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Court of Federal Claims Marks Its Territory, Confirms CDA Jurisdiction Over Proprietary Legends

By James A. Tucker, Locke Bell, and Markus Speidel*

In Raytheon Co. v. United States*, the U.S. Court of Federal Claims affirmed its jurisdiction to settle disputes over protective markings. The authors of this article discuss the decision and its implications.*

The U.S. Court of Federal Claims recently affirmed its jurisdiction to settle disputes over protective markings in *Raytheon Co. v. United States*.[1]

In that case, Raytheon asked the court to review a contracting officer's demand that Raytheon replace its common proprietary, not-subject-to-release-under-Freedom of Information Act ("FOIA")[2] marking with the "Government Purpose Rights" ("GPR") legend prescribed by the Defense Federal Acquisition Regulation Supplement ("DFARS").[3]

Among other claims, Raytheon argued the contracting officer's final decision denied Raytheon certain procedural rights granted by 10 U.S.C. § 2321.[4] The

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[1] *Raytheon Co. v. United States*, 19-883C (Fed. Cl. Jan. 14, 2020), *available at* https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2019cv0883-25-0.

[2] In long form, the Freedom of Information Act, 5 U.S.C. § 552.

[3] "Government purpose rights" are defined in DFARS 252.227-7013 as the right to both "use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction," and to "release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States government purposes." As anyone working for the government will tell you, the United States government has many purposes—so the difference between "government purpose rights" and "unlimited rights," for most intents and purposes, is minimal. In particular, it is the second provision, allowing disclosure to those outside the government, which most vexes those seeking to protect their trade secrets, as it allows the government to share otherwise trade secret information with one's competitors—even in a publicly released solicitation—for purposes of increasing competition.

[4] Specifically, 10 U.S.C. § 2321 provides that the Secretary of Defense shall ensure a

government sought to dismiss that claim, arguing that Raytheon's procedural challenges were outside the court's jurisdiction under the Contract Disputes Act ("CDA").

Thankfully, the court rejected that argument and denied the motion to dismiss, giving some reassurance that the government will still be held to challenges to the "healthy measure of due process" guaranteed for restrictive marking challenges.

BACKGROUND

The dispute in *Raytheon* centered on the agency's request that the contractor remove proprietary markings from a Vendor List submitted in 2016 as part of a contract to supply engineering services supporting the Patriot weapon system. The contract identified the Vendor List as a contract deliverable identifying all the sources Raytheon used to procure subcontracted items in support of the Patriot system "as a means for the Government to track parts selection, supplier qualifications, and identification of parts." Raytheon's markings stated the list was proprietary, privileged, submitted in confidence, exempt from disclosure under FOIA,[5] and subject to the criminal protections of the Trade Secrets Act.[6]

The Army challenged Raytheon's use of these restrictive markings in September 2016, declaring the list contained technical data the government intended to use to fulfill other government contracts, and instructed Raytheon to remove the restrictions. Raytheon replied that it had "no obligation to diminish its competitive advantage" by removing the proprietary legends that protected its proprietary Vendor Lists from competitors.

In March 2017, the Army again objected, warning that it would remove the legends at Raytheon's expense, reject future submissions, and withhold 10 percent of the total contract price until Raytheon resubmitted the lists with proper markings.

In June 2018, the contracting officer issued a final decision in response to Raytheon's justification of November 2016, reasoning that the Vendor List

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"thorough review" of any restriction asserted to technical data in "any contract for supplies or services" with the Department of Defense providing for the delivery of technical data. In challenging a restriction, Section 2321(d)(3)(B) requires the government to provide written notice to the contractor, requiring "a response . . . justifying the current validity of the asserted restriction."

[5] 5 U.S.C. § 552(b)(4) states that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" are exempt from disclosure to the public.

[6] 18 U.S.C. § 1905 makes it a federal crime for a federal employee to publish, divulge, disclose, or make known information related to trade secrets obtained in the course of his or her employment.

qualified as technical data because it contained a list of parts and part numbers, which the Army used in conjunction with other technical drawings.

The contracting officer therefore determined Raytheon's markings failed to conform to DFARS Part 227 and needed to be replaced with GPR legends, and again repeated her earlier warning that failure to comply would result in future rejections and a 10 percent withholding.

ANALYSIS

Raytheon, seeking a declaratory judgment, filed a complaint with the Court of Federal Claims, challenging the final decision, alleging the Army violated procedural rights protected under 10 U.S.C. § 2321, and furthermore breached provisions of the contract, which incorporated the restrictive-marking validation procedures of DFARS 252.227-7037.[7]

The government moved to dismiss one count of Raytheon's complaint for lack of jurisdiction under either the Tucker Act or the Contract Disputes Act ("CDA"). Specifically, the government argued that the court lacked jurisdiction to consider Raytheon's allegation that the Army violated its procedural rights under 10 U.S.C. § 2321. The court rejected all three parts of the government's argument.

