PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 10 **NUMBER 1** **JANUARY 2024**

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:

Heidi A. Litman at 516-771-2169
Email: ..... heidi.a.litman@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . . (518) 487-3385
Fax Number . . . . . (800) 828-8341
LexisNexis® Support Center . . . . . https://supportcenter.lexisnexis.com/app/home/

For information on other Matthew Bender publications, please call

Your account manager or . . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . . (518) 487-3385

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT'S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).
Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT'S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2024–Pub.4938)

Editor-in-Chief, Editor & Board of Editors

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

U.S. Department of Defense Issues Updated "Other Transactions Guide"

By Locke Bell*

In this article, the author discusses guidance updated recently by the U.S. Department of Defense on "other transaction" agreements.

The U.S. Department of Defense (DOD) has updated its guidance on "other transaction" agreements, or "OTs,"[1] an increasingly popular contracting authority not subject to the FAR or most procurement laws that accounted for more than $37 billion in defense spending from 2019 through 2021.[2] Although the new Other Transactions Guide, Version 2.0 (OT Guide),[3] reflects much of the same policy with little substantive change, it includes a few noteworthy updates and helpful reminders.

NOT ALL OTS ARE CREATED EQUAL

First, a clarification. Only certain federal agencies are authorized to enter into OTs, and the form of those agreements can differ substantially from agency to agency. Most of these agencies—NASA, TSA, and certain programs within NIH, for example—have broad authorizing statutes, which, counterintuitively, may limit what they can do with such agreements, particularly when it comes to acquiring goods or services for the government's direct benefit. DoD has a similar authority for carrying out basic, applied, and advanced research projects, but it also has something these other agencies to do not: a specific authority to use OTs to carry out prototype projects that are directly relevant to the DoD's mission—in other words, to acquire prototypes and prototyping services for the DoD's direct benefit.

What is more, DoD can award follow-on production agreements upon successful completion of a prototype project, as discussed below. Although

---

* The author, an attorney in the Washington, D.C., office of Morrison & Foerster LLP, may be contacted at lbell@mofo.com.

1 For many years, policymakers and commenters generally referred to these as "OTAs," including the word "agreement" in the acronym. Since expanding its other transaction authority for prototype projects, DoD has shortened the acronym to "OT," while many other authorized agencies continue to use "OTA."

2 Gov't Accountability Off., Other Transaction Agreements: DOD Can Improve Planning for Consortia Awards, GAO-22-105357, September 2022, at 11, available at https://www.gao.gov/assets/gao-22-105357.pdf.

3 https://www.acq.osd.mil/asda/dpc/cp/policy/docs/guidebook/TAB%20A1%20-%20DoD%20OT%20Guide%20JUL%202023_final.pdf.

DoD's OT Guide addresses all three of these—Research, Prototype, and Production OTs—the latter two are the focus of most industry talk and make up the bulk of DoD's OT spending. As unique acquisition instruments, additional requirements apply to these OTs, including eligibility criteria, funding approval thresholds, and enforcement of the Procurement Integrity Act, all of which are addressed in DoD's OT Guide. These are specific to DoD's Prototype OT authority and should not be imputed to other agencies' OTs.

With the table set, this article now turns to a few specific points in the OT Guide.

NONTRADITIONAL DEFENSE CONTRACTOR (NTDC) STATUS IS DETERMINED AT THE TIME OF SOLICITATION

To qualify for a Prototype OT, a contractor must be a small business, agree to share one-third of the total project costs with the government,[4] or include at least one "nontraditional defense contractor" as a significant participant on its project team. The definition of nontraditional defense contractor (NTDC) includes any entity that has not, in the year prior to the initial OT solicitation, performed a contract subject to Full Coverage under the Cost Accounting Standards (CAS). This is intentionally broad. Many companies that only do business with DoD, or that are corporate affiliates with large, CAS-covered, traditional contractors, nevertheless qualify as NTDCs.

Moreover, DoD has taken an expansive view of "significant" participation, reaffirmed in the most recent OT Guide, that does not require any particular workshare threshold, but instead looks to contributions such as supplying a "new key technology" or "novel application or approach to an existing technology," or even as simple as causing "a material reduction in the cost or schedule" or "a material increase in performance" of the prototype project.

