

## Uptick In DOD Prototype Deals A Harbinger For More Growth

By Daniel Wilson

*Law360 (October 6, 2020, 9:53 PM EDT)* -- An explosive expansion in the U.S. Department of Defense's use of streamlined agreements for rapidly acquiring prototype technology is likely only the beginning of long-term growth for such deals, experts say.

The U.S. Government Accountability Office said in an Oct. 1 report that the Army's use of Other Transaction Authority agreements, or OTAs, had tripled from \$1.59 billion in fiscal year 2017 to \$4.8 billion in 2019 as the Pentagon increasingly focuses on obtaining new technology.

Those figures echo a Pentagonwide trend the GAO had reported last year for OTAs, which are intended to allow agencies to quickly acquire prototype technology or conduct research. They aren't technically procurement contracts, so many of the regulations that can bog down traditional defense deals don't apply.

The streamlined acquisition process for OTAs, combined with factors such as the DOD's hunger for new tech and the positive feedback loop created as contracting officers and companies see the OTA model being used successfully, mean that growth in their use is likely to continue for some time to come, attorneys said.

"It's tough to say how long and how fast the increase will keep going, but I don't think we've seen a ceiling in terms of where the use of other transactions, particularly for prototype projects, will top out," said Aron Beezley, the government contracts practice co-leader at Bradley Arant Boult Cummings LLP.

DOD officials have said frequently in the past few years that the department will devote significant resources to developing emerging technologies such as hypersonic weapons and artificial intelligence to maintain a technological edge over Russia, China and other adversaries.

That fits right in with the purpose of OTAs, which are frequently aimed at getting nontraditional contractors with cutting-edge technology to work with the department, helping to make a case for continued growth in the DOD's use of the model.

Commercial firms already working with the government also have an interest in participating in OTAs, according to Roger Waldron, the president of the Coalition for Government Procurement, which represents commercial companies that sell into the federal market.

"Our members are very interested in the use of OTAs — the fact that it's a flexible process. It's not a

[Federal Acquisition Regulation]-based process," he said. "And more and more, programs of record are using OTA to develop things ... I think everybody recognizes it as a tool in the toolbox that's going to be part of the procurement and logistics landscape moving forward."

Another factor that portends an upward reliance on the use of OTAs is the Defense Department's contracting budget. The \$9.4 billion in total OTA awards made by the Army between 2017 and 2019, which according to the GAO accounts for the bulk of the Pentagon's OTA spending over that period, is only a small fraction of the hundreds of billions of dollars the DOD spends on contracts each year, meaning there's plenty of monetary headroom to grow.

"It's still such a small percentage of DOD spending that I think sometimes some folks within DOD are still wary of using a tool like this, because sometimes creativity is not fully recognized and sometimes punished," Holland & Knight LLP partner Eric Crusius said.

But as contracting officers see more and more successful examples of the use of OTAs, they may be encouraged to experiment with the prototyping model, creating positive feedback that supports continued rapid growth in the use of those deals.

"The more they use them, the more they get familiar with them, the more comfortable they are with them and the more industry starts to pay attention and want to be involved with them," Beezley said. "I think it all builds on itself."

There are also several civilian agencies that have the authority to use OTA agreements but have only rarely used that authority so far, offering another avenue for growth.

At the same time, there may also be a point where the growth in the use of OTAs triggers increased scrutiny from Congress as to whether the deals are being used appropriately. While lawmakers have generally been supportive of OTAs, they could make legislative changes if they perceive the agreements are being used improperly, slowing or stopping growth.

Another issue that may draw the attention of lawmakers is the jurisdictional difficulty that companies that miss out on an OTA face when trying to protest their exclusion from the deal.

The U.S. Court of Federal Claims ruled in 2019 that, at least in the circumstances raised in a SpaceX protest, a disputed OTA was not a procurement contract that the court had the jurisdiction to review. SpaceX took its case to a California district court, and that court recently ruled for the government, but the opinion is sealed so the rationale is not yet clear.

An Arizona district court found in January that an OTA deal disputed by MD Helicopters Inc. was both a contract and "connected to" a procurement, but not a procurement contract itself, and therefore the court lacked jurisdiction.

The GAO has also found that it lacks jurisdiction over OTA award decisions, although it has ruled that it can hear protests alleging an agency wrongly used an OTA in place of another contracting vehicle.

If Congress decides to make a clearer path for pursuing OTA bid protests, that could limit OTAs' growth if contracting officers become more reluctant to use them. But it may also make companies more willing to participate in those deals, which officers would have to take into account.

"For companies, there will obviously be more confidence in the process if the process is more transparent," Mayer Brown LLP partner David Dowd said. "Not that many procurements are protested, but the prospect that you couldn't possibly protest could deter [some companies] from participating."

And it is also almost inevitable as the use of OTAs grows that at some point a "bad actor" will be involved in one of the deals, which could also draw more oversight from Congress, Crusius said.

"When that happens, it'll be interesting to see what the reaction is," he said. "Does a front page Washington Post story drive Congress to require far more oversight of OTAs? Or will they just chalk it up as being part of the process, that these things happen?"

--Editing by Jill Coffey and Emily Kokoll.