First, the government posited that the court lacked jurisdiction because the Tucker Act extends to statutory claims only where a plaintiff seeks monetary relief.[8] Because Raytheon did not seek money damages, but rather sought declaratory relief, the government asserted that Section 1491(a)(1) of the Tucker Act did not apply. The court found no merit in the argument because the Tucker Act, at Section 1491(a)(2), and the CDA clearly grant the court jurisdiction over such requests for declaratory relief.[9]

Second, the court rejected the government's contention that jurisdiction over Count I did not exist under the CDA because Raytheon didn't seek a

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[7] DFARS 252.227-7037 is a contract clause, mandated by regulation, and implements 10 U.S.C. § 2321 and establishes the contractual rights and duties of the parties in the context of a dispute over technical data restrictive markings. Among other things, the clause mandates that the government "require a response . . . justifying and providing sufficient evidence as to the current validity of the asserted restriction" before issuing any final decision finding a restrictive marking to be improper. DFARS 252.227-7037(e)(ii).

[8] 28 U.S.C. § 1491 (a)(1) provides that, "The United States Court of Federal Claims shall have 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."

[9] Jurisdiction over claims arising under the CDA (41 U.S.C. §§ 7101–09) is granted to the U.S. Court of Federal Claims under 28 U.S.C. § 1491(a)(2), including claims over "nonmonetary disputes on which a decision of the contracting officer has been issued."

determination on the government's rights to a GPR license. The court disagreed, finding the gravamen of Raytheon's complaint was whether, in the absence of "the procedural protections mandated by the statute," the agency could compel delivery of the Vendor Lists.

To resolve the issue, the court looked to the Federal Circuit's definition of a "claim," which the CDA left undefined. Finding the higher court applied the term as defined in the Federal Acquisition Regulations ("FAR"), the court held that to be covered by the CDA, a claim "need not be based on the contract itself . . . as long as it relates to its performance under the contract." Therefore, because Raytheon alleged a statutory right "to assert and justify its use of restrictive markings of its own choice" during contract performance, the contracting officer's final decision directing Raytheon to affix GPR marks served to confer jurisdiction by resolving Raytheon's "claim."

Third, the government argued the court lacked the authority to include the language "invalid" or "null and void" in any judgment on the contracting officer's final decision. The court decided to first test the merits of whether the contracting officer committed any procedural violations, and whether such violations prejudiced Raytheon, before addressing the proper scope of any declaratory relief it might provide.

Finally the court summarily rejected the government's motion to dismiss for failure to state a claim. The government contended Raytheon brought a private cause of action not supplied by Section 2321. The court held that, rather than bringing a "freestanding private right of action to enforce . . . [Section] 2321," Raytheon asserted a violation of Section 2321 as the basis for its claim under the CDA.

TAKEAWAYS

While appreciated for its affirmation that the Court of Federal Claims may issue declaratory relief where an agency runs astray from the procedural safeguards Congress has set out in statute, the *Raytheon* decision is most interesting for highlighting the procedural tension between defending one's data rights and safeguarding other confidential information exempt from FOIA and protected by the Trade Secrets Act.

The FAR and DFARS set out rules and procedures for marking technical data and computer software, as well as a clear disputes process for justifying those markings that winds its way to either the Court of Federal Claims or a board of contract appeals. But contractors often share very confidential information—for example, detailed cost or pricing data, personnel management information, or (as relevant here) vendor lists—that is not "technical data," as defined in regulation and statute, but nevertheless is protected from disclosure by law.

Contractors should always mark such data with a proprietary legend like the one used by Raytheon, and, typically, the government will not object. More often, disputes over such markings arise through the regular FOIA process, where a competitor or some other third party requests release of the data, the government acquiesces, and the contractor is forced to defend its proprietary markings in federal district court under the Administrative Procedure Act.

In *Raytheon*, that mold was broken: the government preemptively sought to remove Raytheon's proprietary, FOIA-specific legends, so that it could share Raytheon's information with others to fulfill other government contracts. Thus, because the government's final decision related to the markings themselves, and not the prospect of release under FOIA, the Court of Federal Claims, rather than a federal district court of general jurisdiction, appears to have been the appropriate forum for Raytheon's appeal.

This result is noteworthy—and good for Raytheon and other similarly situated contractors—because, by adhering to the data rights dispute procedures, it affords the contractor a year to decide whether to bring its appeal, with the government all the while bound to the original restrictive marking. Were this a FOIA case in federal district court, Raytheon would have had significantly less time (often two weeks or even less) to decide whether safeguarding its confidential information warranted litigation.