WITHIN THE ORBIT OF THE COURT OF FEDERAL CLAIMS: REQUIRING A MONEY-MANDATING CLAUSE TO COLLAPSE THE JURISDICTIONAL BLACK HOLE OF OTHER TRANSACTION AGREEMENT PERFORMANCE DISPUTES

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I. INTRODUCTION

In October 2018, the U.S. Army Contracting Command-Redstone sought to update its helicopter fleet and issued a solicitation for participation in a unique new program, the Future Attack Reconnaissance Aircraft Competitive

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Prototype program. The Army designed the program using a "phased approach with aggressive deadlines" to progressively down-select among candidates until only one remained.[1] Phase 1 would give prospective bidders a total of nine months to develop preliminary designs.[2] Phase 2 would reduce the pool of bidders to only two, who would, in later phases, design, build, and test their respective prototype aircraft before providing those prototypes to the Army for evaluation.[3] In the final phase, a single bidder would receive a follow-on production contract for a full system integration, qualification, and production of the proposed prototype.[4]

Due to national security concerns, the Army needed to execute this Prototype program quickly.[5] Traditional government contracting methods prioritize regulation over efficiency and are therefore less than ideal in situations where speed is a top priority.[6] So, the Army turned to a unique contracting vehicle—one that allowed for quicker processing times for procurement contracts: an Other Transaction Agreement (OTA).[7] Unlike traditional government contracts, an OTA is a type of government contract that is largely free from regulation, affording the government more flexibility and, consequently, faster results. This means that, while OTAs are still legally binding contractual instruments, they are free from the bureaucratic red tape of the Federal Acquisition Regulation (FAR) that governs most procurement contracts.[8]

Given their flexibility, government agencies have increasingly turned to OTAs to accomplish faster and more efficient procurements.[9] But despite the increased use of OTAs, certain fundamental questions remain surrounding OTAs in practice. One key question concerns how disputes arising out of OTAs can be resolved.

Bid protests, or disputes arising at the contract formation stage, have long been the subject of significant litigation. According to recent decisions, OTA bid protests likely can be heard at either the U.S. Court of Federal Claims (COFC) or the U.S. district courts.[10] Contractor claims, or disputes arising

1. MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003, 1006 (D. Ariz. 2020).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. Matthew Savare, *The Absurdity of Government Contracting*, AFCEA (June 12, 2020), https://www.afcea.org/content/absurdity-government-contracting.
7. *MD Helicopters*, 435 F. Supp. 3d at 1006.
8. Nathaniel E. Castellano, "*Other Transactions*" *Are Government Contracts, and Why It Matters*, 48 Pub. Cont. L.J. 485 (2019).
9. *See* discussion *infra* Part II.C.
10. In 2019, following an U.S. Air Force solicitation for a series of Other Transaction (OTA) awards to develop space launch vehicles as part of the National Security Space Launch program, contractor Space Exploration Tech., Corp., (SpaceX) filed a bid protest with the United States Court of Federal Claims. Space Expl. Tech., Corp., v. United States, 144 Fed. Cl. 433, 436, 438–39 (2019). The case was dismissed for lack of subject matter jurisdiction, with Judge Griggsby categorizing OTAs as "not in connection with a procurement or proposed procurement," and so more appropriately heard in the district courts pursuant to the Administrative Procedures Act (APA). *Id.* at 442–43, 446. However, in January 2020, Judge Teilborg in the United States District Court for the District of Arizona dismissed a similar protest brought by MD Helicopters, Inc., also for lack

during the performance period of OTAs, however, are a different animal entirely, and the path to their resolution is less clear. Because of the nuanced differences between traditional government contracts and OTAs, regulations governing subject matter jurisdiction over contractor claims do not clearly apply to claims arising under OTAs.[11] Rather, OTAs are only subject to jurisdiction in the COFC if the parties can point to a separate and distinct "money-mandating" source of law, affording contractors the ability to recover money damages from the government.[12] For contractors, however, that option is not always possible, creating a "jurisdictional black hole" in which "companies who are looking to participate in the OTA process and who find themselves aggrieved . . . do not have a clear remedy."[13]

Currently, this jurisdictional issue can, in some cases, be resolved in advance at the formation stage through negotiation of a money-mandating clause by the parties, affording the COFC subject matter jurisdiction over claims pursuant to the Tucker Act. However, putting the burden on contractors to negotiate such a clause during formation is particularly problematic from a policy perspective. This burden requires contractors to think through a complex jurisdictional question regarding a dispute arising out of an agreement that they have yet to perform, with little case law and guidance giving them notice of or knowledge on how to protect their interests. Additionally, OTAs are specifically designed to attract innovative and nontraditional companies that often have no experience contracting with the government.[14] Without traditional government contracting experience, these contractors often lack the technical and legal knowledge to recognize this jurisdictional issue upfront—meaning that they are unlikely to engage in negotiations or insist on the inclusion of a money-mandating clause.[15] This lack of experience can be fatal, as a failure to negotiate the inclusion of such a clause can jeopardize these contractors' avenues for recourse in the event a dispute arises.[16] The resulting uncertainty could undermine the purpose and goals of OTAs entirely, since the nontraditional contractors that they are designed to attract will be deterred from working with the government because they could be wronged and unable to recover for the simple reason that there is no forum to hear their claims.

This article proposes a two-part solution for resolving the "jurisdictional black hole" issue related to contractor claims arising under OTAs. First, Congress should implement a new mandatory provision requiring the inclusion of a contract clause in OTAs that specifically provides the COFC jurisdiction

of subject matter jurisdiction, finding that the awarded OTA was still a contract and therefore not subject to litigation under the APA. *MD Helicopters*, 435 F. Supp. 3d at 1010.

11. *See* discussion *infra* Part III.B.

12. *See id.*

13. Daniel Wilson, *Court Cuts off Last Avenue for Prototype Deal Protests*, Law360 (Jan. 31, 2020), https://www.law360.com/articles/1239395/court-cuts-off-last-avenue-for-prototype-deal-protests.

14. *See* discussion *infra* Part II.B.

15. *See id.*

16. *See* Wilson, *supra* note 13.

over claims through the Tucker Act. Second, courts should expand the *Christian* doctrine to apply this regulation to all OTAs, affording OTA contractors a forum for recourse in the event of a dispute, even if the mandatory jurisdictional clause was not included in the text of the OTA during contract formation.

Part II discusses the history of both traditional government contracts and OTA authority and explains the recent trend of increased OTA awards. Part III considers the appropriate forum for dispute resolution of OTA performance-related claims. Specifically, after eliminating the U.S. district courts and the Boards of Contract Appeals as possible fora, the author concludes that the COFC is the appropriate forum to resolve these disputes. Then, Part III considers the COFC's statutory grants of jurisdictional authority and argues that the COFC should have jurisdiction to resolve contractor claims arising under OTAs pursuant to the Tucker Act. Finally, Part IV argues that, to fulfill the money-mandating requirement of the Tucker Act, Congress should implement a statutory provision requiring the inclusion of a contract clause that specifically affords OTA contractors the right to seek money damages in the COFC pursuant to the Tucker Act. Because this clause would be mandatory, and would reflect an important public policy objective in government procurement, the author then argues that the *Christian* doctrine can and should be expanded to read in this clause if it is omitted from contractual texts during formation of OTAs.

