



December 19, 2024

Defense Primer: Other Transactions (OTs)

The Department of Defense (DOD) is authorized to enter into legally binding contracts, referred to as *other transactions* (OTs), to acquire goods and services in certain situations. OTs, in contrast to traditional procurement contracts, are exempt from many federal procurement laws and regulations. These regulatory exemptions give DOD greater flexibility in how OTs are structured, solicited, negotiated, and awarded, but they also render inapplicable various regulatory measures intended to promote transparency, accountability, and competition in government contracts. DOD has used its OT authorities with increasing frequency in recent years, which has prompted debate among Members of Congress about whether to increase statutory limits on their use. What follows is a discussion of how OTs are used and structured, how OT awards may be protested, recently implemented modifications to OT use, and considerations for Congress.

OT Use

DOD can generally use OT authorities for three activities: conducting research, developing prototypes, and starting follow-on production of successful prototype projects. DOD-specific OT authorities are codified at 10 U.S.C. §§ 4021 and 4022. Section 4021 authorizes DOD to use OTs to carry out basic, applied, and advanced research projects. Section 4022 empowers DOD to use OTs for certain prototype projects of \$500 million or less and certain follow-on production projects of \$100 million or less. Section 4022 may be used for projects exceeding those monetary limits only if DOD leadership determines in writing that the work performed is “essential to meet critical national security objectives” and informs Congress.

DOD’s director for contract policy in the Office of Defense Pricing and Contracting has stated that “about 80%” of DOD’s OTs are for research and development, while “a couple” are “for weapons and ammunition, electronic and communication equipment or professional services.”

OTs are exempt from multiple procurement-related statutory and regulatory requirements, such as those involving solicitation, publication, competition, and pricing. Parties to OTs are still subject to procurement ethics and national security requirements. DOD has issued an OT guide that provides additional guidance on OT use.

DOD holds that OTs provide a number of benefits, including “the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards ... and provide the government with access to state-of-the-art technology solutions.”

DOD encourages agencies using OTs to “advertise outside of traditional government media,” such as SAM.gov, to

maximize outreach to industry, particularly nondefense contractors (NDCs). An agency does not need to issue a formal Request for Proposal (RFP) or follow the traditional contracting process of reviewing solicitations and may instead receive solicitations in the form of white papers and oral and panel presentations.

OT Structures

OTs can be structured in numerous ways, including a bilateral agreement between DOD and a single entity, joint ventures, and partnerships. DOD can also work with other federal agencies to fund an agreement encompassing multiple providers, including through a consortium (i.e., a group of organizations and entities, potentially including industry, that focus on a specific technology area). Examples of DOD consortia include the Defense Industrial Base Consortium and the DOD University Consortium for Cybersecurity. DOD may also structure OTs as a commercial solutions opening—a special process for the acquisition of “innovative solutions,” “to close capability gaps,” or for “meaningful proposals with varying technical or scientific approaches.”

OT Award Protests

As discussed in this CRS report, federal law allows contractors to protest (i.e., object to) standard procurement contract awards that they believe violate laws or regulations. Bid protests are generally brought before either the Government Accountability Office (GAO), as provided by the Competition in Contracting Act (CICA), or the U.S. Court of Federal Claims (CFC), pursuant to the Tucker Act. The Tucker Act provides the CFC with exclusive federal court jurisdiction over claims involving federal procurement contracts or “in connection with a procurement or a proposed procurement.”

In contrast, Congress has not expressly established a bid protest process for OTs, which has raised questions about whether OT awards are reviewable and, if so, in what forum. These questions have become particularly relevant since Congress expanded DOD’s OT authority to include acquisition of follow-on production in 10 U.S.C. § 4022.

GAO has determined that it generally lacks jurisdiction over OT-related bid protests except for challenges over whether agencies improperly used OTs for procurements. In a 2024 protest decision, GAO also determined that it has jurisdiction over protests of multi-phase OT awards that operate in a manner “similar to a down-select or competitive range process that agencies may use to eliminate non-viable or low-scoring proposals from consideration” for a potential future procurement contract.

The CFC has determined that the Tucker Act provides it jurisdiction over OT protests to the extent that they are “in connection with a procurement or a proposed procurement.” According to the CFC, this includes OTs that agencies use as means to enter into future contracts. For example, the CFC held in a 2024 decision that it had jurisdiction over an OT “because it initiated an acquisition process that led to, or at least contemplated, the eventual award of a follow-on production contract.” OT bid protests that fall outside of the CFC’s jurisdiction may be brought in federal district court.

