



**Federal
Contractors
Conference**

OTAs and MILCON: Are FAR-based Contracts a Thing of the Past?



Reggie Jones

Chair, Federal Government Contracts Department

Fox Rothschild LLP

June 10, 2026



WHAT ARE OTAs?

- Other Transaction Agreements (OTAs) are flexible contracting mechanisms that allow federal agencies to enter into agreements “other than” standard government contracts, grants, or cooperative agreements.
- They are not governed by the Federal Acquisition Regulation (FAR) or its related regulatory systems, which means the parties effectively start with a “blank sheet of paper” to negotiate terms and conditions tailored to a particular project.

HOW ARE OTAs TYPICALLY AWARDED?

- DoD awards OTAs primarily through consortia—groups organized around specific technology areas that include traditional defense contractors, non-traditional defense contractors (NDCs), academic institutions, nonprofits.
- About 71 percent of prototype OTA obligations from fiscal years 2016 through 2018 were awarded to three consortiums and two traditional defense contractors.

WHERE DID OT AUTHORITY ORIGINATE?

- **The Catalyst:** Soviet launch of Sputnik in 1957
- **The Response:** NASA created, and NASA's OT Authority established in 1958
- First FAR rolled out in 1984
- DoD gets OT authority in 1989, 10 U.S.C. §§ 4021 through 4023;
- DoD's OT authority expanded to construction through FY2026 NDAA (codified at 10 U.S. Code § 2808a).

ADVANTAGES OF OTAs

- Speed & Streamlined Procurement Processes
 - Payment for the pitch meeting
- No FAR/DFARS Contract Clauses including TINA and CAS
- Open Book Pricing
- Non-Competitive Follow-On Production Contracts

SAMPLE PROCUREMENT TIMELINE

Milestone	Date
Industry Day (Virtual)	15-Jun-26
Questions Due (via ProjNet)	22-Jun-26
Step 1: Wihte Paper Due	24-Jun-26
Site Visit	13-Jul-26
Step 2: Pitch Meetings	20-Jul-26
Tentative Award Date	27-Jul-26
Construction Start	15-Jun-28
Construction Complete	30-Nov-30

RISKS OF OTAs

- Unrealistic Not to Exceed Budget
- Limited ability to protest (Limited GAO and Court of Federal Claims jurisdiction)
- Limited dispute resolution (No CICA or Contract Disputes Act protection)
- Future challenge of their use
 - Prior to FY2026 NDAA authorization (codified at 10 U.S. Code § 2808a), how did construction projects meet the definition of a Prototype project?

WHICH OTHER FEDERAL AGENCIES HAVE OT AUTHORITY?

- Congress has authorized more than fifteen federal agencies and sub-agencies to use OTAs. Included are NASA (1958), DHS (2002), DOE (2005), and HHS (2006), and sub-agencies such as the FAA, TSA, the Domestic Nuclear Detection Office, and ARPA-E.
- Within the last decade, the Department of Commerce, the National Science Foundation, and the Office of the National Cyber Director received OT authorities that—unlike DoD's—are not limited to R&D or prototyping.
- Historically, aside from NASA, civilian agency OTA use has been modest.

ACCELERATING DELIVERY OF INFRASTRUCTURE TO THE WARFIGHTER (4/28/26 SecWar Memo)

- “The following direction and guidance is not optional; it is a mandate for immediate and comprehensive implementation. This direction supersedes all conflicting guidance.”
- ”The Secretaries, acting through their designated DoW Construction Agents (DCA), will maximize the use of OT under 10 U.S. Code § 2808a on repair and construction projects where speed, flexibility, cost savings, efficiencies, and risk reductions can be realized.”
- “DCA’s will use collaborative delivery methods - specifically Progressive Design-Build and other Design Build approaches in lieu of traditional Design-Bid-Build where they enable early alignment between the DoW and industry, improve cost certainty, and accelerate delivery timelines.”

DOW'S ACQUISITION TRANSFORMATION STRATEGY (11/7/2025) — Maximize Flexible Contracting

- “The DOW will direct the use of the other transaction authority (OTA) for prototype and follow-on production efforts where in the best interest of the warfighter and the taxpayer. The Department is committed to providing additional resources, guidance, and training to the [Warfighting Acquisition Workforce] to ensure our contracting/agreements officers fully understand the benefits and appropriate application of OTAs to maximize contracting flexibility and accelerate weapon delivery.”
- “The Department will encourage [procurement officials] to communicate with nontraditional defense contractors and consortia to better understand the capabilities that industry can provide. The Department will work to increase engagement with [NDTCs] to educate industry on how to compete for OTAs and other rapid acquisition projects. Additionally, the Department will engage with the DIB to seek feedback on best practices for inclusion of traditional defense contractors in other transactions.”

