Other Transaction Authority (OTA) Agreements: What Contractors Need to Know

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8:00 – 10:30 a.m.

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Introductions

Panelists

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Level Setting

OTs for Research

A legally binding instrument **other than a procurement contract, grant, or cooperative agreement** for performing basic, applied or advanced research and development

- No duplication of research
- 50/50 cost share to the extent practicable
- Used where contract, grant, or cooperative agreement are no feasible or appropriate
- Custom IP negotiated at arms length

OTs for Prototype

A legally binding instrument **other than a procurement contract, grant, or cooperative agreement** used for prototype projects

- Prototyping directly relevant to DOD mission
- 1/3 cost share or significant non-traditional defense contractor participation
- Custom IP negotiated at arms length

Production OT

A legally binding instrument **other than a procurement contract, grant, cooperative agreement, OT for Research or OT for prototype** used to enter a follow-on production transaction under the authority of 10 USC 4022(f) as the outflow of a competitively awarded prototype OTA.

- Competitive procedures used it the prototype OT
- Prototype transaction was successfully completed
- Resource shares only applies to prototype OT and not production OT.

OTs for Other

A legally binding instrument other than a procurement contract, grant, cooperative agreement, OT for Research or OT for prototype used to enter into relationships such as, but limited to, bailments, lease arrangements, lease to own agreements, and other not-yet defined arrangements.

Comparative Overview Of Other Transactions

Agencies with Other Transaction Authority

- National Aeronautics and Space Administration
- National Institutes of Health
- Department of Defense
- Federal Aviation Administration
- Department of Transportation
- Transportation Security Administration
- Department of Energy
- Department of Homeland Security
- Department of Health and Human Services
- Domestic Nuclear Detection Office
- Advanced Research Projects Energy

Agencies' Use of their Other Transaction Authority
FY 2010-2014

	Types of Activities		
Agency	**R&D**	**Prototype**	**Other**
NASA	✓		✓
NIH	✓		
DOD	✓	✓	✓
FAA	✓		✓
DoT	✓		
TSA	✓		✓
DOE	✓		
DHS	✓	✓	
HHS	✓		
DNDO			
ARPA-E	✓		
ARPA- H	✓	✓	

Source: *GAO Analysis of Agencies' Information- GAO 16-209*

Consortia Use in Prototype and Production OTAs

- Consortium is a relationship between a government sponsor and a collection of traditional and non-traditional vendors, non-profit organizations, and academia alighted to a technology domain area (i.e. cyber, space, undersea, propulsion) that may be managed by a single entity or consortium member, focused on innovative solutions to government technology challenges that meet the intended scope and purpose of OTs.
  - Agreement officers have broad discretion to leverage consortia to award prototype or production OTs
  - 7 management firms
  - 30 Agreements
- The Consortia Management Firm is technically the prime contractor with its own subcontract template and flowdowns

OT Solicitation Requirements

- "To the **maximum extent practicable**, competitive procedures shall be used when entering into agreements to carry out the prototype projects…" (10 USC 4022(b)(2))
- "Agencies that intend to award only OTs from a solicitation are **free to create their own process** to solicit and assess potential solutions."(DoD OT Guide July 2023)"
- Competition is important component for Agency to be able to pursue sole source follow-on production under the under DOD OTA Authority



Creative OT Solicitation Methods

- Open Calls

  Commercial Solutions Opening
  - Tradewind Solutions Marketplace
  - Broad Agency Announcement Procedures
- Event Based
  - Tech Demo
  - Design Sprint
  - Hackathon
  - Innovation Workshop
  - Shark Tank / Panel Pitch
  - Prize Contest (Can use 15 USC 3719)
  - Oral Presentation
  - Assessment Event (Can use 10 USC 4023 for DoD)



"Agencies are encouraged to leverage other events, activities, or even authorities to provide for the collection of potential solutions."
- DOD OT Guide

Satisfy Statutory Conditions

- **Purpose:** Directly relevant to enhancing mission effectiveness of military personnel and the supporting 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
- **Prototype:** A proof of concept, model, reverse engineering to address obsolescence, pilot or novel application of commercial technologies for defense purposes, agile development activity, creation, design, development, demonstration of technical or operational utility or combinations of the foregoing. A process including a business process, may be the subject of a prototype project
- **Participation:** Must be either
  - At least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project

    OR
  - 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

Nontraditional Defense Contractor

- A non-traditional defense contractor is an entity that is not currently performing and has not performed, for at least 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 (10 USC 3014).

