

Other Transaction Authority

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Agenda

- What is an Other Transaction?
- History of OTA/OTA Timeline
- Types of Other Transactions
- Definition of a Prototype Project
- Benefits of Other Transactions
- Limitations on the use of OTA
- What is a Nontraditional Defense Contractor?
- What is Significant Participation?
- What is Cost Sharing?

Agenda (continued)

- Delegation of OTA
- Production Other Transactions
- Regulations
- How is OTA being executed within the DoD?
- Consortiums
- Myths
- OTA Resources
- References

What is an Other Transaction?

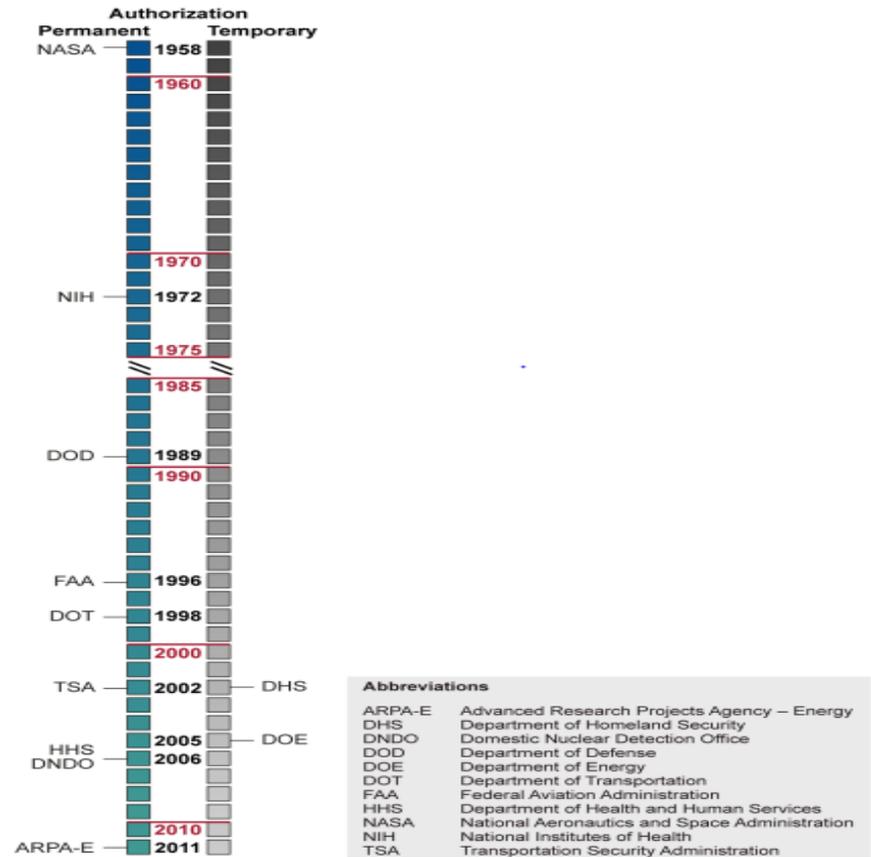
- A legally binding agreement *other than* a Procurement Contract, Grant, or Cooperative Agreement
- Defined by what it is NOT:
 - ✓ Not a Procurement Contract
 - Generally not subject to Federal Laws and Regulations
 - Federal Acquisition Regulations (FAR) do not apply.
 - FAR Supplements do not apply i.e. DFARs, AFFARs
 - ✓ Not a Grant, or Cooperative Agreement
 - DoD Grants and Agreements Regulations (DoDGARS) does not apply.