II. BACKGROUND

Government contracts come in many shapes, sizes, and forms. With those different characteristics come unique requirements, or lack thereof. Today, traditional government contracts are one of the most heavily regulated areas of law—and for good reason—as they account for a significant portion of government spending.[17] This regulatory oversight often comes at the price of efficiency, however, as government contracts can take months or even years to award. The end user of the procured product or service therefore may not see results for years. But this delay is too steep a price at times. In certain cases, therefore, the government may have the option of awarding an OTA—"a special type of legal instrument used for various purposes by federal agencies. . . . [The Government Accountability Office]'s audit reports to the Congress have repeatedly reported that [OTAs] are 'other than [procurement] contracts, grants, or cooperative agreements that generally are not subject to

17. *See* U.S. Dep't of the Treasury, 2020 Financial Report of the United State Government (2021) (stating that the U.S. government's total spending for FY 2020 was $7.4 trillion); U.S. Gov't Accountability Off., *A Snapshot of Government-Wide Contracting for FY 2020 (Infographic)*, U.S. Gov't Accountability Off.: WatchBlog (June 22, 2021), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic (stating that the federal government's spending on traditional government contracts in FY 2020 was $648.6 billion).

federal laws and regulations applicable to procurement contracts.'"[18] With this backdrop, this Part contrasts the basic principles of traditional, FAR-regulated government contracts with the history of OTAs and explains why the rise in OTA awards has been and is likely to continue to be significant.

A. Traditional Government Contracts and the Christian *Doctrine*

Dating back to the 1700s, United States government contracting is, quite literally, older than the country. The New World, while technically under British and French control, was without the industrial and infrastructural support that existed in Europe. Unlike the self-sufficient governments of their rulers, the colonial governments became dependent on private persons and businesses for many of their needs.[19] When the thirteen colonies severed ties with Britain and propelled themselves into war with arguably the most powerful nation in the world at the time, they also cut off their largest source of supplies.[20] As a result, the Continental Army relied on a makeshift procurement system of private merchants to supply weapons, clothing, and food for their soldiers.[21]

Unlike the sophisticated web of laws and regulations government contractors must navigate today, "government contracts" during the Revolutionary War functioned more like carte blanche licenses for contractors to do whatever was necessary to achieve the Army's stated needs.[22] These free-for-all–style contracts quickly became unworkable, however.[23] Among other issues, contract payment schemes provided for a five percent commission to be paid to contractors on all money they spent during performance; what resulted was a system where contractors were not only discouraged from cost-saving, but actually incentivized to spend as much money as possible.[24] Additionally, contractors used marketplace price hijacking as a way to hike up market prices, sometimes even after making formal offers.[25] On top of wasteful spending practices, favoritism and nepotism were commonplace.[26]

18. Space Expl. Tech., Corp. v. United States, 144 Fed. Cl. 433, 435 (2019) (quoting Morpho-Trust USA, L.L.C., B-412711, 2016 CPD ¶ 133, at 6 (Comp. Gen. May 16, 2016)). While not *procurement* contracts, this article assumes that OTAs are legally binding contractual agreements and accordingly refers to OTAs as contracts throughout. *See generally* Castellano, *supra* note 8, at 487–88, 490.

19. For example, in 1756, Jonathan Trumbull, an independent merchant and future Connecticut governor, was sent to supply a brigade of troops with "refreshments and clothing" during the French and Indian War. *See* James Nagle, A History of Government Contracting 13 (2d ed. 1999).

20. *See id.* at 12.

21. *See* Christopher R. Yukins, *The U.S. Federal Procurement System: An Introduction*, 2017 Upphandlingsrättslig Tidskrift 69, 70 (2017).

22. Nagle, *supra* note 19, at 13.

23. *See id.* at 16–20.

24. *See id.* at 13.

25. *See id.* at 14.

26. *See id.*

This flawed system precipitated what is today one of the most heavily regulated areas of law.[27] Indeed, modern government procurement regulations have immense force and power on their own; however, their power surpassed even their written texts in 1963 through a landmark decision from the Court of Claims interpreting an Army Corps of Engineers construction contract.[28] In 1958, the Department of the Army deactivated its base in Fort Polk, Louisiana, prompting the Army Corps of Engineers to terminate its $32.9 million construction contract with the company G.L. Christian & Associates (G.L. Christian).[29] When G.L. Christian submitted claims for costs incurred, settlement expenses, and lost profits, the Department of the Army attempted to settle those claims pursuant to its termination for convenience power[30] and denied G.L. Christian's claim for anticipatory profits.[31] The language of the contract, however, did not expressly permit the Army to terminate the contract for convenience.[32] As such, G.L. Christian contended that the contract's termination therefore constituted a breach of contract, entitling G.L. Christian to common law damages, including anticipatory profits.[33]

In its groundbreaking decision, the Court of Claims wrote that, although the Fort Polk contract did not contain any provision expressly authorizing the Army to terminate the contract for convenience, "it is both fitting and legally sound to read the termination article . . . as necessarily applicable to the present contract and therefore as incorporated into it by operation of law."[34] The court reasoned that the contract was bound by Section 8.703 of the Armed Services Procurement Regulations, which required the termination for convenience clause to be inserted in all fixed-price contracts over $1,000.[35] The court further noted that termination for convenience principles, including the limitation on anticipatory profits, are "a deeply engrained strand of public procurement policy," dating back to World War I.[36] Accordingly, despite not actually being included in the text of the contract, the court read in the ter-

27. Government contracts are subject to regulation from, among others: Federal Acquisition Regulation (and supplements) (Title 48 of the Code of Federal Regulations); Federal Acquisition Streamlining Act of 1994 (Pub. L. No. 103-355, 108 Stat. 3243); Federal Acquisition Reform Act of 1996 (Pub. L. No. 104-106, 110 Stat. 186); Competition in Contracting Act (U.S.C. Titles 10, 31, 41); Buy American Act (41 U.S.C. § 4303(c)); Small Business Act (15 U.S.C. § 632); Trade Agreements Act (19 U.S.C. § 2501); Fair Labor Standards Act (29 U.S.C. §§ 201–219); Davis-Bacon Act (40 U.S.C. § 3144); Drug-Free Workplace Act of 1988, 41 U.S.C. § 8102(b); Service Contract Act, 41 U.S.C. § 6706; Walsh-Healey Act, 41 U.S.C. § 6504; Office of Federal Procurement Policy Act, 41 U.S.C. § 1101; Federal Property and Administrative Services Act, 40 U.S.C. §§ 101–126; Truthful Cost or Pricing Data, 41 U.S.C. §§ 3501–3509; Tucker Act. 28 U.S.C. § 1491; Contract Disputes Act, 41 U.S.C. §§ 7101–7109; False Claims Act, 31 U.S.C. § 3729.

28. *See* G. L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963).

29. *See id.* at 420.

30. *See id.* at 423.

31. Typically, a termination for convenience provides an allowance for profits on work already performed but prohibits all anticipatory profits. *See id.*

32. *See id.* at 424.

33. *See id.* at 423.

