



OTHER TRANSACTION AUTHORITY—SECTION 815

FREQUENTLY ASKED QUESTIONS

1. What is the legal basis for Other Transaction Agreements (OTAs)?

OTAs have been authorized by statute since 1958 and specifically for Department of Defense (DoD) services and agencies since 1994. DoD executes OTAs pursuant to explicit Other Transaction (OT) Authority set out in the statute. Under OT Authority, the Department of the Army has entered into separate OTAs with CEED and C5. OT Authority does not supplant any existing contracting method. Rather, it provides an additional tool for use by DoD agencies.

2. Has Congress made any statement about OTAs recently?

In November 2015, Congress passed, and the President signed into law, Section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year 2016 which significantly expanded the scope of OT Authority. Section 815 is a clear expression of support by Congress and the Administration for a broader, more effective use of OT Authority by DoD. Section 815 does not include a sunset provision. Consequently, DoD has permanent OT Authority, barring revocation by a future Congress.

3. What happened to Section 845, which previously authorized and governed OT Authority?

Section 845 has been deleted in its entirety and replaced by Section 815. In fact, Section 815 adds a new section to the U.S. Code – 10 U.S.C. § 2371b – for OT Authority.

4. Are OTAs executed pursuant to Section 845 still valid?

Yes, all OTAs and the Technical Initiative Awards thereunder remain valid and the OTAs, *e.g.*, CEED and C5, will be modified as appropriate consistent with Section 815.

5. How did Section 815 change OT Authority?

As mentioned above, Section 815 significantly expands the scope of OT Authority. In addition to solidifying Congress's previous expansion beyond weapons and weapon systems, Section 815 primarily affects three areas: (i) raises dollar thresholds at which additional agency approvals

are required; (ii) enhances non-traditional defense contractor (NTDC) and small business participation; and (iii) allows a transition under an OTA from prototype development to production.

6. In addition to “weapons and weapon systems,” what else is eligible for consideration in an OTA?

Section 815 expands the jurisdiction of OT Authority beyond “weapons and weapon systems” to include: “[DARPA], the Secretary of a military department, or any other official designated by the Secretary of Defense may carry out certain prototype projects under OT Authority that are directly relevant to: (i) enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed for acquisition, or (ii) improvement of platforms, systems, components or materials in use by the Armed Services.”

7. What are the new dollar thresholds under Section 815?

DoD field offices such as Army Contracting Command-New Jersey can now award up to \$50 million for prototype projects without any additional approvals and up to \$250 million with the written determination of the senior procurement executive for the contracting agency that certain requirements will be satisfied. The previous thresholds were \$20 million and \$100 million, respectively. There also are certain instances and under certain circumstances involving critical national security objectives where the prototype project may be in excess of \$250 million.

8. Does Section 815 still require that a traditional defense contractor contribute to the cost of the prototype project?

Yes, if a traditional defense contractor is awarded a Technology Initiative pursuant to an OTA, that contractor must contribute at least one-third of the total cost of the prototype project, unless there is at least one NTDC participating to a significant extent in the prototype project.

9. How is NTDC defined in Section 815?

With respect to an NTDC, Section 815 modified the OT Authority statute to read as follows: “An entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by DoD for the procurement or transaction, any contract or subcontract for DoD that is subject to the full coverage under the cost accounting standards (CAS) prescribed pursuant to Section 1502 of Title 41 and the regulations implementing such section.”

10. How does a company determine its eligibility for NTDC status?

Each company that wants to qualify as an NTDC needs to review all of the DoD contracts and subcontracts on which it performed during the previous year to ensure that none of the contracts was subject to full CAS coverage. The existence or non-existence of a CAS-compliant accounting system is technically irrelevant in making the NTDC determination.

11. Are there any other restrictions in doing business with the Federal Government that preclude a determination of NTDC status?

No, the determination of NTDC status is based solely on the existence of a CAS-covered contract or subcontract in the one-year period preceding the solicitation for the prototype project. Section 5 also eliminated the restriction related to previous contracts in excess of \$500,000 subject to the Federal Acquisition Regulation.

12. How does Section 815 benefit small businesses?

CAS typically do not apply to small businesses. Therefore, many but not all small businesses satisfy the definition of NTDC under Section 815. Accordingly, a traditional defense contractor may partner with a small business/NTDC and avoid the cost-share requirement provided the small business participates to a significant extent in the prototype project. If for whatever reason the small business cannot satisfy the definition of NTDC, it still may participate in the OTA by satisfying the definition of “small business interest” as set out in Section 2 of the Small Business Act.

13. Regarding NTDC participation, what does “significant” mean?

Section 815 does not define “significant” but allows for a determination of value added to the prototype project on a case-by-case basis. Also, there is no monetary value for “significant” set out in the statute. A determination of significance is based on the importance of the NTDC contribution to the execution of the prototype project.

14. What happens after successful development of the prototype?

Section 815 specifically allows a prototype project to transition to award under the OTA of a follow-on production contract provided (i) competitive procedures were used in the initial prototype transaction award, i.e., participation in the CEED/C5 Request for White Paper process, and (ii) the awardee successfully completed the prototype project. Also, Section 815 eliminates the prototype cost-share prerequisite and restrictions on the number of units and the prices in such follow-on production contracts.