

and (g)(4)(iii), contained in the notice of proposed rulemaking that was published in the **Federal Register** on December 19, 2017 (82 FR 60135), are withdrawn for taxable years ending after August 19, 2024; (2) proposed § 1.988–7(d) and (e), contained in the notice of proposed rulemaking that was published in the **Federal Register** on December 19, 2017 (82 FR 60135), are withdrawn as of August 19, 2024; and (3) proposed § 1.988–7(c) contained in the notice of proposed rulemaking that was published in the **Federal Register** on December 19, 2017 (82 FR 60135), is withdrawn for taxable years beginning after August 19, 2024.”.

§ 1.988–7 [Corrected]

■ 5. On page 67341, in the first column, in § 1.988–7, the last line of paragraph (c)(1) is corrected to read “election is made, or if applicable, with a request for an extension of time to file that return.”.

Oluwafunmilayo A. Taylor,

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Associate Chief Counsel (Procedure and Administration).*

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 3

[Docket ID: DoD–2021–OS–0071]

RIN 0790–AK98

Transactions Other Than Contracts, Grants, or Cooperative Agreements for Prototype Projects

AGENCY: Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD(A&S)), Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing revisions to its regulations on Other Transaction (OT) agreements for prototype projects to implement changes in statutory authority enacted by Congress since the last update in 2004. The Department is proposing changes in: the authority to provide for follow-on production OTs and contracts; special circumstances for award of OTs to small businesses, nontraditional defense contractors, nonprofit research institutions, and consortia; approval requirements for large dollar OTs; the authority to supply prototypes and production items to another contractor as Government furnished items; and applying

procurement ethics requirements to covered OT agreements.

DATES: Comments must be received by November 4, 2024.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Identifier Number (RIN) number and title, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the Docket ID No. Comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided. Do not submit any information you consider to be Confidential Business Information (CBI) through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Larry McLauray and Mr. Jesse Bendahan, 703–697–6710.

SUPPLEMENTARY INFORMATION:

I. Background and Authority

These proposed changes update 32 CFR 3 under section 4022 of title 10, United States Code (section 4022). An OT is a legal instrument (award) issued by the Federal Government that is not a procurement contract, cooperative agreement or grant, and is the defining characteristic of OTs. OTs pursuant to section 4022 can take many forms and generally are not required to comply with Federal laws and regulations that apply to procurement contracts, grants, and/or cooperative agreements. To the extent that a particular law or regulation is not tied to the type of instrument used (e.g., fiscal and property laws), it would generally apply to an OT.

The purpose of these types of agreements is to provide agility in the contracting process by attracting nontraditional defense contractors and small businesses with leading edge technologies. They are meant to enable acquisition of innovative technologies by allowing for flexibility in terms of the award process and the terms and conditions of a contract.

The Department currently has permanent authority to award OT under three areas.

- **Research**—Section 4021 of title 10, United States Code (section 4021) provides authority for basic, applied,

and advanced research projects. These OTs are intended to spur dual-use research and development to take advantage of economies of scale without burdening companies with Government regulatory overhead, which would make them non-competitive in the commercial (non-defense) sector. The update proposed here is limited to authority for prototype OTs under section 4022, but section 4022 states that OTs for prototypes are under the authority of section 4021.

- **Prototype**—This allows for prototype projects under section 4022 authority that are directly relevant to enhancing the mission effectiveness of personnel of the Department of Defense or improving platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

- **Follow-on Production OTs and Contracts**—This allows for a non-competitive, follow-on OTs to a Prototype OT agreement under section 4022 authority that was competitively awarded and successfully completed. Although advance consideration of transition from a prototype agreement to a follow-on production OT is recommended as best practice, explicit notification is not required within the request for proposal for the transaction if: competitive procedures were used for the selection of parties for participation in the transaction; and the participants in the transaction successfully completed the prototype project provided for in the transaction.

This proposed rule covers prototype OTs and follow-on production OTs and contracts under section 4022. This part of the CFR was last updated on March 30, 2004 (61 FR 16481–16483). The changes proposed facilitate statutory alignment and ensure up-to-date information and policy are codified in the CFR.

For the purposes of this proposed rule, prototype projects can address:

- a proof of concept, model, or process, including a business process;
- reverse engineering to address obsolescence;
- a pilot or novel application of commercial technologies for defense purposes;
- agile development activity; and
- the creation, design, development, demonstration of operational utility; or any combination of the foregoing.

The current provisions of Part 3 in Title 32 are based on authority in section 845 of the NDAA for Fiscal Year 1994, Public Law 103–160, as amended

(section 845). This authority permitted the use of OT agreements for prototype projects directly relevant to weapons or weapon systems proposed to be acquired or developed by the DoD. It was permanently codified when section 2371b, (which is now 10 U.S.C. 4022) was enacted.¹ Although section 4022 replaced section 845, many of the provisions regarding OT agreements for prototype projects are retained in section 4022 and are retained in this proposed rule.

However, DoD is proposing to retain some of the current language from the now replaced Section 845 with some modifications based on changes in the law in the following areas:

- changing the use of OTs for prototype projects so it does not require a cost share from a performer² when at least one nontraditional defense contractor is participating to a significant extent.
- Providing authority for the senior procurement executive of the agency to make an exceptional circumstances justification to use such a prototype OT transaction.
- Including a limitation on cost sharing.
- Comptroller General access and DoD access to records policy provisions.
- Adding authority for follow-on production contracts.