SECTION 2802 OF THE NDAA

Pub. Law 119-60, December 18, 2025

Amended 10 U.S.C. § 2808(a)(Facility Construction or Repair: Transactions Other Than Contracts and Grants).

- “[T]he Secretary concerned may enter into transactions (other than contracts, cooperative agreements, or grants) to carry out repair and construction projects for facilities, including the planning, design, engineering, prototyping, piloting, and execution of such repair and construction projects.”
- Also allows non-competitive follow-on transactions so long as competitive procedures were used for selection of the participants in the original transaction

SECTION 2809 OF THE NDAA

Pub. Law 119-60, December 18, 2025

Amended 10 U.S.C. § 3241 (Design-build selection procedures) to add (g) Authorization of Progressive Design-Build Contracts [for MILCON]. Requires the contract:

- To be awarded in a single phase based on qualifications and demonstrated capabilities without submission of a detailed construction cost or price proposal at the time of award.
- To provide for collaboration between the Secretary and the contractor to develop and refine the project scope, design, and cost estimates.
- To mandate negotiate a GMP or other fixed price agreement for the construction phase.
- To include an off-ramp for termination or renegotiation if negotiations fail.

Note: Civilian agencies use 41 U.S.C. 3309 (Design-build selection procedures).



Still requires two phased selection process – (1) Technical Quals & Approach; and (2) Detailed design with cost or price information.



DRAMATIC GROWTH IN DOD OTA USE OVER THE PAST DECADE

- DoD OTA obligations grew from \$1.8 billion in fiscal year 2016 to over \$18 billion in fiscal year 2024—a tenfold increase in less than a decade.
- The number of new prototype OTAs increased five-fold from 34 to 173 between fiscal years 2016 and 2018.
- Prototype OTAs accounted for \$56.3 billion of the \$62.9 billion (90 percent) DoD obligated on OTAs from fiscal years 2021 through 2024.
- The Army has been the largest user, followed by DARPA and the Air Force.

Source: GAO Report, Other Transaction Agreements, September 2025

OTAs: TYPES OF OTHER TRANSACTIONS

Research Other Transactions (OT)

- Authorized under 10 U.S.C. § 4021 for basic, applied, and advanced research projects.
- Intended to spur dual-use R&D.

Prototype OT

- Authorized under 10 U.S.C. § 4022 to acquire prototype capabilities and allow for those prototypes to transition into Production OTs.
- Successful Prototype OTs offer a streamlined method for transitioning into follow-on production without further competition.

Production OT

- Authorized under 10 U.S.C. § 4022(f) as follow-on OTs to a Prototype OT agreement that was competitively awarded and successfully completed.
- Allows for sole source agreement with successful Prototype OT vendor.

STATUTORY DEFINITION OF “PROTOTYPE PROJECT”

Under 10 U.S.C. § 4022(e)(5), the term "prototype project" is broadly defined to include a project that addresses:

- (A) A proof of concept, model, or process, including a business process
- (B) Reverse engineering to address obsolescence
- (C) A pilot or novel application of commercial technologies for defense purposes
- (D) Agile development activity
- (E) The creation, design, development, or demonstration of operational utility
- (F) Any combination of subparagraphs (A) through (E)

10 U.S.C. 4022(d) – APPROPRIATE USE OF AUTHORITY

The Secretary of Defense shall ensure that ... one of the following conditions is met:

(A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project.

(B) All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. 638)) or nontraditional defense contractors.

(C) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.

(D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

WHAT IS A NONTRADITIONAL DEFENSE CONTRACTOR (NDC)?

- An entity that is not currently performing and has not performed, for at least one year preceding the issuance of a prototype project solicitation, any contract or subcontract for the DoD that is subject to full coverage under the FAR-based Cost Accounting Standards (CAS).
- Full CAS coverage is required typically for contracts > \$100M (previously \$50M – increased through FY2026 NDAA, 10 U.S.C. § 1806(a)).
- Firm-fixed price contracts and contracts with small businesses are exempt from all CAS requirements regardless of dollar value.

HOW CAN FEDERAL CONTRACTORS ENCOURAGE OTA USE?

- **Join Existing Consortia** that align with their technology capabilities, as this provides immediate access to OTA opportunities.
- **Partner with NDCs or Small Businesses** to satisfy the statutory participation requirements for prototype OTAs, making it easier for agencies to justify using OTA authority.
- **Engage in Market Intelligence Activities**—such as industry days, conferences, and direct communication with government program offices—to educate agencies about how OTAs could provide the best vehicle for rapid acquisition.
- **Encourage the Government to Structure Follow-On Production Awards as Production OTAs** rather than FAR-based contracts.
- **Propose Innovative Cost-Sharing and Resource-Sharing Arrangements** that demonstrate commitment and help satisfy statutory conditions.