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A Primer on the Differences Between OTAs and FAR-Based Procurement Contracts

Client Alert

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We often get questions from our clients about the difference between Federal Acquisition Regulation (FAR)-based procurement contracts and Other Transaction Agreements (OTA). The purpose of this Alert is to give the reader a basic understanding of the differences.

FAR-based contracts are the traditional way that the government has contracted with industry for various goods and services. FAR-based contracts are highly regulated, with many strict terms and conditions that contractors must follow. This can lead to steep compliance costs. Although FAR-based contracts can be cumbersome to navigate, they provide a predictable and relatively well-worn path for contracting with the federal government.

OTAs are much different, offering a flexible, strategic partnership between industry and the government to foster innovation and promote collaboration. OTAs were created to address the needs of a number of governmental agencies, including the Department of Defense ("DoD"), to acquire research and development projects and prototypes in a more streamlined manner. Issued under DoD's Other Transaction ("OT") authority, OTAs are legal instruments with the federal government that are neither grants, cooperative agreements, nor standard procurement contracts. OTAs are not required to use FAR procedures and are designed to attract and make it easier for Non-Traditional Defense Contractors ("NDC") to contract with the government. As provided in 10 U.S.C. § 3014, an NDC is defined as an entity that is not currently performing and has not performed, any contract or subcontract for DoD that is subject to full coverage under the Cost Accounting Standards (CAS), prescribed pursuant to 41 U.S.C. § 1502 and the regulations implementing such section, for at least the one-year period

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preceding the solicitation of sources by DoD.

The Secretary of Defense or the Secretary of a military department may use OTAs for projects and research that are necessary to the responsibilities of that military department in the field of research and development and that relate to weapon systems, other military needs, or are of potential interest to the Department of Defense. (10 U.S.C. § 4001). As such, OTAs are a great way for a startup, small business, or company that has operated in the commercial area and wants to explore the possibility of working as a defense contractor to get started working with DoD. Indeed as of FY 22, according to the *Report to Congress on the Use of Other Transaction Authority for Prototype Projects in FY 2022* created by the Office of the Under Secretary of Defense for Acquisition and Sustainment and published in April 2023, FY 2017- FY 2022 saw OTA projects awarded increase from 496 to 4,391 and the total monetary value of all awards given increased from around 2 billion to over 10 billion dollars.

Most OTAs are based off a prototype. The *Department of Defense Prototyping Guidebook* defines a Prototype as a model (e.g., physical, digital, conceptual, and analytical) built to evaluate and inform its feasibility or usefulness. Frequently, the government uses consortiums to request white papers about research, systems, or equipment that they will need. Consortiums are typically designed around a theme, and they allow the government to pay the consortium and then, in turn, the consortium to pay the contractor. Often this system allows for faster payments. There are many different consortiums and joining one is a good way to learn of OTA opportunities. A list of current consortiums can be found here: [Existing Other Transaction \(OT\) Consortia | AiDA](#) or here: [List of Consortia and their Corresponding OTA\(s\) - GovWin IQ](#). A Butzel attorney serves on the Board of the Defense Automotive Technologies Consortium (DATC) and Butzel is involved with National Advanced Mobility Consortium (NAMC) and another resource, the Army Engineer R&D Center Innovation hub, ERDCWERX.

OTAs are a great way for the Department of Defense to be able to move faster to acquire much needed research and products. However, the speed and decrease in red tape, which is great for NDCs, does present higher risk for the contractor should something go wrong. For example, as noted in a prior Client Alert, critical jurisdictional issues regarding OTA disputes are still being fleshed out by the courts. This is just one example but is illustrative of the fact that OTAs operate in a relatively undefined legal area. By contrast, there is extensive precedent and legal doctrine relating to disputes regarding FAR-based contracts in the federal court system and bodies like the U.S. Government Accountability Office and the Agency Boards of Contract Appeals.

Thus, a contractor should consider the pros and cons when evaluating whether to contract with the government using standard procurement contracts, which can be inflexible, or seek out an OTA, which allows for more flexibility in contracting, is quicker to reach an agreement with the government and in the case of using a consortium, can be much quicker in receiving payments from the government. However, the potential contractor should keep in mind there is a higher risk to OTAs due to the uncertainty of the terms and contractor's rights with an OTA.

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Members of Butzel's Aerospace and Defense practice have extensive experience advising on both OTAs and FAR-based contracts. Please reach out to the authors of this Client Alert or your Butzel attorney for further information.

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