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NEWSLETTER

Out With the Old, In With the New? Breaking Down DoD's Other Transaction Authority, Agreements, and Opportunities

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Other Transaction (OT) authority and related agreements (OTAs) continue to be all the rage. And why shouldn't they be? OTAs—particularly those advertised by the U.S. Department of Defense (DoD) for cutting edge prototype and production work—offer companies a means of doing business with the government outside the traditional government contracting space. When considering if, how, when, and where to break into the federal market, or perhaps how to expand a company's footprint in the marketplace, small businesses, nontraditional contractors, and even large businesses may be quick to identify OTs as a way of doing so without signing up for some of the terms, conditions, and obligations that more traditional government contracting may impose. But, as the adage goes, buyer—or, in this case, ***seller***—beware: before jumping on the OT bandwagon, it is critical to understand the origins, scope, and structure of OTAs to properly understand the potential risks and rewards of such vehicles.

(Old) Origins of DoD's OT Authority

While certainly a hot topic in government contracts, OT and OTAs are not new. Indeed, agencies have used OT authority to pursue research projects for decades. The perceived "newness" of OT relates to the more recent expansion of OT authorities for prototypes and related production work.

By way of background, DoD was first granted OT authority in 1989; at that time, use of the authority was limited to advanced research projects performed by the Defense Advanced Research Projects

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Agency (DARPA). In 1993, Congress expanded DoD's OT authority to allow DARPA to use OTAs not just for research, but also for weapons and weapons systems prototype projects. The enduring distinctions between research OT authority and prototype/production OT authority are beyond the scope of this article—as are the ins and outs of research OTAs generally—but are worth exploring, as the history, use, and considerations surrounding each type differ considerably.

Before leaving the topic of non-DoD and research OT authority entirely, however, it bears mentioning that numerous other federal agencies have some form of OT authority. These include the U.S. Department of Energy (DOE); Advanced Research Project Agency-Energy (ARPA-E); the U.S. Department of Health and Humans Services (HHS); the U.S. Department of Homeland Security (DHS); the U.S. Department of Transportation (DOT); the Domestic Nuclear Detection Office (DNDO); the Federal Aviation Administration (FAA); the National Aeronautics and Space Administration (NASA); and the Transportation Security Administration (TSA). Most of these agencies' OT authority covers primarily research work, but a subset including DHS and NASA have prototype authority as well, and TSA has also used OT authority for certain of its security programs.

(New) Expanded Scope of DoD's Authority and Use of Prototype and Production OTs

While DoD has had OT authority for certain projects since 1996, the scope and use of that authority has expanded. The FY16 National Defense Authorization Act (NDAA) gave DoD permanent OT authority to pursue "prototype" projects." DoD has since defined a "prototype" in its *Other Transaction Guidance* to mean 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."

In further expanding DoD's ability to use its OT authority in the FY18 NDAA, Congress confirmed that it had drafted DoD's statutory authority "in an intentionally broad manner." Indeed, in the conference report accompanying that legislation (S. Rep. No. 115-125) legislators stated that any perceived risk with OT "must be viewed as lesser than the risks of stymieing innovation or slowing the development and fielding of critical new capabilities." If anything, Congress expressed concern at DoD's failure to leverage OT authorities to their full potential, noting the chill on innovation as well as the cost implications of "overly narrow" and "restrictive, risk averse interpretations of how OTAs may be used."

Data collected in the first years following the expansion of DoD's authority to use OT confirm that these statutory changes have, in fact, resulted in expanded use. In 2019, the Congressional Research Service (CRS) reported that from FY13 to FY17, the number of new DoD protype OT agreements increased almost 8 times over. In FY17 alone, DoD obligated $2.1 billion on prototype OT agreements.