New in Version 2.0 of the OT Guide is DoD's recognition that NTDC status is determined at the time of solicitation and maintained "for the duration of the prototype project/agreement's period of performance, or for any in-scope work modified under the same agreement." Thus, if an NTDC becomes subject to Full CAS coverage during performance of a Prototype OT—due, for example, to losing its small business and CAS-exempt status as a result of a change in control—the company remains eligible to continue performing the OT without any cost-share agreement (absent any specifically tailored provision to the

---

[4] More precisely, agree that the non-federal parties will collectively share at least one-third of the costs. As recognized in the revised OT Guide, "[t]he resources used as the share do not have to come from the lead or prime performer but can come from any of the performing team's members or third-party resource-sharing."

contrary in the agreement). This is a necessary conclusion inherent in the definition of NTDC and the statutory eligibility provision[5]—but nevertheless, it has been a source of confusion within the government and industry for years. DoD's update to the OT Guide is a welcome reference point.

Also new in the revised OT Guide is a suggestion that ordering activities consider cost-sharing agreements for Prototype OTs even if an NTDC is involved. The revised OT Guide offers that such an arrangement would be appropriate if it "would effectively incentivize and encourage the project's outcomes," but "should not be used if the primary purpose is to cover a program shortfall" or "for defense unique items." This should "typically be limited to those situations where there are commercial or other benefits to the performer" that result from sharing the costs, perhaps a nod to qualifying R&D tax credits.

OT AWARDEES MUST BE REGISTERED IN SAM.GOV

In perhaps the greatest substantive addition to the OT Guide, OT awardees now must be fully registered for All Awards in the System for Award Management[6] to be eligible for OT awards, including awards made through OT consortia (in which case, both the consortium lead/manager and lead performer must be registered). Agreements officers are instructed to check SAM prior to award to confirm the registration is active and the awardee has not been excluded or debarred. With recent administrative changes to SAM causing contractors frequent headaches, unregistered companies interested in OTs should begin the process early to avoid last-minute obstacles to an award.

SUCCESSFUL PROTOTYPE COMPLETION AND FOLLOW-ON PRODUCTION AWARDS

DoD's decision to update its OT Guide is no doubt driven in part by recent legislation affecting DoD's ability to move from prototype to follow-on production without further competition. This statutory change in the National Defense Authorization Act for Fiscal Year 2023 intentionally superseded much-discussed bid protest decisions by the Government Accountability Office requiring DoD to state expressly in its Prototype OT solicitations when it contemplated awarding sole-source follow-on production work. Although no longer required to do so by law, the revised OT Guide nevertheless suggests doing so as a best practice and encourages sharing information such as "the anticipated dollar value or quantity of an eventual production award when that information is known."

---

[5] It is also consistent with the Small Business Administration's regulations regarding changes in small business status. See 13 C.F.R. § 121.404(g).

[6] https://sam.gov.

The revised OT Guide also suggests sharing how the government intends to evaluate the prototype for success, and adds that success should generally mean the OT performer either:

(1) Met the "key technical goals" of a prototype project;

(2) Satisfied "success metrics" incorporated into the OT; or

(3) "[A]ccomplished a particularly favorable or unexpected result that justifies the transition to production."

Expect to see Prototype OTs establishing express "success metrics" that, once met, can support a sole-source production award, while also including language that reserves broad discretion to transition to production upon a "particularly favorable or unexpected result." These success metrics may include "objective and subjective measures," and may be subject to update—although the OT Guide cautions that best practice is to "share these updates with performers, keeping in mind the statutory competition requirement."

Once these specific (or vague) criteria for success are met, DoD can award a sole-source follow-on production award in the form of either a FAR-based procurement contract or a Production OT. As reiterated in the revised OT Guide, the ordering activity that awards a production contract or OT does not have to be the organization that awarded the initial Prototype OT. (The OT Guide even uses the term "Government organization," rather than DoD alone, perhaps recognizing that sole-source production contracts may be awarded by civilian agencies as well.) In a new comment, the OT Guide adds that "multiple DoD organizations can award their own follow-on production awards or contracts based on an individual successful Prototype OT that has satisfied the statutory competition requirement." This is yet another example of DoD's broad interpretation of its statutory authority, which refers only to awarding "a follow-on production contract or transaction." In this instance, DoD's interpretation may substantially increase the value of a successfully completed Prototype OT award.[7]

CONSORTIA AND TEAMING ARRANGEMENTS

One cannot discuss OTs these days without mentioning OT consortia. These collectives—in the words of the revised OT Guide, "a relationship between a government sponsor and a collection of traditional and non-traditional vendors, non-profit organizations, and academia aligned to a technology domain area

[7] You might compare it to a Phase I or Phase II contract in the Small Business Innovation Research (SBIR) program, which can lead to sole-source Phase III awards for work that derives from, extends, or completes the prior SBIR efforts.