History of OTA

- 1958 - NASA granted first Authority to use OTs
- 1972 - National Institute of Health granted OTA
- 1989 - DARPA granted OTs for Research
- 1994 - DARPA granted OTs for Prototype Projects
- 1995-2014 - Authority Granted to 8 other Agencies (11 Federal Agencies total)
- 2016 - OTs permanently codified in 10 U.S.C. §2371b

OTA Timeline

Figure 1: Agencies with Permanent or Temporary Other Transaction Authority and Year Granted



Sources: GAO analysis of U.S. code, public laws, and agency information. | GAO-16-209

Types of Other Transactions

Two Types of Other Transactions:

- Other Transactions for Prototype Projects (10 U.S.C. §2371b)
 - Provide a direct benefit to the DoD
 - Considered acquisition instruments
 - Other Transactions for Research
 - Provide stimulation or support of research
 - Technology Investment Agreements (TIAs)
- This Briefing only covers OTs for Prototype Projects

Definition of a Prototype Project

- Military Departments may use Other Transactions for:
 - Prototype projects that are directly relevant to enhancing the 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.”

Definition of Prototype Project (continued)

- The definition of a “prototype project” in the context of an OT is as follows:
 - a prototype project addresses a proof of concept, model, reverse engineering to address obsolescence, pilot, 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.

Benefits of Other Transactions

- Access to cutting edge commercial technologies
- Allows the Federal Government to leverage the private sector's investments in research and development
- Flexibility in the development of articles crafted in the agreement
- Can design/implement innovative business models
- Promotes the engagement of non-traditional and small business contractors
- Flexibility to use "best practices"
- Flexible payment provisions
- No mandatory Cost Accounting Standards
- No mandatory Certified Cost or Pricing Data

Limitation of Authority

- Pursuant to 10 U.S.C. §2371b(d), Agencies are prohibited from entering into an OT for Prototype unless
 - ✓ At least one nontraditional defense contractor is a significant participant in the prototype project, or
 - ✓ All significant participants in the transaction other than the Federal Government are small businesses or nontraditional defense Contractors, or
 - ✓ A Cost Share of at least 1/3 of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the Federal Government, or
 - ✓ The Senior Procurement Executive for the agency determines in writing that exceptional circumstances justify the use of a transaction.

What is a Nontraditional Defense Contractor?

- New Definition tied to Cost Accounting Standards (CAS)
 - *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 DoD for the procurement or transaction, any contract or subcontract for the DoD 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.*

What is Significant Participation?

- Examples of Significant Participation are:
 - ✓ Supplying New Key Technology or products
 - ✓ Accomplishing a Significant Amount of the effort
 - ✓ Causing a Material Reduction in the cost or schedule or increase in performance in some other way
- Nontraditional does not necessarily have to be a prime contractor -- can be a subcontractor , lower tier vendor, intra-company business unit or teamed with a traditional as long as participation is “significant” .
 - Determination of what is significant is a subjective decision. The determination of significant contribution should be included in the agreement file.

What is Cost-Sharing?

- Cost Sharing is only Applicable when:
 - Neither a Nontraditional Defense Contractor nor a Small Business Concern is participating to a significant extent in the prototype project.
- At least one third of the total cost of the prototype project is to be paid out of funds provided by the parties to the transaction other than the Federal Government.
- Cost sharing should generally consist of labor, materials, equipment, and facilities costs (including allocable indirect costs).

What is Cost-Sharing? (continued)

- Cost share amounts do not include costs that were incurred before the date on which the transaction becomes effective.
- However, costs that were incurred for a prototype project after the beginning of negotiations, but prior to award of the transaction may be considered non-Federal if:
 - The costs were incurred in anticipation of entering into the transaction;
 - and, if it was appropriate for the party to incur the costs before the transaction became effective in order to ensure the successful implementation of the transaction.
 - This must be determined in writing by the Agreements Officer.