(Current) Structure: Nuts, Bolts, and FAQs Related to Prototype and Production OTAs

Today, under 10 U.S.C. § 2371b, DoD has the authority to carry out 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 DoD, or to improve platforms, systems, components, or materials in use by the armed forces." To use this OT authority, one of the following conditions must be met:

- There is at least one "nontraditional defense contractor" or nonprofit research institution participating to a significant extent;
- All significant participants in the transaction other than the Government are small businesses or nontraditional defense contractors;
- 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 Government; or
- The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of such a transaction.

DoD may award a production OTA to the prototype OT provider without any further competition if (i) the initial prototype OT was awarded through competition; (ii) the prototype OT solicitation advised industry of the possibility of a follow-on production phase; and (iii) the prototype OT was successfully completed.

Regardless of when and whether prototype and production OTAs can be used, however, many questions remain regarding how, exactly, agencies put this authority into action, and what it means for contractors.

FAQ No. 1: Who is eligible to enter into a prototype OTA with DoD?

DoD's prototype authority does not restrict award of OTAs to one specific type or size of entity; any type of business may be eligible for a prototype OTA depending on which conditions for use are met. As noted above, DoD is authorized to use its prototype OT authority if one of four conditions are met, only two of which concern the type of entity interested in providing the type of solution the agency seeks. Under the first scenario, DoD may use OT authority if there is at least one "nontraditional defense contractor" participating. A "nontraditional defense contractor" is defined, in turn, as an entity that is not performing and has not performed a DoD contract or subcontract subject to full coverage under the Cost Accounting Standards (CAS) for at least one year prior to the OT solicitation. Under the second scenario, DoD may use its OT authority if all significant participants are either nontraditional defense contractors or small businesses; the statute ties the definition of a "small businesses" to the definition of small business concerns established in the Small Business Act.

But none of this is to say that DoD prototype OTAs are limited to solely nontraditional defense contractors and small businesses. Rather, large and traditional defense contractors may also be eligible for OTA awards if they cost-share to ensure that at least one-third of the total cost of the prototype project is paid by sources other than the Government.

FAQ No. 2: What does the OTA process look like, and where can I find these opportunities?

As a threshold matter, DoD is statutorily required to achieve as much competition as possible in considering and ultimately awarding OTAs. But within that rubric, the process varies. Under the Consortium Management Firm (CMF) model, DoD enters a base OTA with a consortium—a non-profit, member-only organization through which member companies learn of opportunities, obtain OT solicitations, and submit responses. The consortium manager may also play a role in down-selection and negotiation of OTA terms and conditions. Under the "direct" OT model, agencies advertise opportunities and work with interested companies more directly throughout the process. As an example, the Defense Innovation Unit uses its Commercial Solutions Opening (CSO) process to solicit proposals for OTAs for innovative solutions.

Whether using a consortium or soliciting submissions from vendors directly, DoD typically issues some sort of solicitation, request for white paper, or Request for Project Proposals (RPP). These seek vendor responses in various formats, ranging from very brief statements of technical capabilities or white papers, to much more formal, traditional-looking technical and price volumes, to subsequent oral presentations. Some RPPs outline evaluation factors, adjectival ratings, and best value tradeoff language much like Federal Acquisition Regulation (FAR) Part 15 procurements.

In light of the above, contractors interested in jumping into the OT field should research the target DoD entity's OT practices and procedures, and determine whether consortium membership is a prerequisite for participation. There are a number of factors to consider when looking into consortia, including the subject or industry focus of the consortium, as well as the terms and conditions the consortia tend to require in resulting OTAs.

FAQ No. 3: What terms, conditions, and contract clauses are typically in OTAs?

As contractors who are already in this space may already know, it depends. OTAs are not subject to a host of laws and regulations that would ordinarily apply in a procurement context. For example, the FAR does not apply to OT agreements; there is no statutory requirement that any FAR or Defense Federal Acquisition Regulation Supplement (DFARS) clauses be included OT agreements. OTAs are also not subject to the Competition in Contracting Act (CICA), the Truthful Cost and Pricing Data Act, CAS, the Contract Disputes Act (CDA), Buy American Act, the Bayh-Dole Act, or the Rights in Technical Data statute.

