

Is My Firm a Nontraditional Defense Contractor?

What classifies a company as a "nontraditional defense contractor" (NDC), and how are some firms with prior DoD contracts still classified as NDCs and able to reap benefit from exemptions under the OT statute?

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Firms investigating entering into an Other Transaction Agreement (OTA) for prototype with the Department of Defense (DOD), should first identify whether their firm is considered a "nontraditional defense contractor" (NDC). This is because NDCs are afforded special treatment under the OT statute, being exempted from a statutory one-third cost-sharing requirement.² For entities who have never held a contract with the Department of Defense, the answer is quite simply yes, they qualify as an NDC. But for those companies who have performed DOD contracts, and those whose business model is exclusively defense based, you may be surprised to find that your firm is likely to be considered an NDC as well. Under the OT statute, the term "nontraditional defense contractor" is defined as:

[a]n 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 prescribed pursuant to section 1502 of title 41 and the regulations implementing such section.³

Per the statutory definition, NDCs are all entities which have not performed under a narrowly defined set of circumstances within one year of solicitation of the current Other Transaction opportunity. In order for an entity to not qualify for NDC status, it would need to meet all elements of the prescribed definition within that time period. This includes performance of a DOD contract or subcontract subject to full cost accounting standards (CAS) coverage within one year prior to solicitation of the Other Transaction for Prototype opportunity.

The effect of this narrow definition, is that a large number of entities will fall into the NDC category, including all small business concerns, and even those firms that work exclusively with DOD. This is in part due to the exemptions to CAS coverage under 41 U.S.C. § 1502⁴ and FAR Part 30,⁵ which exempt commercial contracts, Firm Fixed Price contracts based on adequate price competition, and any contract or subcontract with a small business concern, amongst other exemptions.

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Further, even where an entity is not outright exempt from CAS coverage, the entity may not have been subject to "full" CAS coverage. This is because full CAS coverage only applies to firms that receive a single CAS-covered contract award of \$50M or more; or received \$50M or more in net CAS-covered awards during its preceding cost accounting period.⁵

Once firms have determined their NDC status, they are in a better position to assess opportunities to engage with DOD through the Other Transaction Authority, and to partner with firms who do not qualify for NDC status, taking advantage of the statute's exception to cost-sharing where there is at least one nontraditional defense contractor participating to a significant extent in the prototype project.



Footnotes:

- ¹ See 10 U.S.C. § 4022(e)(2), stating “The term “nontraditional defense contractor” has the meaning given the term under section 3014 of this title.” See also 10 U.S.C. 3014, stating “the term “nontraditional defense contractor”, with respect to a procurement or with respect to a transaction authorized under section 4021(a) or 4022 of this title, means 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 prescribed pursuant to section 1502 of title 41 and the regulations implementing such section.
- ² See 10 U.S.C. § 4022(d)(1)(A), (d)(1)(B).
- ³ 10 U.S.C. § 3014.
- ⁴ See 41 U.S.C. § 1502(b)(1)(B)–(C) (2016): “(B) When standards are to be used.— Cost accounting standards prescribed under this chapter are mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the Federal Government in excess of the amount set forth in section 3702(a)(1)(A) of title 10 as the amount is adjusted in accordance with applicable requirements of law.
(C) Nonapplication of standards. - Subparagraph (B) does not apply to -
(i) a contract or subcontract for the acquisition of a commercial item;
(ii) a contract or subcontract where the price negotiated is based on a price set by law or regulation;
(iii) a firm, fixed-price contract or subcontract awarded on the basis of adequate price competition without submission of certified cost or pricing data; or
(iv) a contract or subcontract with a value of less than \$7,500,000 if, when the contract or subcontract is entered into, the segment of the contractor or subcontractor that will perform the work has not been awarded at least one contract or subcontract with a value of more than \$7,500,000 that is covered by the standards.”
- ⁵ See FAR Part 30, 30.000 -- Scope of Part (48 C.F.R. § 9900.000 (1992)), stating “This part describes policies and procedures for applying the Cost Accounting Standards Board (CASB) rules and regulations (48 CFR Chapter 99 (FAR Appendix)) to negotiated contracts and subcontracts. This part does not apply to sealed bid contracts or to any contract with a small business concern (see 48 CFR 9903.201-1(b) (FAR Appendix) for these and other exemptions).”
- ⁶ 48 C.F.R. § 9903-201-2 (2011) - Types of CAS Coverage. “(a) Full coverage. Full coverage requires that the business unit comply with all of the CAS specified in Part 9904 that are in effect on the date of the contract award and with any CAS that become applicable because of later award of a CAS-covered contract. Full coverage applies to contractor business units that -
 1. Receive a single CAS-covered contract award of \$50 million or more; or
 2. Received \$50 million or more in net CAS-covered awards during its preceding cost accounting period.”



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