(i.e., cyber, space, undersea, propulsion) that may be managed by a single entity or consortium member, focused on innovative solutions to government technology challenges that meet the intended scope of and purpose of OTs"—are so popular that DoD felt it necessary in its revised OT Guide to debunk a myth that OTs can only be awarded through a consortium (they can, of course, be awarded without one).

These consortia raise independent concerns of competition, transparency, and accountability, all of which DoD continues to grapple with in its OT Guide. Before entering into any OT consortium, it is important to carefully review the consortium's base agreement and terms and conditions to understand any fees, obligations, and mandatory terms required of its members. Although DoD has some involvement in the establishment and operation of most consortia and other teaming arrangements it encourages from industry, the revised OT Guide is clear that "the performer team relationships are industry's responsibility" and recommends the government reiterate that to industry participants.

You should seek legal counsel before entering any teaming arrangement, partnership, or consortium, rather than rely on DoD's blessing for purposes of its OT authority. You can be certain that if a dispute or some third-party liability arises, DoD will be quick to leave that bag on the industry participants' doorstep.

OTS ARE NOT THE WILD WEST

OTs are often heralded for the flexibility and speed they offer outside the confines of the FAR, DFARS, Competition in Contracting Act, and other procurement laws.[8] But it is important to remember they are not entirely lawless. Laws of general applicability, such as the False Claims Act, the Anti-Deficiency Act, the Freedom of Information Act, export controls, environmental laws, and the like, all still apply to your actions in connection with an OT.

Furthermore, as reiterated in the revised OT Guide, Congress has also applied certain procurement laws by reference in DoD's authorizing OT statute—namely, in this case, the Procurement Integrity Act. As explained in the OT Guide, Prototype and Production OTs are "considered Federal agency procurements and are subject to the ethics requirements of the Procurement Integrity Act," and agreements officers (and, by the same token, industry participants) "should consult with counsel on applying the ethics requirements of the PIA to OT agreements."

---

[8] Whether this is, in fact, an overall benefit to the government, the OT participant, the taxpayer, the warfighter and other stakeholders depends on the OT.

READ EACH OT CAREFULLY (WITH COUNSEL)

The flipside of an OT's flexibility is the need to carefully review each OT's terms and conditions, ideally with counsel, to ensure you understand your rights and obligations under the agreement. This remains true even as many agencies adopt their own standard OT clauses and templates. All too often such agency templates skew more favorably towards the government than the familiar clauses in the FAR or DFARS. Call these regulations red tape if you want, but at least the FAR clauses are subject to public notice-and-comment rulemaking procedures. Fortunately, much of an agency's "standard" OT language remains negotiable with the right person in the room.

The OT Guide hints at two areas where often the FAR is preferable to an agency's proposed OT language: changes and terminations. As in most government contracts, the customer in an OT may very well wish to make unilateral changes to specifications, deliveries, and other terms during performance. When that happens, under the FAR Changes clause, the contractor is entitled to a fair and equitable adjustment to the contract price, schedule, or both. This principle is so ubiquitous in federal procurement contracts that one can easily be forgiven for overlooking it as a given when entering into a OT. Do not make that mistake. Thankfully, though, the revised OT Guide recognizes the importance of a fair Changes clause and advises agreement officers, "if the Government contemplates changing the terms and conditions of the agreements without the performer's consent, the AO should consider addressing, as part of the agreement, whether the performer will be entitled to compensation for such unilateral changes, the process by which the performer may request additional compensation or the Government will reduce compensation, and how the parties (including sub performers) will resolve any disagreement about the interpretation of the unilateral change and the impact on the price, particularly in agreements with fixed-amount characteristics."

Similarly, the FAR Termination for Convenience clauses offer sensible procedure for equitably compensating contractors whose performance is cut short by no fault of their own. As with all government contracts, the government, as a steward of the public fisc, often needs a right to terminate an OT for its convenience at any time.

In any regular setting under a procurement contract containing one of the FAR Termination for Convenience clauses, the contractor would nevertheless be entitled to at least some payment for the work performed prior to termination and any costs directly resulting from it. This is true is most OTs as well, but the revised OT Guide offers the concerning thought that "[t]ermination by one party does not necessarily mean that the other party should be compensated for expended efforts." It suggests that agreements officers should

"review their market intelligence to determine what risk performers commonly take in the industry to determine an appropriate method to calculate any amount to be paid resulting from termination," including considerations such as "whether payment is not due unless a milestone is reached." Such limitations on recovery certainly may make sense in some circumstances, but be wary of agreements officers seeking to impose them in OTs that otherwise should operate like any other contract to supply goods and provide services to the United States.