II. Major Provisions

The following is a section-by-section overview of the amendments proposed by this rule.

Section 3.1 Purpose. The proposed amendments reflect the statutory implementation as the basis for the authority to award OT agreements for prototype projects. The amendment identifies the changes in the law since the current rule was published. It also expands the background on the intended use of OTs for prototype projects. Specifically, DoD is aligning the intended uses consistent with law that are directly relevant to enhancing the mission effectiveness of personnel of the DoD or improving platforms, systems, components, or materials

proposed to be acquired or developed by the DoD, or to improvement of platforms, systems, components, or materials in use by the armed forces.

Section 3.2 Background. The proposed amendments clarify that OT agreements for prototype projects are legally binding instruments that include the elements of: offer; acceptance; consideration; authority; a legal purpose; a meeting of the minds; and are approved by an Agreements Officer who has authority to bind the Government. The proposed amendments to this section also highlight that DoD has an internal OT Guide that provides instruction for DoD employees on the planning, publicizing, soliciting, evaluating, negotiation, award, and administration of OTs for prototype projects. It was most recently revised in July 2023, and includes changes codified in 10 U.S.C. 4022.³

Section 3.3 Applicability. The proposed amendments detail how this part applies to OT agreements for prototype projects and follow-on production OTs and contracts awarded under this part. This section also specifies that authority for OT agreements for prototype projects and any follow-on production contract or follow-on production OT under this part has been delegated to specified officials. The amendment proposes to add offices that have been delegated OT authority to include, the Commanding Officers of the Combatant Commands with contracting authority, the Directors of Field Activities with contracting authority, the Director of the Defense Innovation Unit, or any other official designated by the Secretary of Defense to carry out OTs for prototype projects. The proposed amendment also recognizes changes in applicability to include follow-on production OTs and contracts under the authority of this part.

Section 3.4 Definitions. The definitions are retained from the current rule, except that the definition of the term, “nontraditional defense contractor” has been changed to reflect statutory changes in the definition of the term. A definition of the terms “covered official” and “prototype project” are

³The DoD OT Guide is issued by the Office of the Under Secretary of Defense for Acquisition and Sustainment. <https://www.acq.osd.mil/asda/dpc/cp/policy/other-policy-areas.html>. The OT Guide provides internal guidance to DoD practitioners and does not direct any requirements for OT performers. The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or departmental policies.

added to the rule consistent with the definitions in 10 U.S.C. 4022.

Section 3.5 Appropriate use. This section is amended to reflect changes that align the appropriate use of the authority related to nonprofit research institutions and use of small businesses. If a performer meets the required category under this section, there is no requirement for a cost share for the prototype project. The proposed amendment also amends the basis for an exceptional circumstances justification (to forego a requirement for a cost share) to include an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract. Per the National Defense Authorization Act for Fiscal Year 2024, section 821, Public Law 118–31, this section also recognizes that the cost sharing requirements do not apply to follow-on production OTs or contracts.

Section 3.6 Limitations on cost-sharing. This section is proposed to be amended to clarify cost sharing limitations related to OT transactions for prototype projects. The amendment proposes to change the official approving the limits on cost sharing from the agreements officer to the official responsible for entering into the transaction, recognizing that there may be a few cases where approval for a limitation on cost sharing is required above the level of the agreements officer.

Section 3.7 Comptroller General access. This section is proposed to be amended to update changes in the authority from section 845 to 10 U.S.C. 4022, and for organizational changes with the DoD, and for flowdown requirements. The cognizant office is changed to the Principal Director, Defense Pricing, Contracting, and Acquisition Policy. This rule also clarifies the flowdown requirements to any entity that participates in the performance of the agreement that provide for total government payments in excess of \$5,000,000 as discussed in section 4022(c)(1).

Section 3.8 DoD access to records policy. This section is proposed to be amended to update authority for the Single Audit Act, 31 U.S.C. 7501–7506, and for organizational changes within DoD for the Principal Director, Defense Pricing, Contracting, and Acquisition Policy. The amendment also updates the contact address for DoD IG.

Section 3.9 Follow-on production contracts or transactions. This section is revised to add authority for follow-on production OT agreements for prototype projects, and revise authority for follow-on contracts. This section also proposes to add special conditions regarding the

¹Section 845 was codified in section 2371b of title 10, U.S.C. by section 815 of the FY16 NDAA, Public Law 114–92. Section 1841 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, transfers section 2371b to section 4003 of title 10, U.S.C. This change was effective January 1, 2022 by section 1801(d)(1). Further, section 1701(u)(2)(B) of the National Defense Authorization Act for Fiscal Year 2022 transferred section 4003 to section 4022 of title 10, U.S.C. Further references in the proposed revision are to section 4022.

²For OTs under section 4022, awardees are considered “performers”, which is contrasted with traditional FAR procurement contract awardees that are considered “contractors”.

use of consortium. The current provision provides authority for follow-on production contracts and does not address special circumstances for use of consortium. The amendment adds authority for follow-on production OTs or contracts and amends the conditions for approval. The proposed amendment provides that a follow-on production OT or contract may be awarded to the participants in the OT without the use of competitive procedures, if: (1) competitive procedures were used for the selection of parties for participation in the OT for prototype project; (2) the participants in the OT successfully completed the prototype project provided for in the OT; and (3) even if explicit notification was not listed within the request for proposal for the original prototype project transaction. The proposed amendment also provides that follow-on production contract or OT may be awarded to a consortium when the Department determines that an individual prototype or prototype subproject as part of a consortium is successfully completed by the participants. The proposed section recognizes that it is not a condition for award of a follow-on production contract or OT to a consortium to require the successful completion of all activities within a consortium for the prototype projects awarded to the consortium.