Delegation of OTA

- Statute gives authority to the Secretaries of Military Departments, the Director of the Defense Advanced Research Projects Agency (DARPA), or the Director of the Missile Defense Agency (MDA).
- Approval authority for projects under these instruments may be delegated to different levels dependent upon dollar value
 - At or below \$100 Million
 - Depends on the Agency (can be delegated)
 - Over \$100 Million up to \$500 Million
 - Senior Procurement Executive for the Agency or the Director of DARPA or MDA
 - Over \$500 Million
 - Under Secretary of Defense (A&S); may not be delegated

Production Other Transactions

- Sole-Source Production Follow-On: Pursuant to 10 U.S.C. §2371b(f): “a transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction” provided:
 - (A) competitive procedures were used for the selection of parties for participation in the transaction; and
 - (B) the participants in the transaction successfully completed the prototype project provided for in the transaction.

Applicable Regulations

- 10 U.S.C. §2371b
- Procurement Integrity Act
- DoD OT Guide, November 2018
- Federal Fiscal Law
 - Agency Fiscal Regulations Apply - Consult Legal and Comptroller
- Arms Export Control Act (AECA)
- International Traffic in Arms Regulation (ITAR)
- Export Administration Regulations (EAR)
- Laws of General Applicability

Regulations that do not apply

- The following DO NOT apply to Other Transactions:
 - Bayh-Dole Act / IP Statutes
 - Competition in Contracting Act (CICA)
 - Truth in Negotiations Act
 - Contract Disputes Act
 - Grants and Agreements Reg. (DODGARS)
 - Federal Acquisition Regulation (FAR)
 - Defense Federal Acquisition Regulation Supplement (DFARS)
 - GAO Protests
 - Agency-Level Protests and U.S. Court of Federal Claims are applicable
- Use of OT authority does not eliminate the applicability of all Laws and Regulations. Consult your program counsel whenever an OT is used.

How is it being executed within the DoD?

- Single Source Awards
 - DARPA (website links to FedBizOps)
 - Defense Innovation Unit (DIU) (Commercial Solutions Offering)
 - SMC
 - AFLCMC

How is it being executed within the DoD? (continued)

- Consortium Approach

- Homeland Defense/Homeland Security*
- C4ISR Open System Acquisition Initiative*
- AF Propulsion Initiative*
- National Security and Intelligence Solutions*
- Sensors, Communications, and Electronics (SCEC)*
- COBRA(Enterprise Information Systems/Cyber Security)*
- AFLCMC Consortium Initiative (ACI)*
- Energy, Environment, Demilitarization Technology
- National Chemical and Biological Defense
- Rapid Ordnance Technology

How is it being executed within the DoD? (continued)

- Consortium Approach (continued)
 - Nano Technology
 - Vertical Lift Technology
 - National Advanced Mobility and Robotics
 - Electromagnetic Wireless Spectrum Technologies
 - Medical Device Technologies
 - National Warheads and Energetics
 - Defense Automotive Technologies
 - National Security and Intelligence Solutions
 - Warfighter Sustainment and Optimization
 - Space Systems Technologies
 - Underwater Warfare Systems

OT to Single Source vs. Consortium focused on specific technology

- Initially OTs were for Single Agreement with Commercial Firms to satisfy a Government Agency's Specific Prototype Requirement
- Approx. 15 Years Ago, Army Developed New OTA Paradigm/Model
 - Award to *Consortium* of companies/universities/ organizations in a Specific Technological Domain
 - OTA awarded to Consortium Managing Agent (CAO)
 - Multiple Projects for Within Scope Rqmts Awarded against the OTA
 - OTA has Ceiling Price and Completion Date
 - Awards generally Fixed Price with Milestone Deliverables/Payments

Why Use Consortium Based Other Transactions?

- Allows for flexibility in meeting needs/requirements
- Allows for flexibility in teaming
- Attracts new start-up companies, Commercial, technology firms “non-traditional” contractors that normally avoid DoD business or can’t do business with the federal Government
- Projects focus on technical results vs. bureaucratic process Collaboration amongst Consortium Members Facilitated
- Not a formal source selection process(can craft simple yet effective and efficient evaluation criteria/process as simple as those used in BAAs)
- Government Interaction with Consortium Members is Allowed/Encouraged throughout the Acquisition Process—Eliminates Ambiguity, Scrap and Rework and Increases likelihood of a timely, affordable, quality prototype product