34. *Id.* at 427.

35. *See id.* at 424–25.

36. *Id.* at 426.

mination for convenience clause and found it to still have the force and effect of law.[37]

Today, the import of this case, or what has become known as the *Christian* doctrine, is alive and arguably stronger than ever. Through a series of decisions, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has expanded the doctrine to require that any "statute or regulation that expresses a significant or deeply engrained strand of public procurement policy shall be read into a federal contract by operation of law, even if the clause is not in the contract."[38] In practice, this means that government contractors cannot avoid or evade procurement policies set forth by Congress or federal agencies—giving even more force to the already powerful bite of government contract regulations.[39] The repute of the *Christian* doctrine thus makes even more stark the difference between traditional government procurement contracts and the largely unregulated industry of OTAs.

B. The Historical Background of Other Transaction Agreements

By the 1950s, the cumbersome government procurement system proved unworkable in light of the Space Race, leading to the creation of a new type of government contracting authority: OTAs. On October 4, 1957, the Soviet Union launched the world's first artificial satellite, Sputnik, and plunged two battling nations into what would become one of the most defining power struggles of the century.[40] The successful Soviet launch signaled that the communist nation's technological capabilities were advancing rapidly.[41] The launch also warned the United States that it was "falling behind in space."[42] In response, Congress held a series of emergency hearings to draft legislation that would create an agency devoted to space and to develop a mechanism for that agency to quickly and efficiently procure the tools necessary to accomplish its mission.[43] What resulted was the National Aeronautics and Space Act of 1958 (Space Act).[44]

The Space Act created the National Aeronautics and Space Administration (NASA), an agency designed to accomplish the following: "(1) plan, direct, and

37. *See id.*

38. Merle M. Delancey, Jr., *What Is the Christian Doctrine and Why Should You Care?*, Blank Rome LLP (Nov. 19, 2018), https://governmentcontractsnavigator.com/2018/11/19/what-is-the-christian-doctrine-and-why-should-you-care; *see also* K-Con, Inc. v. Secretary of the Army, No. 17-2254, 2018 WL 5780251 (Fed. Cir. Nov. 5, 2018); S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072, 1075 (Fed. Cir. 1993); Gen. Eng'g & Mach. Works v. O'Keefe, 991 F.2d 775, 775 (Fed. Cir. 1993).

39. *See* DeLancey, Jr., *supra* note 38.

40. National Aeronautics and Space Administration (NASA), *Sputnik and the Dawn of the Space Age*, NASA History Division, https://history.nasa.gov/sputnik.html (last visited Apr. 8, 2021).

41. *See* Moshe Schwartz & Heidi M. Peters, Cong. Research Serv., R45521, Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress 1 (Feb. 22, 2019).

42. *Id.*

43. *See id.*

44. National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, 72 Stat. 426-1 (codified at 42 U.S.C. ch. 26 § 2451 et seq.).

conduct aeronautical and space activities [and] (2) arrange for participation by the scientific community in planning scientific measurements and observations to be made through use of aeronautical and space vehicles."[45] In many ways, NASA would function like a traditional government agency. Recognizing the importance of NASA's functions and the burdens of the heavily regulated government contracts system, however, Congress gave NASA "the necessary freedom to carry on research, development, and exploration . . . to insure the full development of these peaceful and defense uses without unnecessary delay."[46] Accordingly, Congress granted NASA broad authority to "enter into and perform such contracts, leases, cooperative agreements, or *other transactions* as may be necessary."[47] Pursuant to this authority, the phrase "other transactions" was intended to be a sort of catchall for contracts that NASA might enter into that do not squarely fit within the existing contracting mechanisms of procurement contracts, grants, or cooperative agreements.[48] Standing outside these traditional mechanisms, OTAs offered a streamlined acquisition process designed to attract nontraditional government contractors.[49]

In the midst of the Space Race, Congress hoped that these relaxed procedures and nontraditional contractors would provide innovative approaches to achieving NASA's mission.[50] Acting on this hope, Congress made a tradeoff: it allocated more risk to the government in exchange for more flexibility. Specifically, without traditional mechanisms of contract administration, OTAs involve minimal government oversight and accountability protections, and even the formation procedures place the government in the unusual position of "playing on the same field" as contractors, without the advantage of having superior bargaining power.[51] At the time, this tradeoff made sense because OTA authority was widely considered a tool of last resort.[52] That, however, has changed along with the rest of the world.

45. *Id.*
46. H.R. Rep. No. 85-2166, at 16 (1958).
47. National Aeronautics and Space Act of 1958, H.R. 12575, 85th Cong. § 203(5) (emphasis added).
48. *See* David S. Schuman, *Space Act Agreements: A Practitioner's Guide*, 34 J. Space L. 277, 278 (2008).
49. *See infra* note 61.
50. *See id.*
51. This means that contractors, as opposed to the government, drive pricing, deliverables, and intellectual property rights in the OTA arena. *Id.* In addition:

> OTAs generally are not subject to many of the federal laws . . . that protect the government and taxpayers, including the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS), competition requirements, the Truth in Negotiations Act, the Procurement Integrity Act, Cost Accounting Standards, audit access for examination of contractor records by auditing agencies, the Bayh-Dole Act, and transparency protections, [which] not only protect against waste, fraud, abuse, and corruption, but also provide mechanisms for ensuring fair and reasonable pricing, and for government ownership of intellectual property rights. *Id.*

52. *See id.*

C. Where Other Transaction Agreements Stand Today

In 1989, through the FY1990 National Defense Authorization Act (NDAA), Congress expanded the breadth of OTA authority to an additional agency, the Defense Advanced Research Project Agency, permitting the Secretary of Defense to engage in advanced research projects via OTAs.[53] Several years later, in 1993, Congress again expanded OTA authority, this time permitting the Department of Defense (DoD) to use OTAs for prototype production contracts.[54] Over the following decades, Congress gradually expanded OTA authority further through subsequent NDAAs, eventually codifying it as part of the permanent procurement authority of the DoD and a small conglomerate of other federal agencies in 2014.[55] That expansion has resulted in a drastic change in how agencies use OTAs.

Once a tool of last resort because of their lack of oversight, OTAs now account for billions of annual U.S. contract spending per year. In 2019, the federal government spent nearly $7 billion in OTA awards; then in 2020, experts estimated the federal government spent nearly $18 billion in OTA awards.[56] This growth may be alarming, but perhaps not surprising. While the DoD currently accounts for nearly ninety percent of OTA awards, other agencies have recognized the appeal of using OTAs.[57] In practice, the DoD OTAs, and therefore the vast majority of OTAs, fall into two categories: (1) basic, applied, or advance research contracts;[58] and (2) prototype production contracts.[59] Under either category, OTAs are legally binding contracts, but they are not covered by the traditional government procurement regulations.[60]

Because of their flexibility and relaxed procedures, OTAs offer a unique mechanism for federal agencies to procure goods and services in a matter of weeks, where such procurements might otherwise require months if not years.[61] Indeed, as the United States tackles more complex threats, OTAs are becoming a particularly attractive alternative method for procuring goods and services quickly. For example, as federal spending has been recently aggravated

53. 10 U.S.C. § 2371.

54. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845, 107 Stat. 1547, 1554 (1993).

55. *Other Transaction Guide*, Defense Acquisition Univ., https://aaf.dau.edu/aaf/ot-guide/history (last visited Apr. 8, 2021).

56. Tom Temin, *Pandemic-Related Costs, OTAs Accelerated Agency Contract Spending for 2020*, Fed. News Network (Jan. 13, 2021), https://federalnewsnetwork.com/contracting/2021/01/pandemic-related-costs-otas-accelerated-agency-contract-spending-for-2020.

57. Because the DoD OTAs account for such a large percentage of present-day OTAs awarded, the solutions proposed by this article will be tailored to the DoD OTAs. *See* Gregory Sanders, *2021 Defense Acquisition Trends: Topline DoD Trends After a Half Decade of Growth*, Ctr. for Strategic & Int'l Studs. (Dec. 2, 2021), https://www.csis.org/analysis/2021-defense-acquisition-trends-topline-dod-trends-after-half-decade-growth.

58. 10 U.S.C. § 2371.

59. 10 U.S.C. § 2371(b).

60. Scott Amey, *Other Transactions: Do the Rewards Outweigh the Risks?*, Project on Gov't Oversight (Mar. 15, 2019), https://www.pogo.org/report/2019/03/other-transactions-do-the-rewards-outweigh-the-risks.

61. Amey, *supra* note 60.

by the global coronavirus pandemic, the Department of Health and Human Services has started to break into the OTA market, awarding upwards of $725 million in OTAs in the first few months of the pandemic alone.[62]

The skyrocketing of OTA awards is likely to continue—and, for many in the commercial sector, this is good news. For those concerned about oversight on government spending, however, the news might not be so welcome. Despite having OTA authority for nearly seventy years, there is still "very little information or data about how OTAs are used, any analysis of their costs, or how effective they have been in producing cutting-edge technologies,"[63] leaving ripe the possibility that disputes may arise during the performance phase of OTA awards. What happens to those disputes is a topic of contention because no clear forum exists to hear those disputes.

III. A BLACK HOLE: THE JURISDICTIONAL PROBLEM

When disputes arise during performance of traditional government contracts, mandatory FAR regulations and the Contract Disputes Act (CDA) provide the parties with a level of consistency and predictability.[64] First, a contractor will submit a formal claim seeking a contracting officer's final decision.[65] Then, if the contractor is dissatisfied with that decision, the contractor may appeal the decision to the appropriate agency board of contract appeals, or, alternatively, to the COFC.[66] In either instance, the relevant board or the COFC reviews the contractor's claim *de novo*.[67] If either party, the contractor or the relevant government agency, is dissatisfied with the outcome, the decision of the relevant board or the COFC can be appealed to the Federal Circuit.[68]

Given the repetitive patterns in types and resolutions of disputes, these procedures make sense. Disputes arising during the performance of OTAs, however, are not so consistent.[69] Because OTAs often concern nuanced research and development or prototype projects, types of performance disputes can vary wildly; and, unfortunately for contractors, the proposed methods for resolving them are just as inconsistent. As OTA awards are on the rise, this lack of clarity creates growing concerns about how the interests of both contractors and the government can be protected through the dispute resolution process. This Part accordingly examines the jurisdiction of potential fora through which OTA contractors can bring performance related claims and

62. *See* Jon Harper, *Major Ramp Up in Use of OTAs*, Nat'l Def. Mag. (July 13, 2020), https://www.nationaldefensemagazine.org/articles/2020/7/13/major-ramp-up-in-use-of-otas.
63. Amey, *supra* note 60.
64. *See* Stuart W. Turner, *Other Transactions Authority (OTA): Protests and Disputes: Advisory*, Arnold & Porter (June 28, 2018), https://www.arnoldporter.com/en/perspectives/publications/2018/06/other-transactions-authority-ota-protests.
65. 41 U.S.C. § 7103(a).
66. *Id.* § 7105; *id.* § 7104(b).
67. *Id.* § 7104(b).
68. *Id.* § 7107(a).
69. *See id.*

concludes that the COFC should have jurisdiction over claims arising out of the performance of OTAs pursuant to the Tucker Act.

A. Forum by Process of Elimination

Of primary concern in the OTA arena is where performance disputes can and should be litigated. Despite little statutory or common law guidance that definitively addresses the issue, the process of elimination quickly narrows down the only appropriate forum for addressing contractor performance-related claims arising under OTAs to the COFC and the Federal Circuit.

First, it is unlikely that federal district courts have subject matter jurisdiction over performance disputes arising under OTAs. By way of background, pursuant to what is colloquially known as the Little Tucker Act, the COFC and the federal district courts have concurrent jurisdiction over

> [a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[70]

Thus, while there is some overlap between the subject matter jurisdictions of the COFC and the federal district courts respectively, that overlap is narrow, as it is limited only to disputes related to contracts worth less than $10,000.[71] In the context of OTAs, this means that performance disputes will almost never fall within the jurisdiction of the federal district courts given the impressive amounts regularly awarded under OTAs.[72]

This conclusion is consistent with congressional intent as well. Prior to 2001, the federal district courts had broader jurisdiction "to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract . . . in connection with a procurement or a proposed procurement."[73] That statutory grant of jurisdiction, however, included a sunset provision that would strip the federal district courts of this jurisdiction, leaving the authority to decide bid protests exclusively with the COFC.[74] The fact that Congress chose not to extend this sunset provision is indicative of its broader intent to consolidate government contracts disputes into a single forum—the COFC. While OTAs are not traditional procurement

70. 28 U.S.C. § 1346(a)(2).

71. *See id.*

72. For example, the SpaceX award totaled $2.2 billion, the MD Helicopters award was $15 million, and the United Launch Services award amounted to $500 million upfront alone. *See* Space Expl. Tech., Corp. v. United States, No. 2:19-CV-07927-ODW (GJSx), 2020 WL 7344615, at *3 (C.D. Cal. Sept. 24, 2020); MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003, 1006 (D. Ariz. 2020); United Launch Serv's, LLC v. United States, 139 Fed. Cl. 664, 669 (2018).

73. 28 U.S.C. § 1491(b)(1).

74. Administrative Dispute Resolution Act of 1996, Pub L. No. 104-320 § 1491 110 Stat. 3874, 3875 (1996); *see* Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals/Edition III*, Briefing Papers, 1, 2 (2019).

contracts, they are still legally binding contractual instruments that the government enters into through its congressionally granted contracting power.[75] Additionally, the performance of OTAs mirrors that of a traditional government contract much more than it does a common law contract, considering the complex and often-classified nature of typical OTA activities. It therefore makes logical sense to resolve OTA performance disputes in the same forum as traditional government contracts, given that the courts deciding these disputes may need to rely on subject-matter expertise.