Section 3.10 Approval requirements. This is a new section consistent with section 4022 to reflect internal DoD approval requirements for proposed large dollar OT agreements for prototype projects and follow-on production OTs and contracts. Per requirements in section 4022(a)(2) OTs in excess of \$100,000,000 but not in excess of \$500,000,000 (including all options) require a written determination by the senior procurement executive for the agency, or for the Defense Advanced Research Projects Agency (DARPA), the Defense Innovation Unit (DIU), or the Missile Defense Agency (MDA), the director of the agency. OTs in excess of \$500,000,000 (including all options) require a written determination by either the Under Secretary of Defense for Research and Engineering, or the Under Secretary of Defense for Acquisition and Sustainment. This latter category also requires congressional notice before exercising such authority. Follow-on production OTs and contracts in excess of \$100,000,000 (including all options) require a written determination by a covered official (defined in § 3.4), including a congressional notice at the time such authority is exercised.

Section 3.11 Authority to provide prototypes and follow-on production items as government-furnished equipment. This is a new section consistent with section 4022 to provide prototypes and follow-on production items as government furnished equipment (GFE). This section reflects authority added in 10 U.S.C. 4022 for providing GFE to support another contractor. The GFE may be provided to another contractor, or to a performer of an OT.

Section 3.12 Competition requirements. This is a new section consistent with section 4022 to reflect competition requirements that were included in section 845, but are not reflected in the current rule, and such competition requirements are retained in 10 U.S.C. 4022. The competition standard under section 4022 is competition to the maximum extent practicable.

Section 3.13 Applicability of procurement ethics requirements. This is a new section consistent with section 4022 to reflect the applicability of the post-Government employment restrictions to OTs under this part covered in the Procurement Integrity Act, in 41 U.S.C. chapter 21. The ethics provisions of the Procurement Integrity Act include a prohibition that a former Government employee may not accept compensation from a contractor (or performer) as an employee, officer, director, or consultant of the contractor (or performer) for a period of one year after the official either served in a specified role, or personally made for the Federal agency a specified decision.

III. Expected Impact of This Rule

OMB Circular No. A-4, Subject: Regulatory Analysis (Nov. 2023) provides guidance to Federal agencies on the development of regulatory analysis as required under Section 6(a)(3)(C) of Executive Order 12866. Under OMB Circular A-4, a benefit-cost analysis is the primary analytical tool used for regulatory analysis. In developing a regulatory analysis for a proposed rule, identifying and evaluating the need for the regulatory action, and defining the baseline are important initial steps. The proposed rule to update 32 CFR 3 for Other Transactions is necessary because the current rule has not been updated in over 20 years, and there have been several changes to OT authority since the current rule.

The OMB Circular A-4 baseline criteria states, “The benefits and costs of a regulation are generally measured against a no-action baseline: an analytically reasonable forecast of the

way the world would look absent the regulatory action being assessed, including any expected changes to current conditions over time.” (p. 11). In the case of the proposed rule to update 32 CFR 3 for OT authority, absent the proposed rule, we have the current regulation that is based on the statutory authority of section 845. In establishing a baseline, A-4 states:

In general, an agency’s first regulatory action implementing a new statutory authority should be assessed in a manner that accounts for the effects of the statute itself—that is, assessed against a without-stature baseline.⁴ However, in some cases, substantial portions of a regulation may simply restate statutory requirements that are self-implementing even in the absence of the regulatory action or over which an agency clearly has essentially no regulatory discretion. In these rare cases, you may use a with-stature baseline in your regulatory analysis, focusing on the discretionary elements of the action and potential alternatives.

A “without-stature baseline” (or pre-statutory baseline) does not fit the proposed rule because the current rule is firmly based on the statutory authority of section 845. The proposed rule cites 10 U.S.C. 4022 (section 4022). However, section 4022 is not a “new statutory authority” under the OMB Circular A-4 criteria for establishing a baseline.⁵ Section 845 is the original OT authority and has been permanently codified as section 4022. Section 845 was originally temporary authority and included as a note to 10 U.S.C. 2371.⁶ Section 815 of the National Defense Authorization Act for Fiscal Year 2016, Public Law 114-92, amended OT authority by permanently codifying OT authority in section 2371b of title 10 U.S.C., and thereby repealed section 845. As a result of reorganization of title 10 U.S. Code, section 2371b became the current section 4022. However, the OT authority of section 845 continued as the current section 4022. Therefore, as

⁴Footnote from A-4: The terms “pre-stature baseline” and “post-stature baseline” were used in OMB Circular No. A-4 as originally issued in 2003. However, as noted elsewhere, the baseline for a regulatory analysis is (and has been) the predicted future state of the world in the absence of the policy being assessed, so more precise terms—that avoid the potentially misleading temporal element of the prefixes “pre-” or “post-”—without-stature or with-stature are now used.

⁵OT statutory authority in the context of this proposed rule is intended to cover OTs for prototype projects under the original section 845 and now section 4022. It is recognized that basic OT authority, including research OTs, is under the original section 2371, and now section 4021 of title 10, U.S.C. titled, “Research projects: transactions other than contracts and grants.” It is further recognized that OT for prototype project authority is under the authority of section 4021.

