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SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

"OTHER TRANSACTIONS"

By Carl L. Vacketta, Richard N. Kuyath, and Holly Emrick Svetz

For at least 50 years, the Federal Government has used a variety of contractual arrangements to acquire or support research and development. Traditionally, the vehicle used was the procurement contract. This type of instrument, however, is subject to a number of procurement statutes, the Federal Acquisition Regulation system, and supplemental agency procurement regulations (e.g., the Defense FAR Supplement) that impose unique cost accounting and allowability rules, administrative requirements, and burdensome socioeconomic and subcontracting obligations on Government contractors. To avoid some of these costly barriers to doing business with the Government, Congress authorized the use of two other, more flexible legal instruments to stimulate research for public purposes—(1) the grant, generally used to support a university or nonprofit organization in performing basic and applied research, and (2) the cooperative agreement, which allows for greater Government involvement than is typical with a grant. While these forms of assistance agreements are not subject to the FAR system, they are subject to detailed Office of Management and Budget Circulars and agency regulations; and some private organizations, especially for-profit commercial firms, have been unwilling to accept even these requirements.

As a result, in 1989 Congress temporarily authorized the Defense Advanced Research Projects Agency (DARPA) to utilize another type of assistance agreement—the so-called "other transaction" (OT)—with the

hope of attracting a greater share of commercial research and development.¹ Since the OT is not a procurement contract, grant, or cooperative agreement, it is arguably not subject to any procurement laws, regulations, circulars, or other rules governing these instruments.² In 1991, Congress made DARPA's authority to use OTs for research permanent and extended the authority to all of DOD.³ Subsequently, in 1993, Congress expanded DARPA's OT authority to prototype development.⁴ Today, all military departments have authority to issue these flexible types of agreements for both research and prototype projects.⁵

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The OT method of contracting has been used successfully by the Department of Defense to (a) exploit dual-use (military and commercial) technology and (b) reduce the time and expense needed to conduct prototype development. DARPA has awarded over 130 OTs involving \$2.3 billion. In Fiscal Year 1997 alone, 20 awards for research and 50 awards for prototypes were made by various DOD agencies using OT authority. Of the 50 prototype projects, 30 were under the Commercial Operations and Support Savings Initiative (COSSI), which was begun in 1997 to reduce the cost of parts and maintenance for weapons systems. For these 30 projects, DOD has invested roughly \$100 million; however, if all 30 COSSI projects are successful and introduced into fielded military systems, the DOD expects to save \$3 billion on this \$100 million investment.⁶

This BRIEFING PAPER reviews (1) the legislative evolution of the DOD's authority to use OTs, (2) the various *types* of OTs that have been employed, (3) the methods used to *solicit the award* of an OT, (4) the terms and conditions typically found in the "Articles of Collaboration" used when an OT is awarded to a *consortium* rather than to a single recipient, (5) the provisions generally included in an OT agreement, using as an example the *DARPA model research OT agreement*, (6) the requirement for *cost sharing* under most research and some prototype OTs, and (7) the *pros and cons of OTs*.

Legislative Evolution

A number of statutory changes have contributed to the evolution of the DOD's authority to use OTs for research and prototype development projects.

■ Space Act Agreements

The term "other transaction" was coined in 1958 by Paul Dembling, then General Counsel of the National Aeronautics and Space Administration (and later General Counsel, General Accounting Office), during the drafting of legislation that resulted in the National Aeronautics and Space Act of 1958.⁷ The Space Act authorized NASA to use "contracts, leases, cooperative agreements, or *other transactions*...in the conduct of its work" with any governmental or non-governmental entity.⁸ During the first decade of its existence, NASA used such "Space Act" agreements—including the OT—to obtain "cutting-edge" research and related prototypes.

Originally, NASA permitted Government funding to finance research covered by an OT. Since the passage of the Federal Grant and Cooperative Agreement Act of 1977,⁹ however, NASA has limited OT use to unfunded arrangements in which no Government money is provided to the private or public sector recipient. In that 1977 Act, Congress distinguished grants and cooperative agreements from procurement contracts and specified when each type of instrument should be used. A grant or cooperative agreement is to be used when the Government intends to "carry out a public purpose of support or stimulation authorized by a law" (e.g., research).¹⁰ A procurement contract, on the other hand, is to be used when the Government intends to acquire "property or services for the *direct benefit or use* of the United States Government."¹¹ Although the OT had been used by NASA for almost 20 years, the term "other transaction" was not identified in the 1977 Act.