Consortium Model

- An “enterprise partnership” between the Government and a consortium of technology developers/providers in a specific domain where...
 - The “Government” partner can be a single sponsor (program executive officer) or multiple sponsors coordinated through a lead agency
 - The “Consortium” partner’s members can include: Non-Traditional and Traditional Defense Contractors; large and small businesses; for-profit companies, not-for-profit and/or non-profit organizations; universities; and, other academic research organizations
- The Government and Consortium are connected through a binding contractual instrument called an “Other Transaction Agreement (OTA)” that operates outside the normal Federal Acquisition Regulations (FAR)
 - Consortium Members are awarded Project Awards against the basic OTA with the OTA Consortium Lead

What can/should Consortium offer

- Provide advanced technology to the warfighters
 - Large, active member organizations -- Small Entrepreneurs to Very Large Business to Non-Profit and Academia
 - Wide range of advanced capabilities
- Engage non-traditional and small business contractors for innovative, novel, affordable high tech solutions
- Enhance cooperation and collaboration between Government customers and Consortium members
- Develop and Execute An Agile End to End Acquisition Process from "Cradle to Grave"

Consortium Features and Benefits

Features	Benefits
Open Membership	Provides access to a broad range of potential solution providers (large and small businesses, academia and non-traditional contractors) by establishing and maintaining low barriers to entry.
Streamlined Acquisition	Reduces the acquisition administrative lead times for development and fielding of prototype/pilot scale solutions without cumbersome restrictions imposed by FAR-based contracting.
Collaborative Strategic Planning	Permits Government and Consortium member collaboration in the development of technology roadmaps and strategic investment plans against which subsequent investments can be made.
Targeted Research Investment	Enables industry to align their Independent Research and Development resources with Government technology needs.
Non-Traditional Entity Participation	Encourages participation by non-traditional sources who bring innovative technologies and solutions to both Government and Consortium members, but who do not have DCAA-approved cost-accounting systems.
Resource Leveraging	Allows industry to apply cost sharing against a specific contracted effort and leverage Government and Consortium member resources.
Single-Point Contracting	Reduces proposal preparation, contract award, and Congressional reporting burdens on both the Government and the Consortium.
Teaming Opportunity	Fosters innovation in proposals by incentivizing traditional contractors to partner with small and non-traditional contractors

Consortiums' Technology Reach

- Agile contracting process to obtain most current technologies
 - Simple process from “cradle to grave”
- Ability to rapidly compete projects among numerous members with leading edge technologies/capabilities
- Flexible consortium: open to new members of all sizes—quick and easy to join
- Force Multiplier: Consortium members supported by Consortium Manager (e.g., SOSSEC, Inc.) from start to finish

Most Desirable attributes of a Consortium Manager

- An honest broker
- No interest in any product or Consortium member
- Not a third party supplier of commercial products
- Cannot compete with Consortium members
- Works for DoD customers' and Consortium members' interests
- Mentoring all members especially commercial firms and small start-ups throughout the process
- Focus on supporting members in meeting/exceeding Government requirements
- Ensuring delivery of the Consortium members' best solutions
- Expands opportunities for the Consortium
- Facilitate teaming amongst Members

Consortium manager works for Consortium Members and Government customers

- Manage projects from requirement identification through product delivery
- Perform market research/analysis
- Solicit white papers upon government customer request
- Assist with drafting requirements documents (e.g., SOO, SOW)
- Solicit proposals for multiple projects and assist in proposal analysis
- Coordinate special events (such as, PlugFests, Shark Tank, etc.)
- Support selection of "Best Value" proposal/offeror
- Support Program/Project Management and monitor contractor performance through final deliverable
- Quality control and problem solving
- Manage financial issues
 - Invoicing, milestone delivery payment schedules, etc.
- Single point of contact for customer from start to finish
- Ensure conflict avoidance and problem identification/resolution