⁶Section 845 of the NDAA for Fiscal Year 1994, Public Law 103-160, as amended.

indicated above, section 4022 is not “new statutory authority”. As a result, the baseline for the proposed rule is the statutory authority of section 845, continued as section 4022. The proposed rule is a direct implementation of OT authority in section 4022. It simply restates OT authority in section 4022 and does not add any new requirements. DoD practitioners are currently using OT authority in section 4022 to award OTs for prototype projects without the benefit of an updated rule. OMB Circular A–4 states that a statute baseline is authorized where a proposed rule simply restate[s] statutory requirements that are self-implementing even in the absence of the regulatory action or over which an agency clearly has essentially no regulatory discretion.” Section 845 is a predecessor OT statutory authority of the current section 4022.⁷ Section 845 and section 4022 share several OT provisions. Therefore, it does not appear appropriate to apply a “without-statute baseline” (or pre-statutory baseline) to our proposed rule. The proposed rule is intended to make the CFR provisions consistent with the current section 4022. The current provisions of section 4022 are self-implementing and are currently being used by DoD practitioners to award OTs without the benefit of updated CFR provisions. The proposed rule does not add any new requirements beyond section 4022. The impact of the proposed rule should be measured by comparing the current rule with section 4022 as authority (a with-statute baseline).

The current rule provides authority for OTs for prototypes as a significant asset in the DoD toolbox for acquisition of items to support the DoD mission. The current rule and the underlying statutory authority provide a valuable alternative to traditional Federal Acquisition Regulation (FAR) procurement contracts⁸ because they encourage participation by small businesses and nontraditional defense contractors⁹ and allow flexibility in

negotiation of terms of the agreement. OTs for prototype agreements are generally not subject to procurement laws and regulations.¹⁰ The proposed rule provides qualitative benefits and cost savings by encouraging small business and nontraditional defense contractors to meet DoD warfighter requirements. The proposed rule and the underlying statutory authority provide incentives to small business and nontraditional defense contractors by waiving cost share requirements if conditions (discussed below) are met. The current rule is out of date with the statutory authority for OTs for prototypes. The proposed rule supports innovation because it authorizes flexibility in negotiation of terms, which require less Government oversight, for prototype projects as an alternative acquisition method if available in certain circumstances specified in statute instead of regulatory contracts governed by the FAR.¹¹ The proposed rule may promote additional competition and spur innovation by attracting nontraditional and small businesses with leading-edge technologies to enable acquisition of innovative technologies.¹² OTs support additional competition because of statutory incentives to small businesses and nontraditional defense contractors that potentially may not participate absent these incentives. OT authority encourages participation by small businesses by waiving cost share requirements if certain statutory conditions are met. Section 4022(d) provides that if all significant participants in the transaction other than the Federal Government are small businesses, or nontraditional defense contractors, the cost share requirements are waived. Further, if a nontraditional defense contractor or a nonprofit research institution participates to a significant extent in the transaction, cost share requirements are met. Small businesses qualify as nontraditional defense contractors in most cases.¹³

It is believed that if the proposed rule is implemented, it will result in only a

definition of an NDC (paraphrased from 10 U.S.C. 3014) is a company that has not done business with DoD within the last year, or does not meet the full coverage requirements for cost accounting standards. This definition permits a large number of entities, including nearly all small business concerns, to be considered NDCs to help drive innovation.

¹⁰ See IBM report above.

¹¹ See IBM report above.

¹² Congressional Research Service (CRS) Report, “Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress” updated February 22, 2019. <https://crsreports.congress.gov/product/pdf/R/R45521>.

¹³ See 10 U.S.C. 3014.

small number of new OTs. DoD practitioners are presently awarding OTs for prototype projects based on the direct authority of section 4022. Based on anecdotal evidence, few DoD practitioners of OT authority are even aware of the current rule in 32 CFR 3. We do not expect that implementation of the proposed rule will change the practice of using section 4022 as authority without consideration of the 32 CFR 3. Therefore, we estimate that implementation of the proposed rule will result in less than a 10% increase new OT awards.¹⁴ Further, we do not believe the proper measurement of the impact of the proposed rule is to count the obligation amounts for OTs. If DoD warfighters have a requirement for an item, they obtain funding for the program and decide as part of acquisition planning what is the appropriate acquisition vehicle to fulfill the requirement. If DoD determines an OT is appropriate for the requirement, it will award an OT, or if not, use a FAR procurement contract as the appropriate vehicle in the acquisition toolbox. However, if an OT is used, it is not a unique impact to the economy because if an OT was not selected, the requirement would be fulfilled by a FAR procurement contract. Section 4022 and the proposed rule do not promote OTs over FAR procurement contracts. DoD must meet specific requirements to use OT authority. DoD does not get a separate appropriation for OTs that may independently impact the economy. Therefore, we do not expect that implementation of the proposed rule will significantly impact the economy.

Further, when OTs for prototype projects requirements are met and are available as an alternative to traditional FAR procurement contracts, it can potentially reduce the costs of doing business for both OT performers and the Government because the compliance costs for traditional FAR procurement contracts are reduced by the use of OTs for prototype projects.

