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The BDO GovCon Week Ahead - August 2023

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Key Changes in the Updated Other Transactions (OT) Guide

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Last Month, the Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD[A&S]) released the newest version of the Other Transactions Guide (OTG), Version 2.0.

The purpose of the guide is to introduce the three types of Other Transaction (OT) agreements: research, prototype, and production. Since the OTG is not a formal policy document, the Government team should still consult with legal counsel when needed, and assume procedures are permitted if enacted in the best interest of the Government. Below we highlight the key updates in the newly released version.

Purpose and Types of OTs

An Other Transaction is a vehicle that federal agencies, specifically the Department of Defense (DoD), can use to expedite and simplify access to important technology that they need faster than typical Federal Acquisition Regulations (FAR) protocol allows. OTs were also created to give the DoD the flexibility to adapt to and incorporate business practices that reflect the current commercial industry standards and best practices that those standards change. The purpose of the guide has been clarified to provide advice and lessons rather than solely introducing the types of OT agreements. It emphasizes that the document is not a formal policy document. Research OTs are now authorized under 10 U.S.C. §4021 instead of 10 U.S.C. §2371, and the Office of the Under Secretary of Defense for Research and Engineering (OUSDR&E) is responsible for promulgating policy for research OTs. Prototype OTs are authorized under 10 U.S.C. §4022 instead of 10 U.S.C. §2371b. Production OTs are authorized under 10 U.S.C. §4022(f) instead of 10 U.S.C. §2371b(f). A new note clarifies that procurement for experimental purposes under 10 U.S.C. §4023 does not create a new type of award instrument, and users should follow the policy rules applicable to the chosen instrument.

Execution

The guide highlights that the involvement of the Defense Contract Management Agency (DCMA) and the Defense Contract Audit Agency (DCAA) may be helpful for the Government Team in executing OTs effectively. The process of appointing Agreements Officers (AOs) is now detailed, with the possibility of delegation by the Head of the Contracting Activity (HCA). It is also clarified that AOs need not be Contracting Officers, unless required by the Component's appointment process. The AO approval authority for Prototype OTs up to \$500 million now lies with the Senior Procurement Executive (SPE) of a Military Department or Agency Director for DARPA and Missile Defense Agency (MDA). Early engagement and coordination with DCMA and DCAA are emphasized as critical for determining the type of support they can provide.

Publicizing, Soliciting, and Evaluating

The guide advises targeting "potential performers" instead of technology providers when publicizing for solutions. Solicitations should generally describe the problem, provide instructions, and include any known terms of the award. The document also specifies that applicable laws and terms should be included in the solicitation. The selection process is made more flexible, with standard regulations such as FAR, DFARS, and CICA no longer applying.

Administration

A new section on entity registration in the System for Award Management (SAM) is introduced. It states that prior to being awarded an OT, the awardee must be fully registered for “All Awards” in SAM. The guide provides additional details on payments, allowable costs, audit procedures, and resource sharing. It specifies that OT agreements awarded under the authority of 10 U.S.C. 4022 are considered Federal agency procurements and are subject to the ethics requirements of the Procurement Integrity Act.

Additional Resources

Several new definitions, including Ask Me Anything Events, Performer, Reverse Industry Day, Small Business Concern, etc., are added in the appendix. The guide includes new links and resources related to OTs for further information and guidance.

Changes in Legislation

Various sections of the National Defense Authorization Act for Fiscal Year 2021, 2022, and 2023 have resulted in changes in the sections of the U.S. Code where OTs are authorized. These changes have impacted the use of OTs for research projects, prototype projects, and follow-on production efforts.

In summary, Version 2.0 of the OTG provides more comprehensive and updated information on the use and execution of OTs, taking into account recent legislative changes and best practices. It addresses key aspects of OT implementation in the sections listed above and provides an updated list of available resources.

August 14, 2023

Department of Labor Issues Final Rule to Revise the Davis-Bacon Act Regulations

The U.S. Department of Labor (DOL) has issued its long-awaited Final Rule to revise the Davis-Bacon Act (DBA) regulations. The Final Rule will be effective 60 days after the date of publication in the Federal Register, which currently is scheduled for August 23rd.

While we are still analyzing all the regulatory changes in the 812 pages Final Rule, it is clear (like

the DOL's Notice of Proposed Rulemaking (NPRM) issued March 18, 2022) that the Final Rule contains only a few changes that will be beneficial to contractors, while most of the changes heavily favor workers and unions and enhance the DOL's enforcement tools. Examples of key changes in the latter category include:

- ▶ Changing the way wage and fringe rates are developed in wage determinations to favor adoption of union rates which will result in higher wage and benefits
- ▶ Broadening the definition of "site of the work" to include locations where "significant portions" of a project (such as prefabricated materials manufacturing facilities) are produced
- ▶ Expanding DBA coverage of truck drivers and material suppliers
- ▶ Making DBA contract clauses and applicable wage determinations effective by "operation of law" even where a contracting agency fails to include them in a contract or funding agreement
- ▶ Requiring DOL approval of vacation and holiday plans for fringe credit
- ▶ Requiring contractors to consent to cross withholding for back wages owed on contracts held by different but related legal entities (those controlled by the same controlling shareholder or entities that are joint venturers or partners on a federal contract)
- ▶ Expanding record-keeping obligations

These changes in the DBA regulation will impact not only DBA contracts, but also the DBA requirements in over 70 statutes (DBA Related Acts) under which federal agencies provide funding assistance for construction projects primarily through direct funding, grants, loans, loan guarantees, or insurance.

Also impacted, at least in part, will be the prevailing wages requirements of the Inflation Reduction Act, which provides enhanced tax credits for certain clean energy projects in exchange for compliance with prevailing wage and apprenticeship requirements.

We anticipate multiple legal challenges to the Final Rule by construction trade associations and other interested parties, and that these court filings will be accompanied by requests for temporary injunctions of the Final Rule.

Construction contractors and other impacted parties should start gearing up now for compliance

with the Final Rule. BDO's experienced professionals in our Government Contracting practice can help you understand and prepare for these new requirements.