Second, it is unlikely that the Boards of Contract Appeals have subject matter jurisdiction over OTA performance disputes for similar reasons. The Boards of Contract Appeals, which include the Armed Services Board of Contract Appeals (ASBCA) and the Civilian Board of Contract Appeals (CBCA),[76] are independent tribunals that resolve disputes between government contractors and federal government agencies. The ASBCA's charter gives it the power to decide "any appeal from a final decision of a contracting officer, pursuant to the Contract Disputes Act . . . or its Charter . . . relative to a contract made by" the DoD, the Army, the Navy, the Air Force, NASA, or any other department or agency.[77] The scope of the CBCA's jurisdiction is identical but applies to civilian executive agencies.[78] Both the ASBCA and the CBCA have jurisdiction over disputes between contractors and government agencies that the parties agree to resolve through alternative dispute resolution (ADR) mechanisms.[79]

Unfortunately, the cumulative scope of the Boards' jurisdiction provides limited resolution with respect to OTA performance disputes, as the Boards' jurisdiction applies only to disputes arising pursuant to the CDA.[80] Under the CDA, the Boards have jurisdiction to "decide any appeal from a decision of a contracting officer."[81] However, the CDA's applicability is strictly limited to *procurement* contracts.[82] Because OTAs are decidedly not procurement contracts,[83] OTA performance disputes fall within the purview of the Boards' jurisdiction only if the parties agree to the Boards' respective ADR mechanisms.[84]

75. "OT agreements are not procurement contracts, but they are legally valid contracts. They have all six legal elements for a contract (offer, acceptance, consideration, authority, legal purpose, and meeting of the minds) and will be signed by someone who has the authority to bind the federal government (i.e., an Agreements Officer)." Office of The Under Sec'y Of Def. For Acquisition & Sustainment, Other Transactions Guide 38 (2018); *see also* Nathaniel E. Castellano, *supra* note 8.

76. The U.S. Postal Service also has its own Board of Contract Appeals, but, because the Postal Service has not been granted OTA Authority, it is not relevant for the purposes of this article. *See* Schaengold, *supra* note 74, at 3.

77. 48 C.F.R. ch. 2, app. A, pt. 1.

78. *See* Schaengold, *supra* note 74, at 4.

79. *See id.* at 13.

80. 41 U.S.C. §§ 7101–7109.

81. *Id.* § 7105(e).

82. *See* Victoria Dalcourt Angle, *Innovation in Government Contracting: Increasing Government Reliance on Other Transaction Agreements Mandates a Clear Path for Dispute Resolution*, 49 Pub. Cont. L.J. 87, 94 (2019).

83. Space Expl. Tech., Corp. v. United States, 144 Fed. Cl. 433, 435 (2019).

84. *See* David S. Schuman, *Space Act Agreements: A Practitioner's Guide*, 34 J. Space L. 277, 277–78, 289 (2008) (quoting Paul G. Dembling, co-author of the Space Act, that initially created

While this does not facially prohibit the Boards from hearing OTA performance disputes, this ADR requirement is impractical to apply to all cases. Ultimately, such a requirement would present many of the same complications as mandatory arbitration clauses in corporate terms of use policies, including a lack of transparency to the public, an inability to set much-needed legal precedent, and a reduced likelihood of an aggrieved contractor prevailing, adding to the possibility of an aggrieved non-traditional contractor finding itself without recourse.[85]

This conclusion also seems consistent with legislative intent. The jurisdiction of the Boards to hear performance disputes generally mirrors that of the Government Accountability Office (GAO) to hear bid protests at the award phase.[86] The GAO is now the main forum for bid protests and accordingly "has developed a wealth of guidance and case law that helps serve as a framework for other protest forums, and provides a uniform body of law relied on by Congress, courts, contracting agencies, and the public."[87] While GAO decisions are not binding on agencies, they are persuasive, and they offer a range of other benefits for the parties.[88] The Boards are much the same on the side of performance disputes, offering parties more flexible procedures and often faster decisions. However, like the Boards, the GAO's jurisdiction is explicitly limited to protests that "an agency is improperly using its other transaction authority to procure goods or services."[89] In other words, the GAO can only weigh in on protests related to *procurement* contracts, which OTAs decidedly are not. Because the jurisdiction of the Boards generally mirrors that of the GAO, it makes legislative sense that the Boards would not have jurisdiction over OTA disputes at the performance stage because the GAO does not have jurisdiction over OTA disputes at the award phase.[90]

Accordingly, neither the federal district courts nor the Boards of Contract Appeals are well-suited fora to hear OTA performance disputes. This realistically leaves only one remaining option: the COFC. The following section will detail why the COFC is not only the last viable forum, but also the best forum to resolve OTA performance disputes.

OT authority: "[A]n "other transaction" is not a procurement contract, cooperative agreement, or grant and, therefore, is *not subject to the laws, regulations, and other requirements applicable to such contracts, agreements, and grants*."); *see also* Paul G. Dembling, *The National Aeronautics and Space Act of 1958: Revisited*, 34 J. Space L. 203, 208–11 (2008).

85. Scott Medintz, *Forced Arbitration: A Clause for Concern*, Consumer Reps. (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern.

86. *Compare* Contract Disputes Act (CDA) of 1978, 41 U.S.C. § 7105(e), *with* Competition in Contracting Act (CICA) of 1984, 31 U.S.C. §§ 3551–3553.

87. Mary Pat Buckenmeyer, *Bid Protests – Filing a GAO Protest*, Dunlap Bennett & Ludwig (May 21, 2021), https://www.dbllawyers.com/bid-protests-filing-a-gao-protest.

88. U.S. Gov't Accountability Off., GAO-18-510, Bid Protests at GAO: A Descriptive Guide 5–6 (2018). For example, protesters may be permitted to provide written comments on an agency report, third parties may be permitted to intervene, and a decision is issued much faster than traditional court procedures—within 100 days of the initial filing. *Id.*

89. MD Helicopters Inc., B-417379 (Comp. Gen. Apr. 4, 2019).

90. *Compare id.*, *with* 41 U.S.C. § 7102(a).

B. The COFC, the Federal Circuit, and the Tucker Act

The COFC and the Federal Circuit have jurisdiction over traditional government contracts performance disputes pursuant to the CDA. Because the CDA applies exclusively to procurement contracts, however, claims arising out of OTA performance disputes cannot be brought pursuant to the CDA.[91] Thus, should a contractor wish to bring an OTA performance claim, it must do so pursuant to the more limited statutory jurisdiction of the COFC's only other relevant jurisdiction-granting statute, the Tucker Act.[92]

Under the Tucker Act, the COFC has subject matter jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon *any express or implied contract* with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[93] This scope of jurisdiction has been read somewhat broadly, with the COFC and the Federal Circuit repeatedly affirming that an implied-in-fact contract is sufficient to invoke the Tucker Act.[94] However, not all contracts fall within the scope of the Tucker Act. For example, cooperative agreements, grants, and cost-share agreements are routinely considered outside the scope of both the Tucker Act and the CDA.[95] This is because these types of agreements lack the traditional form of consideration—a benefit to the government and a detriment to the contractor—such that money damages can be presumed, even in the absence of a clause so providing.[96] There is good reason, however, to think that OTAs would still fall within the COFC's Tucker Act jurisdiction.