Section 4022 provides flexibility in negotiation of terms compared to a traditional FAR procurement contract. Examples of flexibility of negotiation of terms that may not apply to OTs under section 4022 are obtaining certified cost and pricing data; intellectual property reporting provisions;¹⁵ payment

¹⁴ We believe that practitioners will continue to perform acquisition planning of whether a FAR contract or OT is the appropriate way to fill a requirement. As indicated above, use of an OT under section 4022 requires meeting statutory requirements (see section 4022(a) and (d)).

¹⁵ For example on flexibility, intellectual property (IP) provisions in DoD FAR procurement contracts

⁷ Section 1841 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, transfers section 2371b to section 4003 of title 10, U.S.C. This change was effective January 1, 2022 by section 1801(d)(1). Further, section 1701(u)(2)(B) of the National Defense Authorization Act for Fiscal Year 2022 transferred section 4003 to section 4022 of title 10, U.S.C.

⁸ See IBM Center for the Business of Government, “Other Transaction Authorities: After 60 Years, Hitting their Stride, or Hitting the Wall” (2021). <https://www.businessofgovernment.org/sites/default/files/Other%20Transactions%20Authorities.pdf>.

⁹ See 10 U.S.C. 3014 for the definition of the term “nontraditional defense contractor” (NDC). The

procedures; and more extensive audit requirements. Procurement contract laws and regulations generally do not apply to OTs for prototype projects and follow-on production OTs. Therefore, the time and paperwork burden for an offeror and performer of an OT for prototype project agreement is less than that for a traditional contract under the FAR. Section 4022 promotes and encourages award of OTs for prototype projects and follow-on production OTs and contracts to small businesses, including those that are nontraditional defense contractors.¹⁶ It is recognized that with increased flexibility in negotiation of OT terms, that it raises the potential of risks on oversight of such agreements. The oversight risks for OTs are significantly reduced by a statutory requirement in section 4022(c) for Comptroller General access to performer records for OT agreements over \$5M. Further, § 3.8 in the current rule in 32 CFR 3 authorizes DoD access to performer records for cost-type OT agreements. These protections make the risk of flexibility manageable for OT agreements.

Benefits

It has been stated many companies do not pursue Federal Government contracts because they are unwilling to forfeit intellectual property rights or adhere to some of the procurement regulations.¹⁷ One of the goals of OTs is to expand the defense marketplace by creating a mechanism for access to technologies and services of companies that would not otherwise work with DoD, particularly startups and companies developing innovative technology. Section 4022(d) provides that if a nontraditional defense contractor or nonprofit research institution participates to a significant extent in the prototype project, or if all significant participants in the prototype project are either small businesses, or nontraditional defense contractors, there is no requirement for the participants to provide a one-third cost share of the project. This is a significant benefit for small businesses. The proposed rule in implementing 10 U.S.C. 4022 repeats this policy, and assists small businesses, and should make it easier for them to compete in a particular sector of the economy than large businesses.

are subject to the Baye-Dole Act (Pub. L. 96–517 (1980)) specifying IP rights and duties and several proscriptive clauses in the DoD FAR Supplement. IP provisions in OTs are not subject to these provisions and allow for more flexibility in negotiation.

¹⁶ See IBM Report on OTs.

¹⁷ *Id.*

In FY 2022, it is estimated that over 90 percent of dollars obligated under OT agreements for prototype projects went to performers that included nontraditional defense contractors performing a significant part of the project,¹⁸ and in FY 2022 it is estimated that the majority of dollars obligated went to nontraditional defense contractors.¹⁹ Many nontraditional defense contractors are small businesses. Based on the present data available, it is also estimated that 30–40 percent of OT actions for prototype projects were awarded to small businesses.

The proposed rule will promote the growth and well-being of such small entities. The economic impact to small businesses will be beneficial. The effect of the proposed rule will be to encourage more competition and awards to small business of OTs for prototype agreements, and it is expected there will be a reduction in the paperwork burden for small businesses compared to traditional FAR procurement contracts.

The proposed rule would provide an opportunity for public comments and provide updated external guidance on OT for prototype policy in accordance with the statutory provisions of 10 U.S.C. 4022. Public comments are solicited on the aspects of the costs and benefits of the proposed rule. The proposed rule supports the use of small businesses and will enable DoD to gain access to innovative technologies by performers that will not accept doing business through a traditional FAR procurement contract. There are no significant costs related to the adoption of the proposed rule.

A potential alternative to the proposed rule is to delete the present rule in 32 CFR 3. This potential alternative has the benefit of removing an out-of-date regulation. However, the potential benefit is outweighed by the costs of such an alternative. OT for prototype authority is an important tool in the DoD acquisition toolbox, and deletion of such regulatory coverage would be inconsistent with DoD's policy to support innovation through

¹⁸ Where an OT transaction includes a nontraditional defense contractor performing to a significant extent, DoD does not presently have access to data to determine the percentage of obligations that went to the prime performer versus the nontraditional defense contractor. DoD is working to improve the transparency of data to determine the amount of obligations for a nontraditional defense contractor.

¹⁹ This data is included in the DoD Report to Congress on the Use of Other Transactions (OT) Authority for Prototype Projects in Fiscal Year 2022 (April 2022). Annual Reports to Congress may be viewed at <https://www.acq.osd.mil/asda/dpc/cp/policy/other-policy-areas.html>.

acquisition policy. Further, the current rule includes § 3.8 DoD access to records policy. The current rule provision on audit access is the only section that is not directly from the statutory authority in section 845.²⁰ Removal of this audit access section would deprive DoD of important oversight authority for OTs. Another potential alternative is to expand the proposed rule to include best practices for DoD practitioners. This alternative is not recommended since such best practices are included in the DoD internal OT Guide. The proposed rule is the best alternative.