■ DOD Research OT Authority

In 1989, Congress authorized the Secretary of Defense, through DARPA (known from 1993 to

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1996 as the Advanced Research Projects Agency) to carry out advanced research projects and in so doing to "enter into cooperative agreements and *other transactions* with any person, any agency or instrumentality of the United States, any unit of State or local government, any educational institution, and any other entity."¹² Although the 1989 legislation pointed out that an OT was *not* a procurement contract, grant, or cooperative agreement, it did not define an OT. The statute limited DARPA's authority to enter into OTs to a two-year period ending September 30, 1991.¹³ In 1991, Congress made DARPA's authority to use research OTs permanent and also extended authority to use research OTs to the military departments.¹⁴ Subsequent amendments made in 1994 permit the DOD to use OTs—i.e., "transactions (other than contracts, cooperative agreements, and grants)"—for "basic" and "applied" research as well as "advanced" research.¹⁵

The DOD's statutory authority to use OTs for research—codified at Title 10 of the U.S. Code at § 2371—has three conditions. First, the Secretary of Defense must ensure, "to the maximum extent practicable," that an OT does not provide for research that duplicates research being conducted under an existing DOD program.¹⁶ Second, "to the extent that the Secretary determines practicable," the Government may not provide more funding under the OT than the recipient.¹⁷ Congress incorporated this 50% cost-sharing requirement in the expectation that the OT recipient would retain intellectual property rights in the results of the research project and would thereafter benefit by marketing the results commercially.¹⁸ Third, an OT may be used for a research project "when the use of a standard contract, grant, or cooperative agreement for such project is *not feasible or appropriate*."¹⁹ A prior version of this condition permitting research OTs to be used "*only* when the use of a standard contract, grant, or cooperative agreement...is not feasible or appropriate"²⁰ was softened by a 1996 statutory change deleting the word "only."²¹ This change was the result of a DOD initiative to increase the flexibility of the military services and to encourage the use of the 10 USC § 2371 OT for research.²²

The statute further provides that the DOD "shall prescribe regulations" to carry out the authority to

use OTs.²³ Although no regulations addressing the use of research OTs have been developed, the DOD has issued guidance for the use of OTs under 10 USC § 2371.²⁴

■ DOD Prototype OT Authority

In November 1993, encouraged by DARPA's use of research OT authority under 10 USC § 2371 in dual-use critical technology programs, Congress authorized DARPA to use OTs for military *prototype* (but not full production) projects. Specifically, § 845 of the National Defense Authorization Act for FY 1994 included *temporary* DARPA authority to carry out, under the authority of 10 USC § 2371, "prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense."²⁵ DARPA's prototype OT authority under § 845 was originally due to expire on November 30, 1996, but was extended by the National Defense Authorization Act for FY 1997 until September 30, 1999.²⁶ That Act also extended the prototype OT authority to the Secretaries of the military departments and any other officials designated by the Secretary of Defense.²⁷

Subsequently, in a December 14, 1996 memorandum, Under Secretary of Defense for Acquisition and Technology Paul Kaminski, under a delegation of authority from the Secretary of Defense, designated the directors of defense agencies as having authority to use § 845 for prototype OTs.²⁸ (This memorandum also included—as "guidance only"—a list of statutes applicable to procurement contracts but "not necessarily applicable" to OTs.) The Secretaries of the military departments have since delegated prototype OT authority to their major research commands.²⁹

Although the use of *competition* is not addressed in 10 USC § 2371, § 845, as amended, requires that "competitive procedures shall be used" to carry out prototype projects to "the maximum extent practicable."³⁰ Also unlike the DOD's research OT authority, § 845 does *not* require (1) cost sharing or (2) a determination that a procurement contract, grant, or cooperative agreement is not feasible or appropriate for the project.³¹ The DOD may, therefore, fully fund the prototype project and use the OT in place of any other type of acquisition or assistance agreement.

Although no regulations addressing prototype OTs have been issued, their use, like that of research OTs, is addressed in DOD guidance.³²

OT Types

OTs for research or prototype projects typically involve agreements between the DOD and a single entity or a consortium formed for the purpose of carrying out the OT, although other types of agreements or arrangements may also be used. The various types of OTs can be funded on a cost-reimbursement, fixed-price, time-and-material, labor-hour, or payable-milestone basis.