First, OTAs are defined as "other than [procurement] contracts, grants, or cooperative agreements," signaling that Congress intended OTAs to be treated differently than procurement contracts, grants, and cooperative agreements, which fall outside the scope of the Tucker Act.[97] Second, while OTAs may lack the formality of a traditional government contract and may not be legally

91. *See* 41 U.S.C. § 7102(a) (stating that the COFC and, by extension the Federal Circuit, have jurisdiction to decide claims regarding "any express or implied contract . . . made by an executive agency for—(1) the *procurement* of property, other than real property in being; (2) the *procurement* of services; (3) the *procurement* of construction, alteration, repair, or maintenance of real property; or (4) the disposal of personal property") (emphasis added).

92. 28 U.S.C. § 1491(a)(1).

93. *Id.* (emphasis added).

94. *See, e.g.*, Safeguard Base Operations, LLC v. United States, 989 F.3d 1326, 1331 (Fed. Cir. 2021); Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010); Heyer Prod. Co. v. United States, 140 F. Supp. 409, 413 (Ct. Cl. 1956).

95. Rick's Mushroom Serv. v. United States, 76 Fed. Cl. 250 (2007), *aff'd*, 521 F.3d 1338 (Fed. Cir. 2008); City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990); Hyams v. United States, 810 F.3d 1312 (Fed. Cir. 2016); St. Bernard Parish Gov't v. United States, 134 Fed. Cl. 730, 735 (2011).

96. Holmes v. United States, 657 F.3d 1303, 1314 (Fed. Cir. 2011) ("[W]hen a breach of contract claim is brought in the Court of Federal Claims under the Tucker Act, a plaintiff comes armed with the presumption that money damages are available, so that normally no further inquiry is required.").

97. *See* Space Expl. Tech., Corp., v. United States, 144 Fed. Cl. 433, 435, 439 (2019) (quoting MorphoTrust USA, L.L.C., B-412711, 2016 CPD ¶ 133, at 6 (Comp. Gen. May 16, 2016).

considered "procurement" contracts, they do mirror the consideration seen in a typical government contract—with some benefit to the government (e.g., research and development or a prototype) and some detriment to the contractor (usually, cost).[98] Accordingly, it seems appropriate to apply the Tucker Act and therefore invoke the presumption that money damages should be available to an aggrieved contractor in the context of OTAs.[99]

Further, unlike the CDA, the Tucker Act does not require that contracts underlying claims be *procurement* contracts, suggesting that OTAs plausibly fall within the COFC's Tucker Act jurisdiction.[100] Additionally, that the Tucker Act encompasses claims arising under OTAs is consistent with case law and DoD guidance, and is supported by the larger government contracting community.[101] In 2017, the COFC, without discussion, found it had jurisdiction to resolve a contractor's claims arising under an OTA with NASA regarding silicon-carbide sensor patents under the Tucker Act.[102] In its opinion, the COFC classified the relevant OTAs as "contracts" and then, without further analysis, concluded that such claims were therefore subject to Tucker Act jurisdiction.[103] Additionally, DoD guidance specifically states that "[a]lthough OTAs are not subject to the Contract Disputes Act, an OTA dispute can be the subject of a claim in the Court of Federal Claims."[104] Though the guidance never specifically discusses the Tucker Act, eliminating the CDA as an avenue for jurisdiction leaves only the Tucker Act as a viable jurisdiction-granting mechanism. Accordingly, most experts in the field agree that "[t]here should be no serious dispute that an alleged breach of the terms of an [OTA] falls within the Court of Federal Claims' jurisdiction provided by the Tucker Act."[105] Further, and perhaps most importantly, if claims arising under OTAs are not subject to judicial review pursuant to the Tucker Act, contractors who enter into OTAs with the government and subsequently find themselves seeking redress could be left "without meaningful legal recourse if the agreement is not drafted carefully," simply because they have no forum in which to file their dispute.[106]

Granting jurisdiction under the Tucker Act, however, is not entirely straightforward. The Tucker Act serves as a limited waiver of the government's sovereign immunity, but its force stops short of actually granting a substantive

98. Other Transaction Guide, *supra* note 75, at 38 (noting that OTAs possess "all six legal elements for a contract," including consideration).

99. *Holmes*, 657 F.3d at 1314.

100. Wesleyan Co. v. Harvey, 454 F.3d 1375, 1380 (Fed. Cir. 2006); *see also* Karen L. Manos, *Choice of Forum for Government Contracts Disputes*, Cost, Pricing, & Accounting Rep., 1, 2–3 (July 2008).

101. Locke Bell & Krista Nunez, *New Contractor Insights on 'Other Transaction' Bid Protests*, Law360 (Oct. 15, 2021), https://www.law360.com/articles/1429667/new-contractor-insights-on-other-transaction-bid-protests.

102. Spectre Corp. v. United States, 132 Fed. Cl. 626, 627–28 (2017).

103. *Id.* at 628; *see also* Dalcourt Angle, *supra* note 82, at 109.

104. Office of The Under Sec'y Of Def. For Acquisition & Sustainment, Other Transactions Guide 19 (2018).

105. Castellano, *supra* note 8, at 498.

106. *Id.* at 491.

cause of action.[107] Because the Tucker Act itself does not create any substantive cause of action against the United States, hopeful plaintiffs seeking redress must look to another substantive source of law—the Constitution, an act of Congress, or a regulation—to establish a claim for money damages against the United States.[108] In doing so, "the claimant must demonstrate the source of substantive law she relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'"[109]

This money-mandating requirement poses certain concerns with respect to OTAs. Given that OTAs are not subject to traditional procurement regulations and, therefore, are not required to contain specific FAR clauses that would include such money-mandating provisions, there is no regulatory check to ensure an avenue for COFC jurisdiction. Part IV accordingly proposes the following two-prong solution to bring OTA performance disputes squarely within the orbit of the COFC's Tucker Act jurisdiction: (A) Congress should implement a regulatory change that would impose a requirement to include a money-mandating provision in all OTAs for the limited purpose of establishing Tucker Act jurisdiction; and (B) if the drafters of the OTA fail to include the required provision, an aggrieved contractor should then be able to invoke the *Christian* doctrine to read that provision into the OTA as "a deeply engrained strand of public procurement policy."[110]

IV. PROPOSED SOLUTION: BRINGING OTAS INTO THE ORBIT OF THE COURT OF FEDERAL CLAIMS

Because of their flexibly designed nature, any regulatory or legislative change to the structure of OTAs is inherently laden with political complications. This article seeks to reconcile the desire for maximum government flexibility with the much-needed contractor protections that are currently absent from the existing OTA framework. Accordingly, the solutions proposed in this Part require the most limited change to the OTA award and performance process possible, while still providing sweeping protections and clear guidelines for nontraditional OTA contractors: requiring the incorporation of a money-mandating clause into all OTAs.

OTAs are governed only by the explicit provisions that they include. Further, the Tucker Act applies only to contracts with the government that independently or under some other source of law allow for the award of money damages.[111] This means that, for the COFC to have jurisdiction over OTA performance disputes pursuant to the Tucker Act, there must be some provision in the OTA itself that provides a money-mandating source of law in the event of a dispute. In our current framework, an OTA does not fit squarely

107. *Id.* at 497.
108. United States v. Mitchell, 463 U.S. 206, 216–17 (1983); *see also* Manos, *supra* note 100, at 2.
109. *Mitchell*, 463 U.S. at 216–17.
110. G. L. Christian & Assocs. v. United States, 312 F.2d 418, 426 (Ct. Cl. 1963).
111. *See* 28 U.S.C. § 1491.

into this category. While OTAs are contracts in that they are legally binding agreements with the government, unless they have an explicit provision allowing for money damages in the event of a breach, it is not clear that any separate money-mandating source of law would apply, meaning OTA performance disputes are left floating in a "jurisdictional black hole." This article seeks to change that by bringing OTA performance disputes squarely within the orbit of the COFC's Tucker Act jurisdiction.