III. Regulatory Compliance Analysis

A. Executive Order 12866, "Regulatory Planning and Review," as Amended by Executive Order 14094, "Modernizing Regulatory Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

This rulemaking has been determined to be a significant action under Executive Order 12866, as amended by Executive Order 14094. It does not have economic, environmental, public health, safety effects, or distributive impacts. It raised policy issues for which centralized review was meaningful for resolution. Accordingly, the rule was reviewed by the Office of Management and Budget.

B. Public Law 96–354, "Regulatory Flexibility Act" (5 U.S.C. 601)

The Under Secretary of Defense for Acquisition and Sustainment certified that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Although the proposed rule will be beneficial to a substantial number of small entities as discussed in the expected impact section, it will not have a significant economic impact on small businesses. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

C. Sec. 202, Public Law 104–4, "Unfunded Mandates Reform Act"

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. This rule will not

²⁰ The proposed rule only makes administrative changes to section 3.8 on audit policy.

mandate any requirements for State, local, or Tribal governments, and will not affect private sector costs.

D. Public Law 96–511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that this rule does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

E. Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. This rule will not have a substantial effect on State and local governments.

F. Executive Order 13175, “Consultation and Coordination With Indian Tribal Governments”

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct compliance costs on one or more Indian Tribes, preempts Tribal law, or effects the distribution of power and responsibilities between the Federal Government and Indian Tribes. This rule will not have a substantial effect on Indian Tribal Governments.

List of Subjects in 32 CFR Part 3

Government procurement.

Accordingly, the Department of Defense proposes to amend 32 CFR part 3 as follows:

PART 3—TRANSACTIONS OTHER THAN CONTRACTS, GRANTS, OR COOPERATIVE AGREEMENTS FOR PROTOTYPE PROJECTS

■ 1. The authority citation is revised to read as follows:

Authority: 10 U.S.C. 4022.

§ 3.1 Purpose.

This part implements the authority for Other Transaction (OT) agreements for prototype projects established under section 4022 of title 10, United States Code (U.S.C.). Section 4022 of title 10, United States Code (U.S.C.) authorizes the Department of Defense (DoD) to carry out prototype projects that are directly relevant to enhancing the mission effectiveness of personnel of the Department of Defense or improving platforms, systems, components, or materials proposed to be acquired or developed by the DoD, or to the

improvement of platforms, systems, components, or materials in use by the armed forces.

■ 2. Revise § 3.2 to read as follows:

§ 3.2 Background.

OT agreements for prototype projects are legally binding instruments that include the elements of: offer; acceptance; consideration; authority; a legal purpose; a meeting of the minds; and are approved by an Agreements Officer who has authority to bind the Government. OTs for prototype projects are not procurement contracts under the Federal Acquisition Regulation (FAR), and generally are not subject to the Federal laws and regulations limited in applicability to procurement contracts, grants, and cooperative agreements. As such, they are generally not required to comply with the FAR and its DoD supplement. OTs for prototype projects spur innovation and attract nontraditional and small businesses with leading-edge technologies to enable acquisition of innovative technologies more rapidly. The DoD has broad flexibility in terms of the award process and the terms and conditions of an OT for prototype project are negotiable between the parties, subject to the provisions specified in 10 U.S.C. 4022 and its implementation. The DoD has issued the Other Transactions Guide for the promulgation of internal policy on the planning, publicizing, soliciting, evaluating, negotiation, award, and administration of OTs for prototype projects.

■ 3. Revise § 3.3 to read as follows:

§ 3.3 Applicability.

This part applies to:

(a) OT performers, companies, non-profit research institutions, and consortiums of organizations that are awarded OT agreements for prototype projects and follow-on OTs and contracts awarded under the authority of 10 U.S.C. 4022 implemented in this part. The applicability of this part is distinguished from awardees of procurement contracts under the Federal Acquisition Regulation.

(b) The authority for OT agreements for prototype projects under this part has been delegated to the following officials: the Secretaries of the Military Departments, the Commanding Officers of the Combatant Commands with contracting authority, the Directors of the Defense Agencies, the Directors of Field Activities with contracting authority, the Director of the Defense Innovation Unit, or any other official designated by the Secretary of Defense to carry out OTs for prototype projects, and follow-on production OTs and

contracts under the authority of this part.

■ 4. Amend § 3.4 by:

■ a. adding in alphabetical order a definition for “covered official”;

■ b. revising the definition of “Nontraditional Defense contractor”;

and

■ c. adding in alphabetical order a definition for “prototype project”

The additions and revision read as follows:

- § 3.4 Definitions.**
- * * * * *
- Covered official.* An official of the DoD to include:
- (1) A service acquisition executive;
 - (2) The Director of the Defense Advanced Research Projects Agency;
 - (3) The Director of the Missile Defense Agency;
 - (4) The Undersecretary of Defense for Acquisition and Sustainment;
 - (5) The Undersecretary of Defense for Research and Engineering; or
 - (6) The Director of the Defense Innovation Unit (DIU).

* * * * *

Nontraditional Defense contractor. 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 full coverage under the cost accounting standards.