That is not to say, however, that the agency and/or consortia never include these or similar provisions in draft OTAs. Herein lies a significant lesson for hopeful OT participants: always carefully and critically evaluate terms and conditions included in draft OTAs, and consider seeking support from in-house or outside counsel to advise through the negotiation process.

FAQ No. 4: Are there any particularly important terms, conditions, or OT clauses to watch out for?

Intellectual property (IP) and data rights are often a hot topic in OTA negotiation. Notwithstanding the fact that the Bayh-Dole Act and the Rights in Technical Data statute do not apply to OTAs, DoD's *Other Transactions Guide* used to recommend that DoD officials follow Bayh-Dole for inventions/patents and the DFARS clauses for rights in technical data and computer software. The *Guide* has since been revised, however, and currently "encourage[s]" negotiation of IP terms based on consideration of the relative investments and risks borne by the parties, albeit against a backdrop of familiarity with the Bayh-Dole Act and the Rights in Technical Data statute.

For contractors, the facts that there are no mandatory IP clauses and that DoD encourages flexibility mean that language around IP and data rights is negotiable, even if initially told it is not. It is thus important for companies to identify rights in both pre-existing IP—i.e., items, processes, components, or software developed at private expense—and IP contemplated for development under the OTA before a prototype project begins, and to carefully draft the scope and terms of DoD's license to such IP when negotiating the OTA.

FAQ No. 5: How do protests and disputes work?

Much has been written about what (if any) fora can consider protests challenging award of an OT to another entity, particularly as GAO issued a series of decisions in 2018 and 2019 on the topic of jurisdiction. As a general matter, neither GAO nor the Court of Federal Claims (COFC) is likely to exercise jurisdiction over a run-of-the-mill protest challenging the selection of another vendor for an OTA. However, GAO will consider a protest challenging improper use of OT authority, as outlined in *Spartan Medical, Inc.*, B-419503, *System Architecture Info. Tech.*, B-418721, *Oracle America, Inc.*, B-416061, and *MD Helicopters, Inc.*, B-417379. According to GAO, absent an allegation of improper use of statutory authority, GAO does not have jurisdiction over protests related to OT solicitations or agreements because OTAs are not "procurement contracts" within the meaning of the Competition in Contracting Act (CICA).

The COFC has also grappled with jurisdiction over attempted OT protests. As we have previously discussed, the COFC has held that it lacks jurisdiction over pure OT awards—i.e., OTAs that the Court deems not to be "in connection with" a specific procurement. *See Space Exploration Techs. Corp. v. United States*, 19-742C (dismissing and transferring the protest to the U.S. District Court for the Central District of California). Of course, the transferee district court exercised jurisdiction and ultimately decided the *SpaceX* protest on the merits, so federal district courts may also be in play for future OT protests. More recently, in *Kinemetrics, Inc. v. United States*, No. 21-1626, the COFC distinguished *SpaceX* and exercised jurisdiction over a protest challenging the outcome of a CSO procurement. According to the Court, the solicitation at issue "had a direct effect on the award of a contract" and was therefore sufficiently connected to a procurement to fall within the Court's jurisdiction.

On the performance side, because the Contract Disputes Act (CDA) does not apply to OTAs, the parties to an OT agreement must establish their own claim dispute resolution process, which often relies on internal agency review and/or commitments to pursue ADR. The lack of clear guidance on where, and under what statutory regimen, vendors can pursue performance-related claims in the OTA space, presents another area where

vendors should pay close attention to the terms and conditions in their agreements.

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Of course, the FAQs addressed here represent only a fraction of the issues that can and do arise as vendors turn to other transactions as a potential means of working with the Government. Attorneys in Wiley's Government Contracts practice are available to help evaluate and advise on OT opportunities, terms, conditions, possible protest actions, and disputes.