Straight talk

- Consortium-based OT flexibility is important to further U.S. Government's mission of *creating and promoting new technologies from "non-traditional" Sources*
- Consortium-based OTAs provide the means of a Robust, Agile, "Value Added" acquisition process to meet Government's high tech R&D and Prototyping Needs
- OTAs (for DoD) are best for Prototype Development
- The Government working closely with the Consortium Manager develop Sound Acquisition Strategies and Effective Procurement Processes
- OTA Project Award Lead-time can be as little as 30 days or as much as 360 days!
- KISS—Avoid Urge to Mirror the FAR/DFARS or DoD Defense Acq System management process/directives
- The Consortium-based OTA Project Award Process is flexible, tailorable, *Quick and Easy for both the Government and Industry!*

Myth 1: OT authorities are new.

FALSE: As the use of OTA only started to explode over the last 3+ years, most people are under the impression that OTs are a new concept and methodology.

The underlying concept of OTs have been around for more than 60 years. Beginning with the NASA Space Act in 1958, OTs have been a tool available to the Federal R&D community.

FY89: DoD was given the authority for Research OTs in and

FY94: DoD was given the authority for Prototype OTs

Myth 2: OTs will always be faster to award than other contractual instruments.

FALSE: The OT award process will not always be faster than the traditional procurement processes and sometimes can be as long

If the Government Agencies/Acquisition officials establish a FAR-like process it adversely affects lead-time to award:

- The speed of award is tied to many factors, many of which are internal to the organization. For example, some agencies will award an OT but conduct the source selection process as if it were subject to FAR Part 15. In that case, awarding the OT could take nearly as long as a procurement contract.
- If the OT award must go through the same approval chain as a procurement contract, it could take as long.
- Since the terms and conditions of an OT are negotiable, drafting the agreement and the negotiations between the Government and the OT performer may take a long time.

The OT award process can be faster if the Government team embraces the flexibility of the authority, is prepared, and the process remains as streamlined as possible.

Air Force OSAI OTP Consortium Model

It is all about the People and The Process!

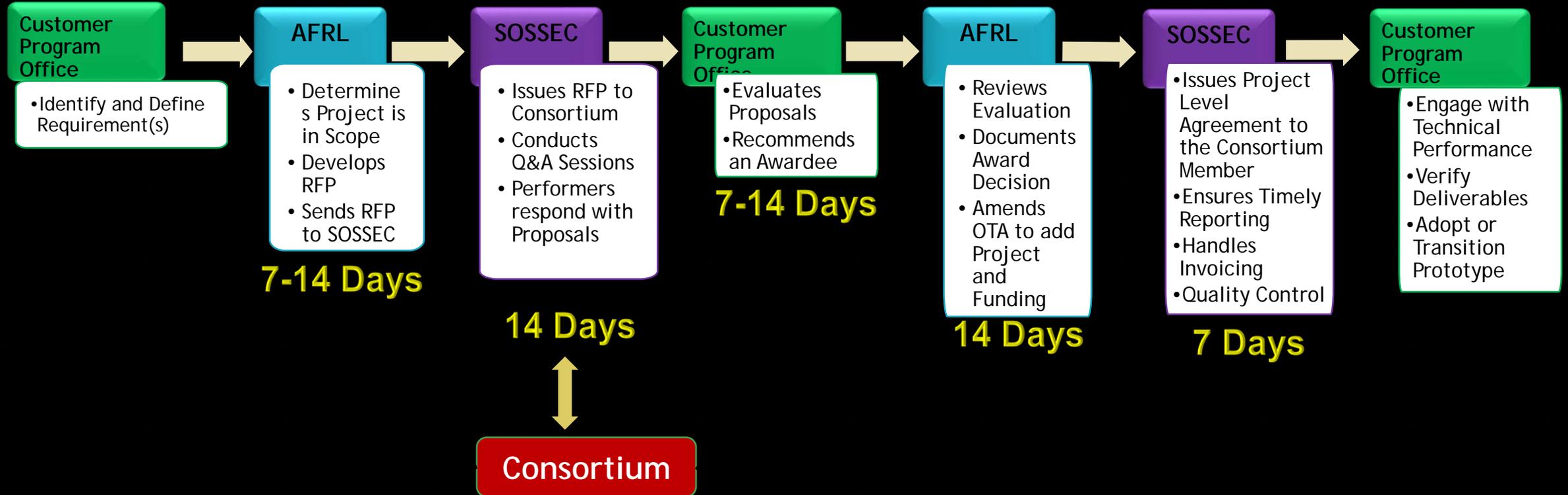
Example of Four Solicitation Approaches:

- 1) Notification of **PlugTest**
 - 2) Request for **Whitepapers (RFPW)**
 - 3) Request for **Whitepapers (RFPW)** leading to a Capability/Technology Demonstration
 - 4) Request for **Proposals (RFPP)**
- AFRL works with the Program Office to determine the best acquisition strategy for each individual prototype project
 - Prototype projects are solicited **competitively** with all members of the SOSSEC consortium eligible for a project award

 - RFP → Award = **One-step Process**
 - RFPW → RFPP → Award = **Two-step Process**
 - RFPW → Capabilities Demonstration → RFPP → Award = **Two and Half-step Process**
 - PlugTest → RFPP → Award = **Two-step Process**

 - **Goal: To employ most agile approach to effectively meet unique prototype mission requirements!**

OSAI OTP Consortium Model



- Average Lead Time on RFPPs is 60 - 70 Days
- Projects have been awarded in 30 days

Myth 3: Since an OT is termed an “agreement”, it is not a contract.

FALSE: When most people in the Government hear the term “contract,” they automatically think “Federal Acquisition Regulation (FAR)-based procurement contract” awarded under the traditional acquisition process and subject to all of the federal acquisition statutes and regulations.

- OT agreements are not procurement contracts, but they are legally valid contracts. OTAs have all *six legal elements* for a contract:
 - offer, acceptance, consideration, authority, legal purpose, and meeting of the minds OTAs
- Signed by a Contracting Officer/Agreements Officer with authority to bind federal Gov
- The terms and conditions can be enforced by/against either party (Articles v. Clauses)
- DoD organizations routinely using OTs have called them *agreements* to ensure there is no confusion between these arrangements and FAR based procurement contracts.

Notional OT Project Award Process with a Consortium and Consortium Manager under an OTA

- Prototype Projects are Awarded to Consortium Manager
 - Firm Fixed Price Prototype Projects
 - Milestone Payments track technical progress of Project Deliverables
 - OT is Amended to add the Project, Milestones, and Funding
- Consortium Manager then enters into a Project-Level Agreements with the Consortium Member (Project-Level Performer)
 - Not a Prime-Subcontractor Relationship
 - Project-Level Performer is responsible for technical work however, Consortium Manager is responsible for delivery
 - Government has direct insight into the technical performance
 - Consortium Manager acts a Mentor/Advisor to the Project-Level Performer and Intermediary for the Government

- Important note of second bullet:

by breaking the traditional prime-sub relationship the government customers using the OTA for prototyping vehicle can be actively involved with the Consortium member (Project-Level Performer) through the life of the project.

Myth 4: Since Competition in Contracting Act (CICA) does not apply to OTs, competition and fairness are not a consideration.

FALSE: Both OT statutory authorities require the use of competitive practices to the maximum extent practicable. Agencies are not required to complete the formal competition structure laid out in CICA (i.e. three tiers of competition: full and open, limited and sole source with justification and approval) nor follow the competition rules in the FAR.

- The OT statutes and guidance allow the agency to determine what the competition will look like and how it will be structured.
- Competition is a good thing and should, if structured properly, keep prices low (reasonable), quality high, and theoretically could give the Government leverage in negotiations.