* * * * *

Prototype Project. Includes a project that addresses any combination of the following:

- (1) A proof of concept, model, or process, including a business process;
 - (2) Reverse engineering to address obsolescence;
 - (3) A pilot or novel application of commercial technologies for defense purposes;
 - (4) Agile development activity;
 - (5) The creation, design, development, or demonstration of operational utility;
- or

* * * * *

■ 5. Revise § 3.5 to read as follows:

§ 3.5 Appropriate use.

OT agreements for prototype project authority under this part may be used only when one of the following conditions is met:

- (a) At least one nontraditional defense contractor or nonprofit research institution is 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;

(c) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government. If any of the conditions of paragraphs (a), (b), or (d) of this section are met, there is no requirement that at least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.

(d) The Senior Procurement Executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

■ 6. Amend § 3.6 by:

■ a. Revising paragraph (a) introductory text.

■ b. In paragraph (a)(1), removing the words “OT agreement” and adding in its place the word “transaction”.

■ c. In paragraph (a)(2), removing the words “OT agreement” and adding in its place the word “transaction”.

■ d. In paragraph (b), removing the words “may be recognized when using” and adding in its place the words “is utilized for”.

The revision reads as follows:

§ 3.6 Limitations on cost-sharing.

(a) If cost-sharing is provided by a non-Federal party under § 3.5 of this part, the non-Federal amounts counted as provided, or to be provided, by the business units of an awardee or subawardee participating in the performance of the transaction for a prototype project shall not include costs that were incurred before the date on which the transaction becomes effective. Costs that were incurred for a prototype project by the business units of an awardee or subawardee after the beginning of negotiations, but prior to the date the transaction becomes effective, may be counted as non-Federal amounts provided if and to the extent that the official responsible for entering into the transaction determines in writing that:

* * * * *

■ 7. Amend § 3.7 by:

■ a. Removing the word “subparagraph” wherever it appears and adding in its place the word “paragraph.”

■ b. Revising paragraph (a).

■ c. In paragraph (c)(1), removing the words “845 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160; 10 U.S.C. 2371” and adding in their place the words “10 U.S.C. 4022.”

■ d. In paragraph (d), removing the words “Director, Defense Procurement” and adding in their place the words “Principal Director, Defense Pricing, Contracting, and Acquisition Policy (D, DPCAP)”.

■ e. Revising paragraph (e).

■ f. Redesignating paragraph (g)(3)(A) and (g)(3)(B) as (g)(3)(i) and (g)(3)(ii), respectively.

■ g. In newly-redesignated paragraph (g)(3)(i), removing the words “845 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160; 10 U.S.C. 2371” and adding in their place the words “10 U.S.C. 4022.”

■ h. Revising paragraph (g)(6).

The revisions read as follows:

§ 3.7 Comptroller General access.

(a) A clause must be included in solicitations and agreements for Other Transaction (OT) agreements for prototype projects awarded under authority of this part that provide for total government payments in excess of \$5,000,000 to allow Comptroller General access to records that directly pertain to such agreements.

* * * * *

(e) The HCA must notify the PD, DPCAP prior to any finalization of a waiver under paragraph (d) of this section, and also of situations where there is evidence that the Comptroller General Access requirement caused companies to refuse to participate or otherwise restricted the Department’s access to companies that typically do not do business with the Department.

* * * * *

(g) * * *

(6) The recipient of the agreement shall flow down this provision to any entity that participates in the performance of the agreement that provide for total government payments in excess of \$5,000,000.

■ 8. Amend § 3.8 by:

■ a. Revising paragraph (a) introductory text.

■ b. In paragraph (a)(2), removing the words “Public Law 98–502, as amended by Public Law 104–156, 110 STAT. 1396–1404” and adding in its place the words “31 U.S.C. 7501–7506 (Single Audit Act, or in this section the Act)”.

■ c. In paragraph (a)(2)(v)(A), removing the word “statute” and adding in its place the words “this part.”

■ d. In paragraph (b)(1)(iv), removing the words “Director, Defense

Procurement” and adding in its place the words “Principal Director, Defense Pricing, Contracting, and Acquisition Policy (PD, DPCAP)”.

■ e. In paragraph (b)(2)(iii), removing the words “Director, Defense Procurement” and adding in its place the acronym “PD, DPCAP”.

■ f. In paragraph (b)(3), adding a sentence at the end of the paragraph.

■ g. In paragraph (c)(2):

■ i. Removing the words “(Public Law 98–502, as amended by Public Law 104–156, 110 STAT. 1396–1404)”.

■ ii. Removing the words “that Act” and adding in its place the words “the Act”.

■ h. In paragraph (c)(2)(ii), removing the acronym “DCAA” and adding in its place the words “the Defense Contract Audit Agency (DCAA)”.

■ i. In paragraph (c)(2)(iii), removing the words “Director, Defense Procurement” and adding in its place the acronym “PD, DPCAP”.

■ j. In paragraph (c)(2)(iii)(B), removing the words “3 years” and adding in its place the words “three years”.

■ k. In paragraph (c)(2)(iii)(C), removing the address “400 Army Navy Drive, Suite 737, Arlington VA 22202”; and adding in its place the address “4800 Mark Center Drive, Alexandria, Virginia 22350–1500.”

■ l. In paragraph (d), removing the words “the DoDIG or GAO” and adding in its place the words “the DoDIG and the Comptroller General”.

The additions and revisions read as follows:

§ 3.8 DoD access to records policy.

(a) *Applicability.* This section provides policy concerning DoD access to awardee and subawardee records on OT agreements for prototype projects awarded under the authority of this part. This policy includes access to follow-on production transactions awarded under § 3.9 of this part. This access is separate and distinct from Comptroller General access provided in § 3.7 of this part.

