



## GOVERNMENT CONTRACTS INSIGHTS

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### DOD OTHER TRANSACTIONS (OTS) DESK REFERENCE

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The incoming Trump administration has sent many signals that it intends to ramp up the Department of Defense’s use of nontraditional acquisition pathways to bridge the “Valley of Death” and bring innovative technologies to the warfighter. [\[1\]](#) This is not a departure from any recent administration, but yet another acceleration of a common trend. Perhaps the most familiar and well-demonstrated such pathway is DoD’s Other Transactions (OTs) for prototyping projects and follow-on production efforts. In the last decade, DoD’s use of that authority has steadily grown from a few hundred OTs and less than \$1 billion in obligations in FY15 [\[2\]](#) to more than 5,000 OTs and \$15.5 billion in FY23. [\[3\]](#) Early reports for FY24 indicate nearly \$18 billion in OT obligations. [\[4\]](#)

Defense contractors need to be armed with reliable legal resources as they navigate this relatively new and evolving legal landscape. That is why we are compiling here our DoD OTs Desk Reference, with an infographic answering common questions and links to our many writings on the rules and risks of contracting through OTs. Bear in mind, although these references often focus on DoD Prototype OTs,

other transaction authority of their own. These agencies issue a variety of other transaction agreements (OTAs) that are likewise exempt from procurement laws and regulations, but are not subject to the same eligibility or other legal requirements of DoD Prototype OTs.

# OTHER TRANSACTIONS (OT) AT A GLANCE

## WHAT IS AN OT?

Other transactions (“OTs” or “OTAs”) are agreements with the federal government that, by definition, are not procurement contracts, grants, or cooperative agreements. They may take many different forms that vary by agency. Federal agencies authorized to award some form of OTs or OTAs include DoD, NASA, Department of Energy, DHS, TSA, FAA, the Department of Transportation, and certain components of HHS, such as NIH and BARDA. Each agency relies on its own statutory authority and internal practices that may impose limitations or affect the nature of the agreement.

OTs are intended to be more flexible and quicker to award than traditional procurement contracts, and often they are used with new entrants to the government marketplace or in other situations where they may facilitate rapid adoption of novel technologies or investigation of new ideas.

This guide focuses on DoD OTs for prototyping projects and follow-on production as authorized by 10 U.S.C. 4022.



### AS A GENERAL RULE, PROCUREMENT LAWS AND REGULATIONS DO NOT APPLY TO OTS OR OTAS, WHILE LAWS OF GENERAL APPLICABILITY DO. FOR EXAMPLE:

#### Do Not Apply

- Federal Acquisition Regulation (FAR), DoD FAR Supplement (DFARS), and other agency supplements
- Competition in Contracting Act (CICA)
- Contract Disputes Act (CDA)
- Bayh-Dole Act\* (patents) and data rights statutes
- Truthful Cost or Pricing Data Act
- Cost Principles and Cost Accounting Standards (CAS)
- Drug-Free Workplace Act
- Buy American Act

Certain procurement-related laws may apply by express statutory incorporation. For example, the Procurement Integrity Act applies to DoD Prototype OTs.

#### Do Apply

- False Claims Act
- Anti-Deficiency Act
- Freedom of Information Act (FOIA)
- Trade Secrets Act
- Nondiscrimination/ Labor-related laws
- Environmental laws
- Export control laws and regulations
- National security laws and regulations related to security clearances



### WHAT QUALIFIES AS A PROTOTYPE PROJECT?

DoD has adopted a broad definition for “prototype projects” that may be carried out through OTs, including:

- Projects that address a proof of concept or model;
- Reverse engineering to address obsolescence;
- A pilot or novel application of commercial technologies for defense purposes;
- Agile development activity;
- The creation, design, development, and demonstration of technical or operational utility; and



## IS MY PROJECT ELEGIBLE FOR A DoD PROTOTYPE OT?

For DoD to award a Prototype OT, one of the following conditions must be met:

1. At least one nontraditional defense contractor or nonprofit research institution is participating to a significant extent in the prototype project.
2. All significant participants are small businesses or nontraditional defense contractors.
3. At least 1/3 of the total cost is paid by nonfederal sources.
4. Exceptional circumstances documented by the agency's senior procurement executive.



