



SECTION 815 of FISCAL YEAR 2016 NATIONAL DEFENSE AUTHORIZATION ACT (Amendments Affecting Other Transaction Authority)

The U.S. Congress recently enacted legislation to streamline the acquisition of innovative research and technology and to increase the Government's access to startup companies and small commercial firms through the expanded use of Other Transaction Authority ("OT Authority"). Section 815, *Amendments to Other Transaction Authority*, of the National Defense Authorization Act ("NDAA") for Fiscal Year 2016 ("FY16"), signed into law on November 25, 2015, amended the Department of Defense ("DoD") OT Authority with changes that impact the Technology Initiative Award process and are designed to encourage broader, more effective use of OT Authority.

Section 815 adds a new Section 2371b to Chapter 10 of the U.S. Code which authorizes the Director of the Defense Advanced Research Projects Agency ("DARPA"), the Secretary of a military department, or any other official designated by the Secretary of Defense, to 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 to be acquired or developed by DoD, or (ii) improvement of platforms, systems, components, or materials in use by the Armed Services. Notably, Section 2371b does not include a sunset provision; DoD now has permanent OT Authority (barring revocation by a subsequent Congress).

Section 815 replaces the OT Authority set out previously in Section 845 of the NDAA for Fiscal Year 1994. Although Section 845 is repealed, all Other Transaction Agreements ("OTA") entered into pursuant to Section 845 (such as the CEED and C5 OTAs) remain in full force and effect and will be modified as appropriate consistent with the Section 815 amendments.

Section 815 reflects continued support by the U.S. Congress for the OT Authority and prototype transactions implemented thereunder. In addition to solidifying Congress' previous expansion of OT Authority beyond weapons and weapon systems, the Section 815 amendments significantly impact three areas: (i) the dollar thresholds at which additional approvals are required for OTAs; (ii) nontraditional defense contractor ("NTDC") and small business participation; and (iii) the transition from prototype development to production.

Dollar Thresholds for Prototype Projects

DoD field offices such as ACC-New Jersey can now award up to \$50 million for prototype projects without any additional approvals, and can award up to \$250 million with the written determination of the senior procurement executive for the agency that certain requirements will be met. The previous thresholds were \$20 million and \$100 million, respectively. This significantly increases the agency's funding capacity and flexibility. There are also certain limited circumstances involving critical national security objectives where the prototype project may be in excess of \$250 million.

NTDCs/Small Businesses

Each Technology Initiative awarded under an OTA must meet one of the following criteria:

- (A) There is at least one nontraditional defense contractor participating to a significant extent in the prototype project.
- (B) All significant participants in the transaction other than the Federal Government are small businesses OR nontraditional defense contractors (emphasis added).
- (C) At least one third of the total cost of the prototype projects is to be paid out of funds provided by parties to the transaction other than the Federal Government.

(10 U.S.C. §2371b(d)(1))

Criterion (A) is unchanged from the Section 845 requirement -- Section 2371b maintains this requirement for NTDC participation "to a significant extent" in a prototype project as an alternative to cost-sharing. The definition of "nontraditional defense contractor" has been modified, however, 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 the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to the full coverage under the cost accounting standards prescribed pursuant to Section 1502 of title 41 and the regulations implementing such section.

The old limitation related to previous contracts in excess of \$500,000.00 subject to the Federal Acquisition Regulation has been eliminated.

Importantly, since current regulations exempt contracts and subcontracts with small businesses from the application of Cost Accounting Standards ("CAS"), many small businesses now will qualify as NTDCs. Accordingly, all small businesses representing themselves as NTDCs should ensure that contracts and

subcontracts on which they performed during the previous year were not subject to full CAS coverage.

Criterion (B) sets out a new and separate category for participating in OTAs as another alternative to cost-share: using exclusively small businesses or NTDCs as the significant participants in the transaction. The term “small business” in Section 2371b has the same meaning as “small business concern” as set out in Section 3 of the Small Business Act (15 U.S.C. §632). The addition of Criterion (B) reflects Congress’ goal of expanding and encouraging the participation of small businesses in OTA prototype projects. Put simply, the traditional/nontraditional delineation now is irrelevant to contractors who are deemed “small businesses.” With respect to both (A) and (B), “significant” is not defined in the statute.

Criterion (C) also is a carryover from Section 845. The requirement for a traditional defense contractor performing a prototype project without the significant participation of an NTDC in accordance with Criterion A (or qualifying under Criterion (B)) remains intact – at least one third of the total cost of the project shall be paid by the traditional contractor.

Follow-On Production Contracts

Section 815 also corrects the inherent difficulties that existed in the previous statute regarding the OTA contractor’s ability to move into the production of the successful prototype developed under an OTA. Congress recognized the need to establish a seamless transition into production for technologies developed under an OTA. Section 815 specifically allows a prototype project to transition to award of a follow-on production contract or transaction. DoD may make such award without the use of competitive procedures provided (i) competitive procedures were used in the initial prototype transaction award (Participation in the consortium member white paper/award process satisfies this requirement.), and (ii) the OTA contractor successfully completed the prototype project. The Section 845 requirement that a prototype project contain cost-share as a pre-requisite to a follow-on production contract has been removed, as have the Section 845 restrictions on the number of units and the prices in such follow-on production contracts.