Other Transaction Authority May Change Military Construction

By **Jeremy Burkhart, Gregory Koger and Mike Wakefield** (August 14, 2026)

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The U.S. Department of Defense has long used other transaction agreements to move quickly in areas such as research, prototyping and defense technology. A new authority was created eight months ago, in the fiscal year 2026 National Defense Authorization Act, for defense agencies to use OTAs to carry out military construction, or MILCON, or repair projects.

Title 10 of the U.S. Code, Section 2808a, "Facility construction or repair: transactions other than contracts and grants," allows the secretary of Defense and other relevant military department secretaries to enter into OTAs "to carry out repair and construction projects for facilities, including the planning, design, engineering, prototyping, piloting and execution of those projects."

Since the 2026 NDAA was signed in December, the Pentagon has begun flexing this new authority across multiple military departments and commands. On July 7, the U.S. Army awarded a $169.1 million OTA for facilities modernization Joint Base Lewis-McChord, signaling that MILCON OTAs are a rapidly emerging reality.

The DOD and the military branches now have a construction-specific OTA tool alongside traditional Federal Acquisition Regulation-based MILCON authority under Section 2802. As the use of MILCON OTAs expands, defense construction and repair opportunities may attract a wider field of competitors, including nontraditional contractors, technology companies, design-build teams and traditional federal construction firms willing to pursue work outside the familiar FAR-based model.

Background

The NDAA for fiscal year 2023 established a pilot program under Section 4022(i) for using OTAs to prototype the design, development or demonstration of new construction technologies for improving military installations or facilities, permitting only two prototype projects per year. In 2024, the Defense Innovation Unit and the U.S. Army Corps of Engineers partnered to award the Army's first construction OTA under the new pilot authority for a barracks renovation project at Fort Campbell, Kentucky.

Another recent partnership between the Defense Innovation Unit and Army includes an OTA awarded in January to construct 3D-printed training barracks at Fort Bliss, Texas.

The New Authority

Section 2808a authorizes the use of OTAs for facility repair and construction projects. The statutory wording is broad. It permits the use of MILCON, operations and maintenance, as well as funding for research, development, testing and evaluation to carry out projects executed under the new authority.

Notably, congressional notification is required before a defense agency may use the new authority. Not later than 14 days before entering into a MILCON OTA, the secretary concerned must submit a notification to the congressional defense committees that includes:

- The project title;
- A description of the project and its location;
- The estimated project cost and source of funds;
- The contractor selected to execute the project, if known at notification; and
- The rationale for using OTA authority, rather than the traditional MILCON authority under Chapter 169, Subchapter I.

How It Differs From Traditional Prototype OTAs

The new authority is parallel to, rather than a supplement or revision of, the DOD's existing prototype OTA authority under Section 4022. Section 2808a provides an independent, MILCON-focused OTA authority.

Whereas prior construction efforts under Section 4022(i) were limited to design, development or demonstration of new construction techniques or technologies, Section 2808a can be used for any type of facility repair and construction, even if the work is not novel.

Although the new authority allows for prototyping, this is in the context of construction projects for facilities. A construction prototype under Section 2808a might involve, for example, 3D printing, modular barracks, rapid airfield repair methods, resilient utility systems or other facility-related innovations.

Funding and Other Threshold Questions

The statutory text does not impose an express dollar limitation on Section 2808a transactions, unlike other OTA contexts in which the U.S. Congress has imposed dollar limits, approval thresholds and pilot-program caps. The authority could therefore be attractive for major facility projects, although limits may arise from the underlying appropriation, DOD policy, congressional notification requirements or project-specific fiscal law constraints.

This does not mean the authority is unlimited. Section 2808a is expressly subject to Section 2853, which limits authorized cost and scope variations for MILCON projects. The authority also operates in the broader MILCON environment, which is highly structured and closely overseen by Congress.

Notably, Section 8150 of the Consolidated Appropriations Act signed into law on Feb. 3, mere weeks after Section 2808a was enacted, imposes material restrictions on the use of Section 2808a authority.[1] Section 8150 provides that any transactions entered into pursuant to Section 2808a may only be carried out if "such projects are otherwise authorized by law and the use of military construction, operations and maintenance, or research, development, test and evaluation funds is otherwise authorized for such projects."

The provision further prohibits the transfer of any funds appropriated by the act, prior appropriations acts, or any prior act that made funds available for military construction, the U.S. Department of Veterans Affairs or related agencies.

In practical terms, Section 8150 requires that a project have independent legal authorization and an independent appropriation before a MILCON OTA can be used. In the short term, this appears intended to limit the Pentagon's use of this authority to projects that could already proceed through traditional channels.

The DOD will likely need to update existing OTA guidance to address Section 2808a. Many government and industry participants are familiar with the rules and risk allocations developed around Section 4022 prototype and follow-on production OTAs. Section 2808a may require new templates, approval processes and training because construction projects raise distinct issues, including bonding, safety, labor standards, design responsibility, inspection, differing site conditions and warranties.[2]

Until the DOD issues implementing regulations or policy guidance, contractors should expect variation across military departments and buying commands.

Recent Use of MILCON OTA Authority

Several contracting offices are taking advantage of this new authority. The Army was the first to act. As noted above, last month an Army contracting office awarded a MILCON OTA for facilities modernization at Joint Base Lewis-McChord in Pierce County, Washington.

