

ARTICLE

Streamlining federal contracting: the push to acquire products and services at speed and scale

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The Trump Administration recently issued an Executive Order (EO) aimed at overhauling the Department of Defense (DoD) acquisition system to "rapidly reform" acquisition processes with an emphasis on "speed, flexibility, and execution." The EO directs DoD to use existing authorities to the maximum extent practicable, including a "first preference" for commercial solutions and a "general preference" for Other Transaction Agreements (OTAs).

This EO follows a recent memorandum from DoD Secretary Pete Hegseth, which directed DoD to maximize the use of existing authorities, contracting strategies, and processes, and adopt the Software Acquisition Pathway (SWP) as the preferred method for software development. The memorandum also mandated the use of Commercial Solutions Openings (CSOs) and OTAs as the default SWP approaches.

The Government's push to use more CSOs and OTAs aligns with a trend towards more flexible and streamlined acquisition techniques to expedite procurement and avoid some of the requirements of the Federal Acquisition Regulation (FAR). As the Government increasingly adopts these methods, it is critical that businesses understand how they differ from traditional government contracts.

Authors

Jonathan C. Clark
Associate
202.719.4731
jcclark@wiley.law

Practice Areas

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So what are CSOs, OTAs, and other rapid acquisition techniques, and how are they different from traditional FAR-based procurements? Below, we highlight a few key considerations for industry.

Rapid acquisition techniques

The Government's effort to adopt quicker and more flexible contracting techniques is not new. The Defense Innovation Unit (DIU) has led the charge in expanding the use of CSOs and OTAs to swiftly acquire innovative capabilities, claiming these techniques allow proposals to be evaluated and contracts awarded "in a fraction of the time it traditionally takes," in a statement on its website.

DoD agencies have established their own innovation hubs like AFWERX, NavalX, EAGLEWERX, and SPACEWERX to bridge gaps between entrepreneurs, small businesses, and commercial companies as the military develops and adopts new technologies. These hubs frequently use CSOs and OTAs to overcome challenges in traditional procurement methods, including lengthy procurement times, FAR compliance, and other requirements not typically found in the commercial sector.

Commercial Solutions Openings

A CSO is a rapid acquisition technique designed to procure innovative commercial items, technologies, or services that meet agency requirements, close capability gaps, or offer technological advances. All federal agencies can use CSOs to procure "innovative" solutions, such as new technologies, processes, or methods, including research and development, or new applications of existing technologies. Agencies can award both OTAs and traditional FAR-based fixed price contracts using a CSO.

CSOs allow for more rapid acquisitions because they are exempt from many FAR requirements. As a result, CSOs and resulting contracts often have a streamlined application process, fast-track evaluation timelines, and simpler contract terms. Also, unlike traditional solicitations, CSOs typically describe problems to be solved or technologies of interest rather than dictate detailed specifications. Because CSOs are not based on a common statement of work or performance work statement, the Agency need not compare proposals against each other when evaluating solutions.

CSOs thus provide agencies with flexibility to determine the best technical solution for meeting their needs. Contractors benefit from this flexibility because, under a CSO, they can negotiate and tailor contract terms, restrict government intellectual property rights, and potentially receive sole-source follow-on production contracts.

Despite being exempt from the FAR, CSOs do have some requirements guiding their use. For example, CSOs must be published on SAM.gov (the official U.S. government website for publicizing federal contract opportunities) and include descriptions of agency interests, necessary technical data, evaluation factors, and proposal submission instructions. To use CSOs, contracting officers must anticipate meaningful proposals with varying technical or scientific approaches and evaluate them according to specified factors. The maximum award value is generally limited to \$100 million unless approved by a senior procurement official.

Other transaction agreements

OTAs (or OTs) are flexible procurement vehicles used by the Government to contract with non-traditional contractors and streamline the acquisition of innovative technologies. Designed to provide agencies with flexibility, OTAs are meant to encourage businesses that might otherwise be unwilling to accept government contracts to work with the Government. OTAs are commonly defined by what they are not: They are not procurement contracts, grants, or cooperative agreements. As a result, OTAs are generally exempt from most federal procurement rules, including the FAR.

OT authority varies by agency. For example, DoD's OT authority is limited to basic, applied, and advanced research, and prototypes. In contrast, NASA's OT authority applies to all agency functions.