- Common for businesses to qualify as non-traditional defense contractor if:
  - Small Business- SBs exempt from CAS requirements
  - Exclusively perform commercial procedure contracts (FAR part 12)
  - Exclusively perform under fixed price contracts awarded pursuant to adequate price competition
  - Perform less than $50M in CAS-covered efforts during the previous accounting period
  - Exclusively perform under non-FAR based contracts
- May still require cost share in circumstances such as when a prototype is more developmental with low TRL and NDC's cannot support pricing

Significant Extent

- Agreement Officer is expected to consider input from relevant technical advisors in assessing the totality of the circumstances for each proposed prototype project
- Government supposed to consider whether non-traditional contractor or nonprofit research institution supplying
  - New or key technology, product or process
  - A novel application or approach to an existing technology, product or process
  - A material increase in performance, efficiency, quality or versatility of a key technology, product or process
  - Accomplish a significant amount of the prototype project
  - Cause a material reduction in the cost or schedule of the prototype project
  - Provide for a material increase in the the performance of the prototype project

Funding Considerations

Fiscal law applies to all federal expenditures, regardless of contract instrument; e.g. purpose, time and availability of funds

Agency determination of funding and fund type is an independent determination solely within Agency's discretion on the award instrument it will use.

All fund types are available for use on OTAs. However, the the Agency must comply with fiscal law and the OT statute.



OTA Legal Standards

Laws that Apply

- Procurement Integrity Act
- Laws of general applicability (Civil Rights Act)
- Federal Property & Administrative Services Act of 1949
- ITAR and EAR
- Environmental Laws
- Criminal Laws (false claims/ statements)
- FOIA exemption applies

Laws that Don't Apply

- Competition in Contracting Act (CICA)
- Truthful Cost and Pricing
- Cost Accounting Standards
- Contract Disputes Act
- Procurement Protest Process
- Cost plus a percentage of cost prohibition
- Buy American Act (in part)
- Bayh-Dole Act (patents)
- FAR/DFARS/Agency specific acquisition regulations
  - Termination for Convenience or Default
  - Changes Clause
  - Mandatory flowdowns to subcontractors

OTA Terms and Conditions

- Similar to a commercial contract memorializing an agreement
  - Government must codify these terms like any other entity working with industry
  - FAR clauses do not come with OTs
- OTA agreement and its terms should be structured to accomplish the unique goals of the prototype project
- Keep commercial practices in mind when developing terms
- Preference to use commercial terms over FAR-based clauses
- Eschew overly restrictive clauses
- OTA T&Cs are flexible and each agreement should be unique to its particular project



OTA Negotiation Process

Collaborative Proposal Development Process

- Vendor can work with government to develop SOW
- Not required to prepare proposal in SILO for submission
- Proposal can be modified after submission depending on issues that arise during negotiations

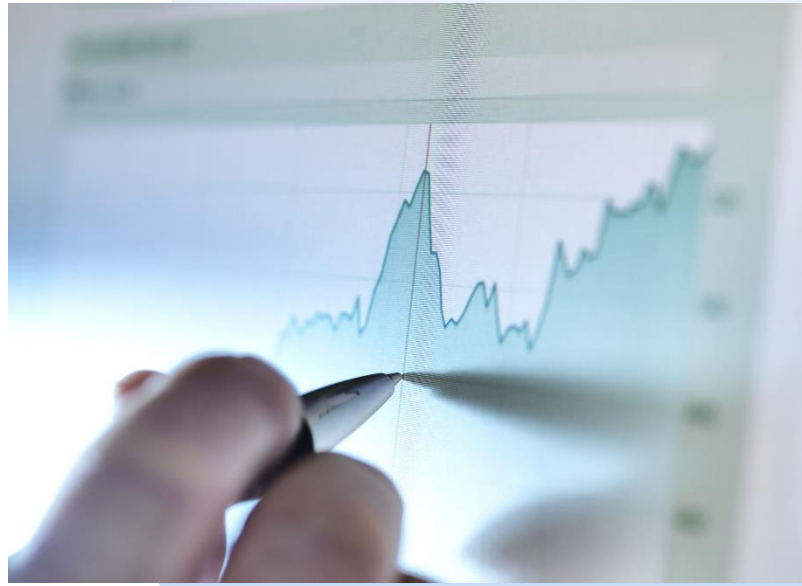
IP Terms can be negotiated as creating technical process

