2024, the DOD proposed a rule that would expand the definition of “appropriate circumstances” to award a prototype OTA and add authority for follow-on production contracts.²⁸ These new guidelines show the DOD’s continued interest in new applications for and increased use of OTAs.

The new administration’s priority of running the federal government like a business also bodes well for OTAs. OTAs align with the current administration’s expressed interest of efficiency and flexibility.²⁹ Utilizing the Department of

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Report to Congress On the Use of Other Transaction Authority for Prototype Projects In FY 2022.

²⁸ 89 FR 71865, 71866 (However, given the statutory requirements of OTs, DOD estimates “implementation of the proposed rule will result in less than a 10% increase new OT awards.”).

²⁹ Gregory Korte, “Trump Agencies Move to Centralize Contracts in Bid to Cut Costs,” *Bloomberg Law* (Feb. 26, 2025), available at <https://news.bloomberglaw.com/us-law-week/trump->

Government Efficiency (DOGE), the new administration is working to limit government contracts and procurement spending generally. An executive order, “Implementing the President’s ‘Department of Government Efficiency’ Cost Efficiency Initiative,” issued on Feb. 26, 2025, asked agency heads to terminate contracts when allowable and begin “a comprehensive review of each agency’s contracting policies, procedures, and personnel.” This executive order will likely result in delays in contractors receiving new contract awards and modifications.

OTAs also allow for the integration of commercial applications, with the expectation of reduced cost, for government contracts. Major defense contractor L3Harris wrote a letter to DOGE with its proposals to reduce spending on government contracts, specifically encouraging DOGE to commercialize defense acquisition process.³⁰

The SecDef Memo emphasizes the importance of using streamlined acquisition pathways, including OTAs, to enhance the efficiency and effectiveness of defense procurement.³¹ The SecDef Memo mandates that all DOD components use the Pentagon’s Software Acquisition Pathway and other authorities designed to leverage commercial capabilities, such as Commercial Solutions Openings and Other Transaction contracting approaches.³² This directive aims to speed up the process for fielding software-heavy systems and underscores the DOD’s commitment to performance-based outcomes. This policy shift aims to reduce bureaucratic barriers, accelerate procurement timelines and attract nontraditional defense contractors by offering more flexible contractual frameworks. The memorandum highlights the DOD’s intent to leverage OTAs to rapidly integrate cutting-edge technologies and maintain a competitive edge.

It is not surprising that the current administration encourages the use of OTAs. OTAs are special contractual instruments that allow federal agencies to engage in agreements outside the traditional Federal Acquisition Regulation (FAR) framework. They are particularly useful for research, prototyping and production projects where conventional contracts may be too restrictive. By utilizing OTAs, the DOD can collaborate more effectively with innovative companies that might otherwise be deterred by the complexities of standard government contracts.

Finally, fewer traditional procurement contracts will likely increase competition for, and protests resulting from, all procurements, including OTA

agencies-move-to-centralize-contracts-in-bid-to-cut-costs.

³⁰ A Letter to the Leaders of the DOGE,” L3Harris (Jan. 15, 2025), available at <https://www.l3harris.com/newsroom/editorial/2025/01/letter-leaders-doge>.

³¹ Directing Modern Software Acquisition to Maximize Lethality,” supra n. 2.

³² Id.

protests. This administration's goal of reducing spending on government contracts will ultimately make competition for federal contracts such as OTAs more fierce and push companies whose pursuit of an OTA is to litigate. Taking all of these factors into consideration, government contractors should be aware of the COFC jurisdiction over OTA bid protests and their ability to litigate the OTAs in the COFC if they are unsuccessful.

IMPLICATIONS FOR DEFENSE CONTRACTORS

The increased emphasis on OTAs presents both opportunities and challenges for defense contractors:

- *Access to Nontraditional Vendors.* The flexibility of OTAs makes it easier for the DOD to partner with startups and tech firms that are at the forefront of innovation but lack experience with government contracting. Traditional defense contractors may need to adapt by forming partnerships or consortia with these nontraditional vendors to remain competitive.
- *Accelerated Procurement Processes.* OTAs can significantly shorten procurement cycles, allowing for faster deployment of new technologies. Contractors must be prepared to operate within these expedited timelines, which may require more agile development and decision-making processes.
- *Compliance and Oversight.* Though OTAs offer flexibility, they also require diligent attention to compliance and ethical standards. Robust compliance programs remain crucial, even within the flexible OTA framework.

PRACTICAL TIPS FOR CONTRACTORS

To navigate the evolving landscape effectively, contractors should consider the following strategies:

- *Develop Agile Contracting Capabilities.* Invest in training and infrastructure that enable rapid proposal development and project execution to align with the expedited timelines associated with OTAs.
- *Enhance Compliance Programs.* Establish comprehensive compliance and ethics programs to prevent misconduct. Regular audits and employee training can mitigate the risk of violations that could lead to substantial penalties.
- *Engage with Nontraditional Partners.* Explore collaborations with startups and tech companies to integrate innovative solutions into defense projects. Such partnerships can enhance competitiveness in securing OTA-based contracts.

- *Stay Informed on Policy Developments.* Regularly monitor DOD communications and policy changes related to OTAs to anticipate shifts in procurement strategies and adjust business approaches accordingly.

By proactively adapting to the DOD's increased use of OTAs and learning from recent industry and jurisdictional developments, defense contractors can position themselves for success in a rapidly changing procurement environment.

Staying informed about the latest legal developments and DOD policies regarding OTAs is crucial for successfully pursuing and performing OTA agreements. Contractors should ensure thorough documentation of all interactions and agreements related to OTAs, including maintaining detailed records of communications, proposals and contract modifications. Engaging experienced legal counsel to review OTA agreements and provide guidance on potential legal challenges can help identify and mitigate risks associated with OTAs. Additionally, contractors should be prepared to file a protest if they believe an OTA award was improperly executed, as the *Raytheon* decision provides a clear precedent for challenging OTA awards in the COFC.