* * * * *

(b) * * *

(3) * * * Such deviation shall be consistent with the requirements of the Single Audit Act, and paragraph (c)(2)(ii) of this section.

* * * * *

■ 9. Revise § 3.9 to read as follows:

§ 3.9 Follow-on production contracts or transactions.

(a) An OT agreement for a prototype project entered into under the authority of this part may provide for the award of a follow-on production contract or OT to the participants in the OT for prototype project. If such a strategy is

considered, the acquisition plan for the OT for prototype project, and the solicitation, and the OT agreement for the prototype project at the time of award should all specify that a follow-on production contract or OT is authorized subject to the below requirements. A follow-on production contract or OT provided for in an OT for prototype project may be awarded to the participants in the OT without the use of competitive procedures, notwithstanding the requirements of the Competition in Contracting Act, 10 U.S.C. 3201 (CICA) if:

(1) competitive procedures were used for the selection of parties for participation in the OT for prototype project;

(2) the participants in the OT successfully completed the prototype project provided for in the OT; and

(3) even if explicit notification was not listed within the request for proposal for the original prototype project transaction.

(b) The OT agreement shall specify at the time of award of the prototype project how a project is determined to be successfully completed by the participants. Follow-on contracts and OTs entered into pursuant to this part may be awarded using the authority in this part, under the authority of 10 U.S.C. chapter 221, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

(c) There are additional circumstances for follow-on OT agreements or contracts with consortium. An OT includes all individual prototype subprojects awarded under the OT to a consortium of United States industry and academic institutions. A follow-on production contract or OT may be awarded, pursuant to this section, when the Department determines that an individual prototype or prototype subproject as part of a consortium is successfully completed by the participants. Award of a follow-on production contract or OT pursuant to the terms under this section is not contingent upon the successful completion of all activities within a consortium as a condition for an award for follow-on production of a successfully completed prototype or prototype subproject within that consortium.

(d) The cost sharing requirements for prototype projects under § 3.5 of this part do not apply to follow-on production OTs and contracts.

■ 10. Add § 3.10 to read as follows:

§ 3.10 Approval requirements.

(a) An OT agreement entered into under the authority of this part may be exercised for a transaction for a prototype project that is expected to cost the Department of Defense in excess of:

(1) \$100,000,000 but not in excess of \$500,000,000 (including all options) only upon a written determination by the senior procurement executive for the agency as designated for the purpose of 41 U.S.C. 1702(c) or, for the Defense Advanced Research Projects Agency (DARPA), the Defense Innovation Unit (DIU), or the Missile Defense Agency (MDA), the director of the agency that:

(i) the requirements of § 3.5 of this part will be met for the prototype project; and

(ii) the use of the authority of this section is essential to promoting the success of the prototype project; and

(2) \$500,000,000 (including all options) only if:

(i) the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment determines in writing that:

(A) the requirements of § 3.5 of this part will be met for the prototype project; and

(B) the use of the authority of this section is essential to meet critical national security objectives; and

(C) the congressional defense committees are notified in writing at least 30 days before such authority is exercised.

(ii) Reserved.

(b) The authority of a senior procurement executive or director of DARPA, DIU or MDA under paragraph (a)(1) of this section, and the authority of the Under Secretaries of Defense under paragraph (a)(2) of this section may not be delegated.

(c) A follow-on production OT or contract may be entered into under the authority of this part that is expected to cost the Department of Defense in excess of: \$100,000,000 (including all options) only upon a written determination by a covered official (as defined in § 3.4 of this part) that:

(1) the requirements of § 3.5 of this part will be met for the prototype project;

(2) the use of the authority of this section is essential to meet critical national security objectives; and

(3) the congressional defense committees are notified in writing of the determinations at the time such authority is exercised.

■ 11. Add § 3.11 to read as follows:

§ 3.11 Authority to provide prototypes and follow-on production items as government-furnished equipment.

An OT agreement for a prototype project, or a follow-on contract or OT entered into under the authority of this part may provide for prototypes or follow-on production items to be provided to another contractor, or to a performer of an OT, as Government-furnished equipment.

■ 12. Add § 3.12 to read as follows:

§ 3.12 Competition requirements.

An OT for a prototype project entered into under the authority of this part shall use competitive procedures when entering into agreements to carry out prototype projects, to the maximum extent practicable.

■ 13. Add § 3.13 to read as follows:

§ 3.13 Applicability of procurement ethics requirements.

An OT entered into under the authority of this part shall be treated as a Federal agency procurement for the purposes of the Procurement Integrity Act, in 41 U.S.C. chapter 21.

Dated: August 26, 2024.

Patricia L. Toppings,
OSD Federal Register Liaison Officer,
Department of Defense.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2024-0380; FRL-12206-01-R6]

Finding of Failure to Attain by the Attainment Date for the 2010 1-Hour Primary Sulfur Dioxide National Ambient Air Quality Standard; Louisiana; Evangeline Parish Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is proposing to determine that the Evangeline Parish, Louisiana, sulfur dioxide (SO₂) nonattainment area (NAA) has failed to attain the 2010 1-hour primary SO₂ national ambient air quality standard (2010 SO₂ NAAQS) by the applicable statutory attainment date of April 9, 2023. This determination is based on analysis of reported emissions records and available modeling data. This action, if finalized, will address the