

Advance Payments in Other Transactions

As a general matter, the same fiscal laws that apply to other types of contracts and assistance apply to other transactions (OTs) because they originate in Congress' constitutional authority under Article I, Section 9, Clause 7 (the Appropriations Clause). Congress made an exception for advance payments under OTs as part of its initial authorization for DOD to use OTs in the [1990 and 1991 NDAA](#), the precursor to today's 10 U.S.C. 4021. The current text in 10 U.S.C. 4021 is that same as in the initial authorization, which states, "[t]he authority provided under subsection (a) may be exercised without regard to section 3324 of title 31." It is that authority that DOD relies upon for both Research OTs under 10 U.S.C. 4021 and Prototype OTs under 10 U.S.C. 4022 today.

Congress initially added the authority to carry out a prototype project to 10 U.S.C. 2371 in Section 845 of [Public Law 103-160](#). Section 845 was subsequently repealed and Congress inserted the Prototype OT authority as 10 U.S.C. 2371b in the [FY 2016 NDAA](#) that is the basic text of today's Prototype OT statute. DOD's position has always been that the language authorizing the exercise of OT authority without regard to section 3323 of title 31, *i.e.*, the advance payment statute, applies to all types of OTs. This position has been consistently reflected in each of the OT Guides, although with varying levels of guidance on how to implement them.¹ The renumbering in January 2022 of 10 U.S.C. 2371 to 10 U.S.C. 4021, and 10 U.S.C. 2371b to 10 U.S.C. 4022 did not change DOD's interpretation of that authority.

For AOs, the current OT Guide (July 2023) replaces all prior versions of the Guides. It states that "[b]oth OT statutes [10 U.S.C. 4021 and 4022] allow for advance payments." The remaining text in the 2023 version is substantially the same text as the previous Guides issued in 2017² and 2018, which states:

The Government Team should exercise business judgment to determine when to allow advance payments. Some instances in which advance payments may be beneficial include reducing financing costs for large, up-front expenditures and ensuring sufficient cash flow for small companies. If advanced payments are used, Government team should address interest earned, including whether to establish an interest-bearing account.

The June 2023 Guide to Research OTs contains similar language:

the performer is required to maintain any amounts received in excess of need in an interest-bearing account with the interest to be reimbursed to the Government. The performer is not required to maintain this account if the best reasonably available account would not be expected to earn interest in excess of \$1000 per year or if the depository

¹ Note, however, that if a follow-on production contract is awarded pursuant to 10 U.S.C. 4022(f) the advance payment exception is inapplicable. This may figure into the decision about whether to use a FAR-based contract or OT award as the appropriate instrument for follow-on production. For a FAR-based contract, see FAR Subpart 32.4 for Advance Payments for Other Than Commercial Acquisitions or Subpart 32.2 for commercial advance payments.

² The exact text of the 2017 Guide in Section C2.17.3 states, "Agreements Officers should exercise business judgment when determining when to allow advance payments. Some instances in which advance payments may be beneficial include reducing financing costs for large, up-front expenditures and ensuring sufficient cash flow for small companies. If advanced payments are used, Agreements Officers should address interest earned, including whether to establish an interest-bearing account."

would require an average or minimum balance so high that it would not be feasible with the expected Federal and non-Federal cash resources for the program.

As a practical matter, a brief review of the concerns expressed in the 2002³³ version of the Guide may be useful for those who have only learned about the prohibition on advance payments as opposed to managing them. The 2002 version the noted that DOD could exercise its OT authority without regard to section 31 U.S.C. 3324 regarding advance payments and that:

C2.17.3 Advance Payments. Generally, the government should avoid making advance payments to the OT awardee.

C2.17.3.1 Requirement to establish an interest bearing account. If advance payments are authorized, the agreement should require the OT awardee to maintain funds in an interest-bearing account unless one of the following applies:

C2.17.3.1.1 the OT awardee receives less than \$120,000 in Federal awards per year;

C2.17.3.1.2 the best reasonably available interest bearing account would not expect to earn interest in excess of \$150 per year on such cash advances;

C2.17.3.1.1.3 the depository would require an average or minimum balance so high that it would not be feasible within the expected cash resources for the project.

C2.17.3.1.4 or the advance payments are made one time to reduce financing costs for large up-front expenditures and the funds will not remain in the awardee's account for any significant period of time.

So, at the end of the day, the omission from 10 U.S.C. 4022 of a subsection that expressly allows advance payments should not be read to treat these types of OTs differently, that is, the exception to the advance payment statute applies to all types of OTs. Moreover, this isn't the only tool in the toolbox; for example, creatively structuring milestone payments may create a more favorable business deal for both parties. Agreements Officers should exercise prudent business judgment in the decision to use advance payments as well as monitoring and administering the funds available to a performer from them.

This was originally published in 2023 as a Blog Post on the DAU Other Transactions Community of Practice page.

³³ The 2002 Guide's name was "Other Transactions' (OT) Guide for Prototype Projects."