Efforts to Improve DOD’s Use of OTs

DOD’s use of OTs has increased rapidly over the past 10 years, particularly during and after the COVID-19 pandemic. According to DOD, from FY2017 to FY2022, DOD increased the number of OT actions from 496 to 4,391. As OT use has increased, Congress has passed measures to increase their accountability and transparency, including requiring quarterly reports to the House and Senate Appropriations Committees and annual reports to Congress on OT use for prototype projects. DOD has also attempted to address concerns over its increasing use of OTs by, for instance, overhauling its OT guide in 2023 to include best practices for reporting funding.

Considerations for Congress

Consortia Use

According to DOD reporting, roughly half of DOD’s OT obligations are awarded to consortia. Some analysts argue that DOD’s use of consortia encourages collaboration among disparate entities, enables the pooling of technological expertise, and promotes innovation. DOD’s Office of Inspector General has found, however, that DOD contracting personnel have at times not properly complied with guidance and regulations when awarding OTs through consortia. Congress might consider whether to create new reporting requirements concerning OT consortia use.

Competition and OT Use

OTs are exempt from DOD contract-related statutory requirements related to competition in contracting, including CICA. Section 4022 requires DOD to use competitive procedures “to the maximum extent possible.” DOD’s OT guide states that “competition is a good thing. It helps keep prices low, quality high, and gives the government leverage in negotiations.” Additionally, OTs may provide a lower cost of entry for NDCs to work with DOD, which could promote competition. Congress might consider to what extent the current statutory requirements for competition of OTs sufficiently ensure that OTs are competitive and OT awardees are accountable.

OT Bid Protests

The extent to which GAO and federal courts have jurisdiction over OT award protests is both more limited and scattered across more courts than is true of procurement protests. Congress could clarify how and where OT award protests may be reviewed. Congress could—consistent with OTs’ general design to be less regulated and bureaucratic—expressly provide that OT awards, including those contemplating follow-on acquisition contracts, are unreviewable by any court or GAO. Alternatively,

Congress could amend CICA and the Tucker Act to grant GAO and the CFC jurisdiction over all or some subset of OT award protests. Congress might also consider restricting federal district court jurisdiction over OT award protests that fall outside of the CFC’s jurisdiction to avoid potentially inconsistent rulings by non-specialized courts.

OT Agreement Pricing

OTs are exempt from several procurement-related statutory requirements designed to maintain fair and reasonable pricing, including cost accounting standards. Some analysts have argued that compliance with cost accounting standards is expensive and onerous and discourages NDCs and small businesses from engaging with DOD. Despite these concerns, Congress could consider whether imposing certain cost accounting standards on OTs would help control OT costs and decrease barriers to market entry.

OT Effectiveness

Two potential benefits of OTs are that they can be awarded faster than conventional procurement contracts and can aid NDCs’ ability to work with DOD. Some critics, however, assert that DOD officials award OTs to large, traditional defense contractors, in part to avoid the administrative and oversight burdens of the standard procurement process. Congress may consider whether and under what conditions it may authorize DOD to award OTs to traditional defense contractors or set quantity or cost limitations to such awards.

Congress might also consider whether the legislative intent of OT authorities of simplifying DOD contracting is being met, particularly given DOD’s increased use of OTs in recent years. Congress could, for instance, consider whether to cap either the number of OTs DOD can award each year or the amount of annual appropriations available for OTs.

OT Training

DOD has noted that administering OT agreements can require specialized skills that traditional acquisition professionals may lack. DOD’s OT guide states that agreements officers, who administer OTs, must “have demonstrated expertise in ... administering complex acquisition instruments” and “can function in a less structured environment where prudent judgment is essential.” Congress could consider providing funding for specialized training DOD personnel on OT use.

Codifying OT Best Practices

DOD’s OT guide outlines a number of discretionary best practices for agreements officers. For example, when DOD issues a prototype OT that contemplates a follow-on production award, the OT guide states that it is a best practice, but not a requirement, “for the Government to have clearly defined criteria for success as well as pricing for any potential follow-on production award set forth prior to selection of the successful prototype for production.” Congress might consider whether to mandate this or other best practices to improve oversight of OTs and reduce potential waste, fraud, and abuse.

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