- Allocation of rights may depend on the technology
- Learn about the standard rights in the industry
- Take into account contractor investment through both resource sharing and previous investments
- Always keep in mind the goal of both the proposing team and the Government set out in the agreement vision statement and their commercialization plan
- There are no standard approaches or required positions
- Agencies differ in positions so read solicitation and know your customer

OTA Pricing Support Data

Government required to determine price reasonableness which is not the same as "fair and reasonable" determination in accordance w/ FAR

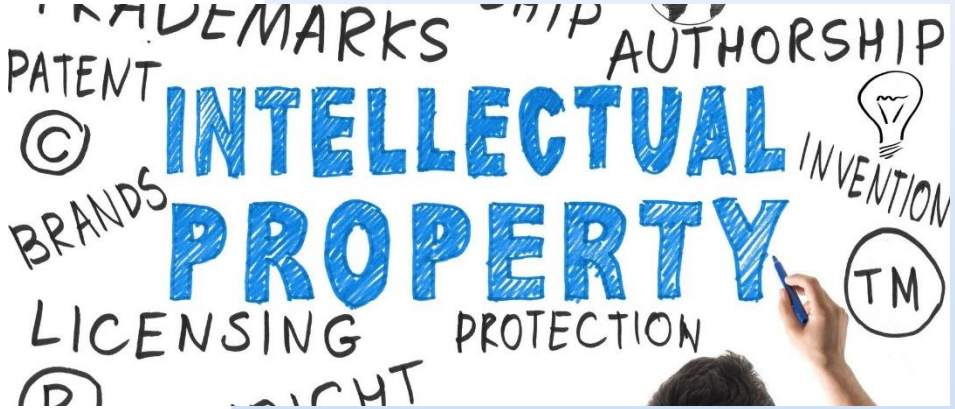
- Government encouraged to use price analysis techniques
  - Commercial/Market prices reign supreme
  - GSA pricing is okay (even if DFARs says it's not)
  - Parametric data
  - Comparable cost information
  - Analogous pricing
    - DIU tip: use amounts published in press releases
- Government may also consider
  - ROI Analysis
  - Affordability



However, if necessary, the AO may request cost information (even a representation or certification) but defective pricing doesn't apply

Intellectual Property Considerations

- Parties have significant flexibility to negotiate license agreements for prototypes
- Not applicable to OTAs
  - 35 U.S.C. § 201-204
  - 10 U.S.C § 3771
  - FAR data rights clauses
  - DFARs data rights clauses
  - Statutory / regulatory minimums for license rights
- Government encouraged to avoid one-size-fits-all solution for IP language to entice non-traditional vendors to work with government
  - Government still manages vendor lock in negotiating licenses
- Interest-based negotiation is ideal to ensure needs of government and non-traditional vendor are balanced
- Tailored terms may include royalty provisions, options, conditions, exclusive dealing terms, amongst others



Other Issues

Accounting: Generally accepted accounting principles sufficient to support OTA pricing

Audits: Comptroller General has statutory access to information and review for agreements exceeding $5,000,000

Disputes: Conditions for handling disputes governed by OT terms

Export Control: If the project requires the export of a defense article then then vendor must still comply with export laws.

Property: If Government takes title of prototype, then the Federal Property Act applies and vendor must comply with property identification, maintenance and disposal procedures.

Teaming: Government may influence the parties working together to the prototype objective

Resources

DoD Authorizing Statutes: 10 U.S.C. § § 4021 - 4026

Other Transactions Guide, Office of the Under Secretary of Defense for Acquisition and Sustainment, ver 2.0, July https://www.acq.osd.mil/asda/dpc/cp/policy/docs/guidebook/TAB%20A1%20-%20DoD%20OT%20Guide%20JUL%202023_final.pdf

Guide to Research Other Transactions under 10 U.S.C. 4021, Sept 13, 2023 - https://www.acq.osd.mil/asda/dpc/cp/policy/docs/guidebook/Guide%20to%20Research%20Other%20Transactions.pdf

DIU: https://www.diu.mil/

DARPA OT Website https://acquisitioninnovation.darpa.mil/

ARPA- H website: https://arpa-h.gov/engage-and-transition/other-transaction-community