## AM I A NONTRADITIONAL DEFENSE CONTRACTOR?

The term "nontraditional defense contractor" is broadly defined to include any entity that is not, and has not in the year prior to a solicitation, performed a DoD contract or subcontract subject to Full CAS coverage. It may include entities that are corporate affiliates with other Full CAS-covered entities. An entity's status is determined at the date of award and not affected by subsequent changes in size or CAS coverage, unless stated otherwise in the OT.



## WHAT CONSTITUTES SIGNIFICANT PARTICIPATION?

There is no blanket rule or threshold for significance of a nontraditional defense contractor's participation. DoD will consider the following, among others, as evidence of significant participation:

1. Supplying a new key technology, product, or process, or novel application or approach to an existing technology.
2. Providing a material increase in the performance, efficiency, quality, or versatility of a key technology, product, or process.
3. Accomplishing a significant amount of the project.
4. Causing a material reduction in cost or schedule or providing a material increase in performance of the project.



## HOW TO OBTAIN FOLLOW-ON PRODUCTION WORK?

Sole-source contracts or OTs may be awarded for follow-on production efforts upon successful completion of a competitively awarded Prototype OT project. Follow-on production includes any efforts to produce, sustain, or otherwise implement the results of a prototype project for continued or expanded use by DoD. More than one follow-on production contract or OT may be awarded for the same Prototype OT, and they can be awarded by any government organization, not just the agency that awarded the Prototype OT.




## HAVE I ACHIEVED SUCCESSFUL COMPLETION?

Successful completion can occur prior to the conclusion of the Prototype OT itself and may be achieved by (1) meeting the key technical goals of a project, (2) satisfying success metrics incorporated into the Prototype OT, or (3) accomplishing a particularly favorable or unexpected result that justifies transition to production. These are commonly documented in a "Success Memo" from the agreements officer for the Prototype OT.



## CAN AN OT AWARD BE PROTESTED?

Yes, but protests are rare, and where to file requires close consideration by counsel. Pre-award protests challenging an agency's authority to award an OT rather than a procurement contract may be filed at the Government Accountability Office (GAO) or U.S. Court of Federal Claims



Read more here [OT Bid Protests: A Call for Clarity and Consistency](#).

### CAN A CONTRACT CLAIM BE FILED?

Although the standard claims process under the CDA does not apply, breach actions may be filed against the government in the U.S. Court of Federal Claims under the Tucker Act. Parties may also agree to alternative dispute resolution (ADR) procedures at the Armed Services Board of Contract Appeals (ASBCA).

*\*Even though the Bayh-Dole Act is not specifically a procurement law, DoD and others have concluded Congress intended OTs to be exempt.*

## References:

***Other Transaction (OT) Bid Protests: A Call for Clarity and Consistency***

***DoD Dusts Off Other Transactions (OT) Regulations***

***Court of Federal Claims Potentially Expands Its Other Transaction (OT) Bid Protest Jurisdiction***

***Has the GAO Opened the Door to Certain Other Transaction (OT) Bid Protests?***

***DoD Issues Updated Other Transactions (OT) Guide***

***Another Piece to the Puzzle: Court of Federal Claims Has Jurisdiction Over Bid Protest Where the Disputed Other Transaction Could Lead to a Follow-On Production Contract***

***New Contractor Insights on ‘Other Transaction’ Bid Protests***

***Where Can You Protest an Other Transaction Award? Insights from Kinometrics***

***Congress, DoD Encourage Use of Other Transaction Authority in Response to COVID-19***

***DoD’s Other Transactions: Data Rights & Intellectual Property Simplified***

**[1]** See, e.g., Pete Hegseth, Opening Statement, Secretary of Defense Nomination Hearing, Senate Armed Services Committee (Jan. 14, 2025), available at [https://www.armed-services.senate.gov/imo/media/doc/hegseth\\_opening\\_statement.pdf](https://www.armed-services.senate.gov/imo/media/doc/hegseth_opening_statement.pdf).

**[2]** See Rhys McCormick, Ctr. for Strategic & Int’l Studies, Department of Defense Other Transaction Authority Trends 2 (Dec. 2020)

**FOI** 