The Army Corps of Engineers has since signaled more ambitious plans. On June 18, the Army Corps of Engineers' Alaska District announced a virtual industry day for the Fightertown Recapitalization Program at Joint Base Elmendorf-Richardson in Anchorage, Alaska — an approximately $7 billion effort to create a new fighter hub supporting U.S. Air Force operations in the Arctic and Pacific regions.

The Army Corps of Engineers announcement says the program takes a "complete campus approach." According to the System for Award Management, or SAM, industry day notice, the Corps intends to leverage the flexible authorities granted in the 2026 NDAA, and use a combination of OTA, progressive design-build and other execution methods to promote innovative delivery, and reduce construction timelines and life cycle costs.

The new authority is not limited to the Army. On March 27, the U.S. Department of the Air Force announced on SAM that it intends to utilize MILCON OTAs for the construction of the U.S. Space Command's new permanent headquarters command and control facility at Redstone Arsenal, Alabama. It is seeking the first increment of $450 million for the total $1.8 billion project in its budget request for fiscal year 2027.

The budget documents note that the planned OTA progressive design-build approach "is intentionally non-prescriptive to empower industry partners to innovate and propose the most effective technical solution to meet the defined needs." The acquisition for both the owner's representative and the design-build performance contractor will be executed using an OTA.

The scale and variety of these initial projects suggest that the DOD views Section 2808a as more than a niche tool and is prepared to use it for some of the department's most significant construction programs.

Follow-On Production Opportunities

Like Section 4022, Section 2808a also contains a follow-on production contract mechanism. A transaction entered into under the authority may provide for award of a follow-on production contract or follow-on production transaction without further competition if (1) competitive procedures were used in the original transaction, and (2) the participants in the original transaction successfully completed either a complete and useable facility, or a complete and useable improvement to a facility.

This feature may be important for contractors investing in innovative construction solutions. A company that successfully completes a pilot or prototype facility project may be positioned for larger and more profitable follow-on efforts, including a larger program of record, broader installation rollout or repeatable construction solution. Contractors should therefore pay close attention to whether the initial OTA includes follow-on language, what constitutes successful completion, what deliverables or performance metrics must be met and whether the government has preserved the right to award a follow-on without further competition.

Takeaways for Government Construction Contractors

OTAs are different instruments than FAR-based construction contracts. Though they may offer flexibility, they also may omit standard clauses and protections that contractors are accustomed to seeing in federal construction contracts. Accordingly, construction contractors competing for and negotiating MILCON OTAs should be vigilant.

- Contractors should monitor the DOD implementation closely. The statute provides the authority, but policy will determine much of its practical effect. Key issues include approval levels, competition requirements, documentation standards, use of construction agents, fiscal law review, labor requirements, bonding expectations, intellectual property treatment, payment structures, dispute processes and follow-on procedures.

- Contractors should be prepared to explain why an OTA is appropriate for a particular construction project. The strongest candidates may involve nontraditional performers, innovative construction methods, urgent mission needs, modular or repeatable designs, installation resilience, energy or utility modernization, rapid repair, advanced materials or integrated design-build solutions that do not fit neatly within standard procurement models.

- Contractors should scrutinize risk allocation. FAR-based construction contracts come with familiar clauses addressing changes, differing site conditions, inspection, termination, payment, disputes, bonds, warranties and other construction-specific issues. An OTA may not include those protections unless the parties negotiate the terms into the agreement. Contractors should not assume that standard construction protections automatically apply.

- Contractors should evaluate team structure early. Section 2808a may create opportunities for partnerships between traditional federal construction firms and nontraditional technology or construction innovation companies. Teams that can combine federal construction experience with new delivery methods may be well positioned.

- Contractors should pay close attention to follow-on rights. If a pilot project may lead to a follow-on production contract or transaction, the initial OTA should be reviewed carefully for competition history, success criteria, data rights, pricing assumptions, production scope and the government's discretion to proceed.

- Contractors should recognize that protests of MILCON OTA evaluations are more limited than protests of traditional FAR-based opportunities. The U.S. Government Accountability Office generally will not review a protest challenging an agency's evaluation of proposals and award decision for an OTA, although it will consider whether an agency improperly used its authority. The U.S. Court of Federal Claims has been more willing to exercise jurisdiction over OTA protests, but the law remains nuanced, evolving and highly fact-specific.[3]

- Contractors should expect oversight. MILCON remains politically and fiscally sensitive. Large-dollar use of Section 2808a will likely draw attention from DOD leadership, Congress, auditors and inspectors general. Contractors should maintain strong documentation, transparent pricing support, sound compliance systems and a clear record showing why the OTA approach serves the government's mission.

Looking Ahead

Section 2808a may become one of the more consequential recent changes in the federal construction acquisition landscape. Its early use suggests that MILCON OTAs could draw new entrants into the defense construction marketplace, including firms that previously avoided opportunities in that space because of the federal regulatory regime.

Whether used aggressively or cautiously, the authority could support faster and more innovative delivery of military facilities, as well as pilot projects, urgent repairs and construction technologies that do not fit traditional procurement rules.

Government construction contractors should prepare by understanding both the flexibility of OTAs and the enduring legal, fiscal and practical demands of MILCON.

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[1] Consolidated Appropriations Act, 2026 (P.L. 119-75).

[2] https://www.acq.osd.mil/asda/dpc/cp/policy/docs/guidebook/DoD OT Guide (July 2023) - 508 Update_11Jul2025.pdf.

[3] https://www.hklaw.com/en/insights/publications/2025/06/navigating-the-evolving-jurisdiction-of-the-court-of-federal-claims.