Eleven agencies currently have some type of OT authority: DoD, Department of Energy, Advanced Research Projects Agency-Energy, Department of Health and Human Services, Department of Homeland Security, Department of Transportation, Transportation Security Administration, Federal Aviation Administration, NASA, Domestic Nuclear Detection Office, and the National Institutes. Each agency has its own internal policies governing the appropriate use of OTAs.

Because OTAs are not subject to the FAR, the Government can bypass traditional FAR clauses in favor of tailored and innovative terms. This does not mean, however, that agencies cannot or do not use FAR clauses in OTAs. In fact, agencies often include standard or modified FAR/DFARS clauses in OTAs because it is easier to use standard clauses rather than drafting new ones.

Although OTAs are exempt from the FAR's competition requirements, OT authorizing statutes often require agencies to use "competitive procedures." See, e.g., 10 U.S.C. § 4022. Thus, OTA competitions often resemble traditional FAR-based procurements even if their agreement terms are different.

Finally, although authorized agencies have discretion in selecting OTAs as the appropriate contracting technique, there are often statute-specific limitations on their use. OTAs are also subject to other procurement-related statutes, including the Procurement Integrity Act, Contract Disputes Act, Anti-Deficiency Act, Freedom of Information Act, False Claims Act, and Anti-Kickback Act.

Like CSOs, OTAs provide contractors with added flexibility by reducing regulatory burdens, allowing for tailored contract terms, and enabling faster project execution. This flexibility enhances collaboration, allows for innovative project execution, and provides increased incentives for nontraditional contractors to work with agencies.

FAR-based rapid acquisition techniques

Beyond OTAs and CSOs, several FAR-based acquisition techniques also allow the Government to rapidly award contracts and acquire new technologies. For example, the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs fund small businesses engaged in the research, development, and commercialization of new technology. Like a CSO or OTA follow-on production contract, a

Phase III SBIR/STTR contract can be awarded on a noncompetitive basis if the Phase I or Phase II awards were competitively awarded.

Federal agencies can also use FAR Part 12's streamlined requirements to acquire commercial products and services. Unlike other FAR-based procurements, FAR Part 12 (commercial products and services) simplifies acquisitions by eliminating the need for detailed evaluation plans, competitive range determinations, extensive negotiation procedures, or the submission of certified cost or pricing data. FAR Part 12 also requires agencies to use standardized commercial clauses that resemble standard commercial terms and thus reduce compliance burdens on nontraditional contractors.

Other considerations

Although OTAs and CSOs provide contractors and the Government with greater flexibility and enable faster contract awards, they are not without risks. One major drawback is that OTAs can omit standard FAR clauses that protect contractors.

For example, an agency might exclude risk-shifting clauses such as DFARS 252.228-7001, Ground and Flight Risk; FAR 52.245-1, Government Property; or FAR 52.246-23, Limitation of Liability, all of which shift certain contractor liability to the Government.

Other beneficial clauses that might be omitted from an OTA include FAR 52.227-1, Authorization & Consent; FAR 52.225-8, Duty-Free Entry; and FAR 52.233-1, Disputes. Contractors negotiating OTAs and CSOs must carefully review OTAs and CSOs to ensure they are protected from the inherent risks of working with the Government.

SBIR/STTR contracts also have unique rules and restrictions, including some related to the Government's ability to use products developed using SBIR/STTR funds, technical data rights, and limitations on funding. And commercial products and services contracts are just that: limited to commercial products and services. So even these rapid FAR-based contracts might not always be appropriate.

Finally, businesses that are unfamiliar with bid protests should be aware of two recent Court of Federal Claims cases holding that OTAs (and CSOs) may be subject to protest depending on the products or services being acquired. (Raytheon Co. v. United States and Indep. Rough Terrain Ctr. v. United States).

Consequently, as the Government uses more CSOs and OTAs, we may see more post-award protests of these procurements, potentially limiting the benefits of their rapid acquisition timelines.

Conclusion

As Government interest in rapid acquisition and procurement reform grows, the use of techniques like CSOs and OTAs will likely increase. Congress may even introduce new authorities, like it did with CSOs, to address the slow pace of traditional FAR-based procurement. Contractors should closely monitor these developments to ensure they are well-positioned to leverage the Government's shift towards more flexible and expedited acquisitions.