■ Research

Under a research OT (also known as a science and technology OT) authorized by 10 USC § 2371, a single recipient or consortium performs basic, applied, or advanced research. To the extent practicable, at least 50% of the costs of performing the research must be contributed by the non-Government parties.³³ While the Government has entered into a number of research OTs with individual for-profit companies (e.g., Intel Corp., Cray Research, The Boeing Co.), most OTs have been with consortia composed of two or more legal entities (including commercial firms, defense contractors, federal laboratories, small businesses, and educational institutions).³⁴ As noted at the outset of this PAPER, the DOD reported to Congress that DARPA, the Air Force, Army, and Navy awarded 20 OTs for research in FY 1997.³⁵

Under DARPA policy, while a research OT cannot be used where the principal purpose is to acquire goods and services for the *direct* benefit or use of the Government, incidental acquisition of property or services is impliedly acceptable.³⁶ Also, DARPA policy precludes using an OT to sponsor basic research at a single university or nonprofit research corporation; the standard grant is to be used for that purpose.³⁷ DOD guidance for research OTs states that such agreements are appropriate only when at least one for-profit concern, particularly a firm that has not traditionally done business with the Government, is to be involved in the performance of the research project. If this requirement is met, nonprofit concerns may also perform under the research OT as members of a consortium.³⁸

Most research OTs have been fixed-price, "best efforts"-type contracts, with payments of fixed amounts made for accomplishment of set technical milestones.

■ Prototype

Under a § 845 prototype OT, a project is undertaken—by a single party or a consortium—that is directly relevant to a weapon or weapons system to be acquired or developed by the DOD.³⁹ Such projects may include not only weapons systems, but also subsystems, components, technology demonstrations, training, simulations, and auxiliary and support equipment. Prototype OT projects may also include the adaptation, testing, or integration of commercial items for military purposes.⁴⁰ According to DARPA policy, the prototype OT may be used—as a precursor to production—to acquire goods or services for the direct benefit of the Federal Government.⁴¹ Prototype OTs have generally provided for payment on a cost-reimbursement or milestone basis.

Like the research OT, the prototype OT is exempt from the FAR system policies and procedures.⁴² Both OT types are also exempt from the standard socioeconomic requirements found in procurement contracts, although both types require compliance with the requirements of Title VI of the Civil Rights Act of 1964 relating to nondiscrimination in federally assisted programs.⁴³ Unlike a research OT, as noted previously, a prototype OT for a purely military project need not provide for cost sharing.⁴⁴

The first prototype OTs were awarded by DARPA in 1994 for the development of an unmanned air vehicle—called the UAV, TIER II Plus (Global Hawk)—to provide surveillance information to the war fighter.⁴⁵ Prototype OTs have been issued for other projects, including (a) the Tier III Minus (low observable UAV) Program (Dark Star), (b) the Arsenal Ship Program, (c) the Affordable Multi-Missile Manufacturing Program, and (d) COSSI.⁴⁶ The goal of COSSI is to insert commercial items into existing weapons systems to reduce operation and support costs.⁴⁷ According to the DOD's annual report to Congress, 50 prototype OTs were awarded in 1997 (by DARPA, Army, Air Force, Navy, and National Imagery and Mapping Agency). Thirty of these 50 awards were for COSSI projects.⁴⁸

■ Other Types

In addition to agreements with single commercial firms or consortia for research or prototype development, the DOD has used other types of OT agreements or arrangements. They include the following:⁴⁹

- (1) Bailment agreements involving the lending or borrowing of equipment, typically with a sharing of research or test results.
- (2) Parallel or coordinated research agreements involving sponsorship of a research project related to one or more other research projects funded by others and an arrangement to share results or to coordinate research to enhance the end result.
- (3) Joint funding arrangements with another party to finance a third party's research.
- (4) Reimbursable arrangements in which DARPA or another DOD agency provides services to a recipient (such as transportation services on an experimental space launch vehicle, an experimental air vehicle, or an experimental undersea vehicle). The recipient would typically provide one or more of its own experiments to be conducted during the test mission.

OT Solicitation & Award

There is no set method for announcing or soliciting an OT; several different formats have been used. Prior to the Competition in Contracting Act of 1984, DARPA and other defense research agencies used the unsolicited proposal as the source of ideas for research projects. CICA, however, made an award based on an unsolicited proposal a noncompetitive process requiring the Government to prepare a justification and approval document,⁵⁰ which proved to be time consuming and burdensome. Today, the award of a competitive OT starts with issuance of a broad agency announcement (BAA), a research announcement, a request for proposals, or some similar type of announcement. Proposals submitted in response to the announcement may be used in combination with oral presentations.

