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***Panoptic Enterprises'* FEDERAL CONTRACTS DISPATCH**

DATE: March 30, 2004

SUBJECT: Department of Defense; Follow-On Production Contracts to Awardees of "Other Transactions"

SOURCE: *Federal Register*, March 30, 2004, Vol. 69, No. 61, page [16481](#)

AGENCIES: Department of Defense (DOD)

ACTION: Final Rule

SYNOPSIS: DOD is [revising](#) its regulations to implement Section 822 of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107), which provides for award of a follow-on production contract to traditional defense contractors, without further competition, when the other transaction (OT) agreement for the prototype project provides for at least one-third non-federal cost-share.

EDITOR'S NOTE: The regulations for OTs ("transactions other than contracts, grants, or cooperative agreements for prototype projects") are in Title 32 of the Code of Federal Regulations (CFR), Chapter 1, Office of the Secretary of Defense, [Part 3](#), Transactions Other Than Contracts, Grants, or Cooperative Agreements for Prototype Projects. Additional guidance on OTs can be found on the Defense Procurement website at <http://www.acq.osd.mil/dp/dsps/ot/dspsot.htm>. For more on the [proposed rule](#) being [finalized](#), see the May 20, 2003, **FEDERAL CONTRACTS DISPATCH** "[Department of Defense: Follow-On Production Contracts to Awardees of 'Other Transactions'](#)".

For more on the acquisition-related provisions of Public Law 107-107, see the January 2, 2002, **FEDERAL CONTRACTS DISPATCH** "[Enactment of the National Defense Authorization Act for Fiscal Year 2002](#)".

DATES: The [final rule](#) is effective March 30, 2004, and its provisions may be used for new prototype awards that result from solicitations issued prior to March 30, 2004.

FOR FURTHER INFORMATION CONTACT: David Boyd, 703-697-6710.

SUPPLEMENTAL INFORMATION: Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160) authorized the secretary of a military department, the director of Defense Advanced Research Projects Agency (DARPA), and any other official designated by the Secretary of Defense, to enter into "transactions other than contracts, grants or cooperative agreements for prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense." These are commonly referred to as "other transactions" (OTs) and they are generally exempt from all the statutes and regulations that govern federal contracts and grants. The purpose of OTs is to overcome the reluctance of many firms with significant technological advances and innovations to share their innovations with the government because of the significant statutory and regulatory requirements involved in government contracts and grants. When using OTs, DOD contracting officials are not required to include standard contract provisions that typically address such issues as financial management or intellectual property rights, but may structure the agreements as they consider appropriate.

Use of OT authority is authorized by law in the absence of the significant participation of a nontraditional defense contractor, and when at least one-third of the costs of the prototype project are to be provided by non-federal parties to the agreement.

The authority granted by Section 822 of Public Law 107-107 provides the authority to continue such prototype projects into production without competition in certain circumstances (for more on the proposed Defense Federal Acquisition Regulation Supplement (DFARS) [change](#) that would exempt such production contracts from further competition, see the June 3, 2003, **FEDERAL CONTRACTS DISPATCH** "[Defense Federal Acquisition Regulation Supplement \(DFARS\); Follow-On Production Contracts to Awardees of 'Other Transactions'](#)").

On May 20, 2003, DOD published a [proposed rule](#) that would add 32 CFR 3.9, Follow-On Production Contracts, to implement Section 822 of Public Law 107-107. No comments on the [proposed rule](#) were received, so DOD is [finalizing](#) the [proposed rule](#) without change.

The following are the key provisions of 32 CFR 3.9:

- Paragraph (a) states, "A competitively awarded OT agreement for a prototype project that satisfies the condition set forth in law that requires non-federal parties to the OT agreement to provide at least one-third of the costs of the prototype project may provide for the award of a follow-on production contract to the awardee of the OT prototype agreement for a specific number of units at specific target prices, without further competition."
- Paragraph (b) requires the Agreements Officer to do the following in the award of a prototype agreement to ensure the agreement will qualify for a follow-on production contract:
 - Ensure non-federal parties to the OT prototype agreement offer at least-one third of the costs of the prototype project.
 - Use competition to select parties for participation in the OT prototype agreement, and evaluate the proposed quantity and target prices for the follow-on production units as part of that competition.
 - Determine the production quantity that may be procured without further competition by balancing of the level of the investment made in the project by the non-federal parties with the interest of the federal government in having competition among sources in the acquisition of the product or products prototyped under the project.
 - Specify the production quantity and target prices in the OT prototype agreement and stipulate in the agreement that the contracting officer for the follow-on production contract may award a production contract without

further competition if the awardee successfully completes the prototype project and agrees to production quantities and prices that do not exceed those specified in the OT prototype agreement.

- Paragraph (c) states, "As a matter of policy, establishing target prices for production units should only be considered when the risk of the prototype project permits realistic production pricing without placing undue risks on the awardee."
- Paragraph (d) consists of the documentation and information the Agreements Officer needs to provide to the follow-on production contracting officer from the agreement and award file demonstrating that the conditions established in paragraph (b) have been satisfied. The documentation and information includes, as a minimum: (i) the competitive procedures used; (ii) an explanation of how the production quantities and target prices were evaluated in the competition; (iii) the percentage of cost-share; and (iv) the production quantities and target prices in the OT agreement. In addition, the project manager must provide evidence of successful completion of the prototype project to the contracting officer.

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