Myth 4 (continued)

- If an agency wishes to award a follow-on from a Prototype OT into either a Production OT or a FAR-based procurement contract without re-competing, the solicitation documents and the original OT award *must* have been competitive and announce its intent to award either type of follow-on Production award.

Myth 5: OTs cannot be protested.

FALSE: Bid protests are rare for OTs, as agencies are becoming mindful of the possibility of Protests

Agency-level protests are possible if the agency chooses to include language in its solicitation describing the procedures.

- Most Government Agencies perpetuate the myth
 - Rarely [never] include language to encourage any issues to be handled internally and quickly
- GAO has limited jurisdiction to review OT award decisions (review matters of OT law)
- Protests to GAO regarding OT awards are rare
- Protests to the U.S. Court of Federal Claims are also possible, but are a rare occurrence.

Myth 6: None of the federal statutes or regulations apply to OTs.

FALSE: OT authorities are authorized by law with clear statutory guidelines. Generally, the statutes and regulations applicable to acquisition and assistance do not apply to OTs.

- Since OTs are defined by what they are NOT (not procurement contracts, grants, or cooperative agreements)
- OTs are exempt from 17 laws and regulations
- Statute, regulation, or policy that applies solely to these types of contractual arrangements generally will not apply to OTs.
- Laws and regulations unrelated to the federal acquisitions still apply to OTs.
- (Note: These include, but are not limited to, appropriations, security, export control, socio-economic, and criminal laws.)

Myth 6: None of the federal statutes or regulations apply to OTs (continued)

- Competition in Contracting Act (CICA)
- Truth in Negotiation Act (TINA)
- Contract Disputes Act
- Procurement Protest System
- P.L. 85-804 and indemnification
- Cost plus a percentage of cost prohibition
- Procurement Integrity Act
- Cost Accounting Standards
- Bayh-Dole Act
- Drug-Free Workplace Act
- Anti-Kickback Act
- Walsh-Healey Act
- Buy American Act (in part)
- Kinds of Contracts
- Examinations of Records of Contractor
- No Changes clause
- No Disputes/claims
- No Termination for Default
- No mandatory Accounting System

Myth 7: OTs can only be awarded through a consortium.

FALSE: There are many arrangements permitted, to include award to a single company, joint venture, partnership, consortium (through its members or authorized agent), or a prime contractor with subcontract relationships.

- Each construct has its advantages and issues, and each situation may dictate a different approach
- The proliferation and benefits of Consortium-based OTAs has created the Myth
- Until approximately 15 years ago the vast majority of OTs were to a Single, truly Non-traditional entity(that could not or did not want to deal with the FEDERAL Government) to accomplish a specific technological requirement

Myth 8: The OT allows for only the use of RDT&E appropriations.

FALSE: OT efforts are focused on RDT&E activities and therefore, most Government Financial Managers determine that only RDT&E appropriations can be used for Research or Prototyping OTs

Although the statute does not prohibit the use of other fiscal appropriations and does not automatically preclude use of non-RDT&E appropriations, this determination ultimately rests with the funding agency comptroller

Comptrollers are encouraged to consider the nature of the intended effort and whether the appropriation being used is appropriate for the activity of the project and the specific language in the appropriation documents

OTA Resources

- DoD OT Guide, November 2018
 - <https://aaf.dau.mil/ot-guide/>
- DoD Centers of Excellence for OTs
 - Defense Advanced Research Projects Agency (DARPA): <http://www.darpa.mil/>
 - USAF: Transformational Innovation web page at <http://www.transform.af.mil/>
 - USA: <http://acc.army.mil/contractingcenters/acc-nj/index.html>
 - USN: <https://www.nrl.navy.mil/>

References

- 10 U.S.C §2371 (b)
- GAO Report, "Use of 'Other Transaction' Agreements Limited and Mostly for Research and Development Activities" dated January 2016 (<https://www.gao.gov/products/GAO-16-209>)
- DoD Other Transactions Guide, November 2018, (<https://aaf.dau.mil/ot-guide/>)

For Further Information

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Questions??