■ Broad Agency Announcement

The BAA is a standard method described by the FAR for procuring "research" for the direct benefit of the Government.⁵¹ The FAR provides that a BAA may be used to fulfill an agency's requirements "for scientific study and experimentation directed toward advancing the state-of-the-art or increasing knowledge or understanding rather than focusing on a specific system or hardware solution."⁵² DARPA's practice has been to issue a BAA for a project where a procurement contract, cooperative agreement, grant, or OT may be used, depending on the circumstances at the time of award. The prior research and intellectual property rights the recipient brings to the project are important factors in determining which type of agreement will be used. Other factors include whether the recipient is a commercial firm and whether a consortium or a single recipient is involved.

In DARPA's view, CICA,⁵³ the Procurement Integrity Act,⁵⁴ the Anti-Kickback Act,⁵⁵ and the procurement protest system⁵⁶ apply to the BAA when a procurement contract, grant, cooperative agreement, or OT is a possible contractual instrument. However, if and when an OT is chosen as the instrument for award, DARPA takes the position that the procurement statutes no longer apply.⁵⁷

■ Research Announcement

If DARPA determines *before* issuance of a solicitation that an OT, grant, or cooperative agreement will be used, it issues a "research announcement." It is DARPA's position that the procurement statutes and the FAR and DFARS do not apply to the research announcement or to the subsequent award because no "procurement" is involved.⁵⁸

■ RFPs & Other Types

Although the FAR, DFARS, and CICA do not apply to OTs, some agencies believe there is sufficient flexibility to use the familiar request for proposals format for an OT solicitation. The Air Force, for example, suggests use of an RFP in its draft guidance on prototype OTs.⁵⁹

Other types of announcements have also been issued in the OT solicitation process. For example, the Air Force uses a "program research and devel-

opment announcement" as well as a BAA for research OTs.⁶⁰

■ Use Of Competition

As noted earlier, § 845, as amended, requires DOD to use competition to the maximum extent practicable in awarding a prototype OT. Even in awarding research OTs, however, agencies typically use competitive procedures. In fact, DOD's recent guidance on research OTs requires them to be awarded competitively to the maximum extent practicable.⁶¹

■ Protests

Currently, there is no procedure provided by statute, regulation, or a model OT agreement for a disappointed offeror to challenge the award of an OT. The GAO procurement protest process remedies violations of procurement statutes and regulations in the solicitation and award of "procurement" contracts,⁶² not OTs. The GAO will, however, consider whether an OT was properly used in place of a procurement contract.⁶³ Similarly, CICA does not apply to the award of an OT.⁶⁴ Although no court has so decided, protests involving OTs would arguably fall within the jurisdiction of the U.S. Court of Federal Claims or the U.S. District Courts to hear protests challenging the solicitation or award of "contracts" (not limited to "procurement" contracts) under the Tucker Act⁶⁵ and the Administrative Procedure Act, which permits a court to invalidate agency action found to be arbitrary, capricious, an abuse of discretion, or unlawful.⁶⁶ DARPA agrees that a procedure for handling OT protests should be developed,⁶⁷ and DARPA would presumably be in favor of some type of agency-controlled alternative dispute resolution process like that implemented by the Army Materiel Command.

Consortium Articles Of Collaboration

Most OTs are issued to a consortium⁶⁸ instead of to a single recipient. Before a consortium enters into an OT, the Government agency will usually require the consortium to submit "Articles of Collaboration" or an equivalent document. This agreement—separate and distinct from the OT agreement—will set forth the relative rights and respon-

sibilities of the members of the consortium that will perform the OT research or prototype development project. There is no prescribed format for this document. Its purpose is to memorialize the working relationship between its members while they perform the OT work; however, the consortium does not constitute a new legal entity.

In addition to defining the members' rights and responsibilities, the Articles of Collaboration will prescribe how the members will interact with one another. At a minimum, the Articles should provide the following information:

- (a) The name of the consortium and its membership.
- (b) Who is authorized to negotiate on behalf of the consortium.
- (c) Who is authorized to sign the OT agreement (and modifications thereto) and commit other members. (In some Articles, one member is given this authority; in others, each member is required to sign the OT agreement and any modifications.)
- (d) The consortium's technical and business goals.
- (e) The time period during which the Articles are to remain in effect.
- (f) The management and organizational structure of the consortium (e.g., how decisions will be made, who has the authority to vote on what issues, etc.).
- (g) Who has administrative and payment responsibilities for the consortium and what procedures will be followed for disbursement of Government funds to members.
- (h) Pertinent terms and conditions, including (1) the procedures for handling proprietary information, (2) the bases upon which the OT and the Articles may be terminated, (3) the members' rights in foreground and background intellectual property, and (4) the disputes resolution procedure to be followed.

Key provisions commonly found in consortium Articles of Collaboration are discussed below.