This Part proposes a two-fold solution. First, Congress should implement a mandatory provision through the National Defense Authorization Act for Fiscal Year 2023 (FY2023 NDAA) that explicitly provides the text of a money-mandating provision and a clear jurisdictional hook for OTA performance disputes to be resolved in the COFC. Second, that mandatory provision should be recognized as a deeply engrained strand of public procurement policy and therefore subject to incorporation by the *Christian* doctrine if it is omitted from the contractual language of a given OTA.

A. Requiring a Money-Mandating Provision as a Jurisdictional Hook

Because there are no mandatory FAR clauses in OTAs, OTA drafters are left to their own devices to determine the language of the contract. Despite this flexibility, there are common drafting trends. For example, most OTAs have some dispute resolution clauses.[112] But those dispute clauses typically do not include a specific agreement among the parties about the forum of litigation, and they do not consistently include a money-mandating provision.[113]

Some in the field have proposed that it would be good practice for contractors to insist that such language be included in all OTA dispute clauses.[114] And it is true that including a simple clause, such as, "The parties agree that this agreement is a contract under 28 U.S.C. § 1491(a) contemplating monetary damages. Accordingly, failing resolution by mutual agreement, the aggrieved Party may pursue monetary remedies before the U.S. Court of Federal Claims," would solve the jurisdictional problem and squarely put OTA performance dispute litigation under the jurisdiction of the Tucker Act.[115]

But this solution places the burden on contractors to ensure that such a clause is included and potentially leaves them defenseless if they are unsuccessful. OTAs are a unique form of government contract specifically designed to draw in non-traditional government contractors.[116] By definition, then, the contractors the government seeks out through its use of OTAs are not familiar with the nuances of federal procurement law.[117] If the government places the burden on contractors to insist on the inclusion of such a clause, it risks undercutting the entire purpose of the OTA system: if those nontraditional contractors fail to so insist, they could be left without the ability to seek legal

112. *See* Dalcourt Angle, *supra* note 82, at 112–13.
113. *See id.*
114. *Id.*
115. *Id.*
116. Amey, *supra* note 60.
117. *See id.*

recourse if a dispute arises during performance.[118] Such a result could deter nontraditional contractors from the OTA system entirely if they determine that working with the government is not worth this risk.

However, too much regulation of OTA award and performance mechanisms could also have damaging consequences. It is also true that this jurisdictional issue could be resolved with dramatic solutions such as redefining OTAs as procurement contracts, and thus under the jurisdiction of the CDA, or implementing an entirely new statutory framework to resolve OTA performance disputes. But these solutions are likely impractical for two reasons. First, these solutions require a significant overhaul of the current statutory landscape, which is both time-consuming and laden with political barriers. Second, and perhaps more importantly, these solutions would open OTAs up to additional regulation on all fronts, including award, competition, and performance procedures. The very purpose of OTAs is to avoid the strict regulatory framework of traditional procurement contracts to allow the government to achieve rapid developments in technology with nontraditional contractors without being held back by Congress.[119]

If the goal of awarding OTAs is to be preserved while also respecting the rights of those the system is designed to attract, Congress must step in and provide parties with some form of regulation in the context of OTA performance disputes—but that regulation must be limited. Accordingly, through the very same mechanism that it used to award OTA authority to agencies to begin with, the NDAA, Congress should utilize the FY2023 NDAA to implement a congressional provision affording contractors who are awarded OTAs a money-mandating mechanism that provides a jurisdictional hook for dispute resolution in the COFC. OTAs would thus be required to include prescribed language: "All disputes arising under or relating to this contract during performance shall be resolved under this clause," citing this new congressional provision. Such a provision could read as follows:

> Unless otherwise specifically provided in this chapter, this chapter applies to any Other Transaction Agreement made and entered into by an authorized agency and governs disputes arising during performance.
>
> (a) Claims Generally:
>
> Each claim by a contractor against the Federal Government relating to an Other Transaction Agreement shall be submitted, in writing, to the agreements officer for a decision. Each claim shall be submitted within six (6) years after the accrual of the claim.
>
> (b) Fraudulent Claims:
>
> This section does not authorize an agency head or agreements officer to settle, compromise, pay, or otherwise adjust any claim involving fraud or

118. *See* Castellano, *supra* note 8, at 491.

119. *See* Scott Maucione, *As OTAs Grow, Traditional Contractors Are Reaping the Benefits*, Fed. News Network (July 17, 2018), https://federalnewsnetwork.com/contracting/2018/07/as-otas-grow-prime-contractors-are-reaping-the-benefits.

that is otherwise the result of the exclusive actions of or failure to act by the contractor.

(c) Issuance of a Decision:

The agreements officer shall issue a decision in writing stating the reasons for the decision. The agreements officer shall issue a decision on any submitted within sixty days from receipt of a written request from the contractor.

(d) Bringing an Action De Novo in Federal Court:

Except as provided in this statute, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary. The aggrieved party shall have the right to pursue monetary remedies in the United States Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1).

This above-proposed language intentionally mirrors that of the CDA,[120] but omits the requirement that contractors certify all claims over $100,000.[121] Omitting this requirement alleviates some of the technical burdens that OTA contractors face when submitting claims. For contractors who are unfamiliar with traditional government contract dispute resolution processes, this relaxation of requirements affords them additional protections against their claims being thrown out on procedural grounds. The remainder of the text, at least at a high level, mirrors that of the CDA almost exactly, and it does so intentionally. The CDA is a well-studied statute that provides contractors with a clear mechanism to resolve disputes that arise under traditional, FAR-regulated government contracts. Not only does it detail the steps that a contractor must take to initiate a claim,[122] it also informs contractors of the forum in which those claims can be heard.[123]

Mirroring the CDA language provides two key benefits. First, it provides some guidance to courts in interpreting the new statutory language. While not identical, the proposed language is similar enough to the language of the CDA that courts can look to prior CDA cases as non-binding but persuasive precedent, at least for interpretation of the clauses that mirror the CDA.[124] In addition, the types of disputes that may arise during the performance of an OTA, unlike the types of disputes that may arise during the award of an OTA, often look very similar to the kinds of disputes that arise during the performance of a traditional government procurement contract. Because of this resemblance, the resolution mechanisms for traditional government procurement contracts, under the CDA, can and should be considered persuasive precedent for courts when resolving similar OTA disputes arising under

120. 41 U.S.C. §§ 7103–7104.
121. *Id.* § 7103(b).
122. *Id.* § 7103(a).
123. *Id.* § 7104(a)–(b).
124. For example, courts could turn to CDA precedent for assistance in determining when a contractor's claim under an OTA accrued or in assessing whether a contractor's claim submitted under an OTA is fraudulent.

similar clauses. This precedent will also ease the implementation of this new congressional provision for both courts and contract parties.

