

COFC Adds Clarity to Standards for Establishing Jurisdiction and Standing in Other Transaction Protests

Litigation Alert

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The Court of Federal Claims (COFC) exercised jurisdiction last week in a bid protest of an award issued under the Commercial Solutions Opening Pilot Program (CSO) – the [latest decision](#) addressing the Court's ability to hear protests involving Other Transaction Authority (OTA) acquisitions. The Court's decision in *Kinometrics Inc. v. U.S. et al.* is instructive because it provides additional insight into when a disappointed offeror can (and cannot) bring an OTA protest at COFC.

Background

Established in 2017, the CSO authorizes federal agencies to acquire innovative and commercial solutions from non-traditional contractors, either through OTA contracts or fixed-price contracts governed by the Federal Acquisition Regulation (FAR).

The Air Force issued an OTA-based CSO to acquire seismic equipment for use in monitoring nuclear treaty compliance and awarded a contract to Nanometrics, Inc. (Nanometrics). A disappointed offeror, Kinometrics, Inc. (Kinometrics), protested the award at COFC, arguing that the Air Force applied unstated evaluation criteria and conducted an irrational technical evaluation. The government and intervenor moved to dismiss the protest for lack of jurisdiction, lack of standing, and for failure to state a claim upon which relief can be granted. COFC addressed the issues of jurisdiction and standing before turning to the merits.

Summary

First, COFC noted the well-established principle that Tucker Act jurisdiction is limited to protests filed "in connection with a procurement or proposed procurement." According to the Court, this language precludes COFC from exercising jurisdiction over protests involving OTA solicitations that are "separate and distinct" from procurement solicitations. For example, in *Space Expl. Techs. Corp. v. United States*, 144 Fed. Cl. 433 (2019), COFC held that an OTA solicitation to develop space launch infrastructure was not "in connection with" a future, anticipated procurement solicitation for space launch services because, in that case, an offeror could be considered for award under the procurement solicitation even if it was not selected for an OTA award. The facts in *Kinometrics* were different, however, because the OTA-based CSO contemplated delivery of equipment to a seismic station in Alaska, and the government explicitly recommended against awarding a procurement contract to the protester. The jurisdictional requirements of the Tucker Act, therefore, were satisfied because the CSO solicitation had "a direct effect on the award of a contract" to Nanometrics.

Second, Nanometrics, as the intervenor, also challenged Kinometrics' standing to bring the protest. Nanometrics argued that CSOs are not a traditional acquisition method where "offerors compete against one another" for award. Instead, according to Nanometrics, the proposals in a CSO "need not be evaluated against one another," and thus are similar to broad agency announcements, which "arguably" do not provide a disappointed offeror standing to challenge an award. Alternatively, Nanometrics argued that Kinometrics lacked standing because the CSO contemplated multiple awards and, therefore, Kinometrics could only challenge its exclusion, not an award to Nanometrics. COFC rejected both arguments, finding that Kinometrics submitted a technically acceptable proposal, the proposal was evaluated by the Air Force, and Kinometrics had a substantial chance of being awarded the contract. Nothing more was needed to satisfy the standing requirement.

Third, despite finding jurisdiction and standing, the Court declined to adopt Kinometrics' substantive arguments. COFC held that, in reviewing the Air Force's OTA award decision, it must apply a highly deferential standard, especially in the "context of a peer-review process regarding specialized, scientific equipment." According to the Court, there was no indication in the record that the Air Force applied unstated evaluation criteria or otherwise conducted an irrational technical evaluation. The Court, therefore,

granted the government's motion to dismiss for failure to state a claim.

Key Takeaways

Though the protest ultimately was unsuccessful, the *Kinometrics* decision adds two important pieces to the OTA protests puzzle at COFC:

- First, *Kinometrics* is yet another instructive example of when COFC will find that an OTA solicitation has a "connection with a procurement or proposed procurement" sufficient to establish Tucker Act jurisdiction. In this regard, it seems increasingly clear that COFC will find such a "connection" if the OTA solicitation and technical evaluation will result in awarded work or otherwise impact the award of a future, contemplated procurement contract such that the two opportunities are inherently linked — not "separate and distinct."
- Second, the *Kinometrics* decision suggests that a protester can establish standing in an OTA protest as long as the protester can demonstrate that it had a "substantial chance" of being selected for award, regardless of how the agency structures the evaluation process. A protester can satisfy the "substantial chance" standard with evidence that it submitted an acceptable proposal and/or that the agency evaluated or otherwise considered its proposal for award (*e.g.*, by engaging in substantive discussions with the protester or requesting proposal revisions).

If you have any questions about the *Kinometrics* decision or other OTA protest matters, please contact one of the Miller & Chevalier attorneys listed below.

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