Second, the similarities in this proposed language to the CDA give its implementation significant weight. Except where the government contracts with foreign governments or international organizations, the CDA applies to all government contract claims.[125] To enforce the CDA, all applicable government contracts are required to include the FAR clause articulated in 52.233-1, which mandates that "[a]ll disputes arising under or relating to this contract shall be resolved under this clause," and, by extension, the CDA.[126] Because this is a required FAR clause and is widely considered to reflect "a deeply engrained strand of public procurement policy," this clause can be read into contracts even where it was omitted during drafting.[127] With the CDA as guiding precedent, this new proposed statutory language can be interpreted to have similar weight, ultimately protecting the interests of unsuspecting nontraditional government contractors and affording parties a certain degree of predictability in terms of application and interpretation.

B. The Christian *Doctrine as an Additional Safe Harbor for Nontraditional Contractors*

Congressional regulation of OTAs may seem like a drastic step. This proposal, however, is not without precedent. While OTAs provide the government with significant flexibility because they are not subject to the FAR and many other regulations, they are not entirely free from regulation either.[128] For example, OTAs must be "directly relevant to enhancing mission effectiveness" for the awarding agency.[129] For DoD prototype awards specifically, OTA contracts must address "a proof of concept, model, reverse engineering to address obsolescence, pilot, novel application of commercial technologies for defense purposes, agile development activity, creation, design, development, demonstration of technical or operational utility, or combinations of the foregoing."[130] OTA awards must also meet at least one of the following conditions:

> (A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project.
>
> (B) All significant participants in the transaction other than the Federal Government are small businesses . . . or nontraditional defense contractors.
>
> (C) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.
>
> (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction. (10 U.S.C. [§] 2371b).[131]

125. *See* FAR 33.203.
126. FAR 52.233-1.
127. G. L. Christian & Assocs. v. United States, 312 F.2d 418, 426 (Ct. Cl. 1963).
128. *See* Mayer et al., Rand Corp., Rep No. RR4417, Prototyping Using Other Transactions: Case Studies for the Acquisition Community 4 (2020).
129. *Id.*
130. *Id.*
131. *Id.*

Depending on the value of the OTA award, an OTA may also be subject to additional regulations or approvals; for example, OTA awards over $100 million require approval from the awarding agency's senior procurement officer, and OTA awards over $500 million require approval from the DoD.[132] Finally, OTAs are still subject to laws "such as criminal laws, export controls, and the Civil Rights Act."[133]

These regulations reflect a common theme that, while not subject to regulation from the FAR, OTAs are subject to some fundamental rules that, as a matter of public policy, should apply across the board. A similar provision mandating the forum in which disputes should be resolved fits neatly in this category. Moreover, a dispute resolution forum is a fundamental element of most contractual arrangements, from major corporate contracts to low-level commercial consumer contracts.[134]

Accordingly, once there is statutory language requiring a money-mandating provision as a jurisdictional hook in all OTAs, all parties to OTAs could be bound by that language—regardless of whether they complied with it during their drafting phase. Because a money-mandating provision reflects such a fundamental aspect of contracting principles and provides the only clear path to dispute resolution, that clause almost certainly reflects "a deeply engrained strand of public procurement policy," invoking the *Christian* doctrine.[135] This means that, in the event the parties fail to include the mandatory dispute resolution clause in the contract itself, that clause would be read into the contract and still considered binding.[136]

Expanding the *Christian* doctrine to encompass mandatory provisions in OTAs is logical from a practical standpoint, and it is also consistent with the Federal Circuit's recent expansion of the doctrine. In 2018, the Federal Circuit issued its decision in *K-Con, Inc. v. Secretary of the Army*, finding that regulations on performance and payment bonds, provided in FAR 28.102-1, 28.103-3, and 52.228-15 were "deeply engrained strand[s] of public procurement policy."[137] The court reasoned that, unlike commercial contracts, bonds are a necessary safeguard for those who supply labor or materials to government contractors.[138] Accordingly, the regulations imposing bond requirements are mandatory and thus subject to incorporation under the *Christian* doctrine.[139] This decision served as a reminder that the *Christian* doctrine is

132. *Id.* at 5.
133. *Id.*
134. This is why more and more commercial contracts include mandatory arbitration clauses, as they resolve the question of where and how a dispute can be resolved. *See* Jean Murray, *Mandatory Arbitration Clauses in Business Agreements*, Balance Small Bus. (May 30, 2019), https://www.thebalancesmb.com/mandatory-arbitration-clauses-in-business-agreements-397425.
135. G. L. Christian & Assocs. v. United States, 312 F.2d 418, 426 (Ct. Cl. 1963).
136. *See id.*
137. K-Con, Inc. v. Sec'y of the Army, 908 F.3d 719, 723–24, 727 (Fed. Cir. 2018).
138. *Id.* at 722, 725.
139. *Id.* at 725.

"alive and well" and demonstrates that the Federal Circuit will readily expand its application to new types of contracts and regulations.[140]

Expanding the *Christian* doctrine to OTAs, then, is not only entirely consistent with its recent trajectory, but it also makes sense from a policy perspective. Without the expertise in the nuanced world of government contracts, the nontraditional contractors OTAs are designed to attract may not have the necessary technical knowledge to negotiate a dispute resolution clause during the drafting phase of a contract. A mandatory provision by Congress would mean that such a clause would be required in all OTAs, even if the contractor failed to insist on its inclusion. Expanding the *Christian* doctrine to encompass this clause would take these protections for nontraditional contractors one step further, meaning that, even if such a clause were left out of an OTA during its formation, contractors would still have a clear forum in which to seek relief. Without this provision, contractors are left to fend for themselves, with the potential consequence of having no available relief at all simply because there is no clear forum in which to request or receive it. Relegating contractor claims to a "jurisdictional black hole" in this way is an unacceptable result for contractors, and could ultimately prove catastrophic for the government as well.

V. CONCLUSION

Without clear protections in place to allow contractors avenues for relief, the entire practice of hiring non-traditional contractors could fall apart. Non-traditional contractors bring a wealth of knowledge, technology, talent, and unique perspective to the government, spurring innovative thought and transformation across the public sector. And when these non-traditional contractors enter into business with the government, they rely on the legal system to protect them, making up for what they lack in experience or knowledge of contract law. If contractors are not protected by the laws that they depend on, it no longer becomes practical, or feasible, for them to engage in those contracts, stripping the government of all the resources and capabilities that these contractors can bring to the table. Adding protections for these non-traditional contractors may well cost the government time and money in the short term. But it is an investment the government cannot afford to opt out of. While the OTA framework was first designed to allocate more risk to the government in the hopes of attracting innovative partners, Congress inadvertently placed the potentially devastating risk of performance disputes on its unwitting new contractors in the process. Today, this jurisdictional black hole risks swallowing the entire OTA procurement framework if the government fails to act. This article proposes to collapse this black hole with a limited and common sense regulatory change to bring OTA performance disputes squarely within the orbit of the COFC's jurisdiction, once and for all eliminating an unnecessary risk of OTA contracting for all parties.

140. DeLancey, *supra* note 38.