■ Legal Status

As earlier noted, the consortium usually is not a separate legal entity; each member is considered an independent contractor. Therefore, you should include a disclaimer in the Articles that the consortium is not to be considered or construed as a joint venture, partnership, or any other type of legal entity. Also, you should consider providing a notice about the consortium formation to the Federal Trade Commission and the Department of Justice to obtain certain joint venture antitrust protections under the National Cooperative Research and Production Act of 1993.⁶⁹

■ Member Obligations

Each member of the consortium should agree to use its best efforts (or reasonable commercial efforts) to perform the research tasks assigned under the OT's statement of work. Authority to review and negotiate the OT agreement (and any amendments) is usually given to one representative of the consortium, often called the "Consortium Administrator." This article should also establish the procedures for voluntary withdrawal of a member and the member's remaining obligations after withdrawal.

■ Management

The consortium is normally managed by a board consisting of a representative from each member. The "Management" article should describe the frequency of management board meetings and the procedures for voting on issues before the board. In some consortia, it may be appropriate to establish two boards: one to manage the overall operation of the consortium and one to manage technology development. The article should also address how the management board will treat a member that defaults on its obligations, and how that member may be forced to withdraw from the consortium.

■ Consortium Administrator

The Articles of Collaboration should specify the responsibilities of the Consortium Administrator. The Administrator is the representative of the consortium member with the administrative point-of-contact authority for the consortium with the Government. (In some instances, a representative of a *nonmember* of the consortium, such as a university, is

given the role of Consortium Administrator.) The Administrator receives all Government payments and is responsible for disbursing funds to the members in accordance with a specified formula. It is common for the Administrator to be paid a fee by the other members (from the Government funding) for these efforts.

■ Terms & Conditions

(1) *Intellectual Property*—The "Intellectual Property" article is usually the most important and most difficult to negotiate. In some cases, separate intellectual property agreements are negotiated between members.

Each member's rights in intellectual property—developed solely or jointly under the OT—should be set forth. You should also address what rights, if any, each member will receive in background intellectual property that is owned or controlled by other members and was developed outside the OT but is necessary to practice the foreground intellectual property. In addition, you should address what rights, if any, each member will receive in intellectual property developed by the other members under the OT (i.e., foreground technology). At a minimum, this article should provide that each member obtains a license under the other members' foreground and background intellectual property for the sole purpose of conducting the OT research.

(2) *Termination*—The "Termination" article generally covers how the consortium may terminate the OT agreement for convenience based upon a determination that the research project will not produce beneficial results. In addition, the article should specify any other grounds on which the members may terminate the Articles of Collaboration, such as the Government's failure to award the consortium an OT within a certain time period.

(3) *Disputes Process*—Another important article is one that establishes a process for resolving members' disputes. This article should provide that, if a dispute arises, the issue is to be first addressed by management executives of the various members. If the matter cannot be resolved by these executives within a specified time period, the dispute should be elevated to mediation (or arbitration if the article so provides). If mediation is unsuccessful after

a specified time period, any member should be permitted to bring an action in a court of competent jurisdiction.

Governing law should also be specified for interpretation of the Articles and the resolution of disputes. In addition, the "Disputes" article may address how members handle OT disputes between (a) the consortium and the Government and (b) the consortium and third parties.

(4) *Liability Disclaimer*—Another provision often found in the consortium Articles of Collaboration is a disclaimer of liability between the consortium members. In this disclaimer, you should consider covering (a) indirect, incidental, consequential, or special damages and (b) any express or implied warranty (including the warranties of merchantability and fitness for a particular purpose) relating to the research project.

(5) *Other*—Other terms or conditions may be included in the Articles of Collaboration, such as those for indemnification, advertising, notices, and waiver of member rights granted under the Articles.

DARPA's Model Research OT Agreement

DARPA has prepared two model research OT agreements—one for a single party and the other for a consortium. Both DARPA models are similar in content.⁷⁰ The Air Force has also prepared (a) two model research OT agreements—one for a single party and one for a consortium—and (b) a model prototype OT agreement.⁷¹ In addition, the DOD has developed a prototype OT cost-share agreement for dual-use technology projects under the COSSI Program.⁷² Each of these model OTs is a "best efforts" agreement, providing for the payment of fixed amounts for the accomplishment of milestone tasks.

All of the model OT agreements are much shorter and simpler than a standard FAR-covered procurement contract. Also, the exemption of OTs from the requirements applicable to procurement contracts permits the parties to negotiate the terms and conditions of an OT agreement under a "freedom of contract" mode not generally permitted under the FAR system. The parties are often much more able under an OT

agreement than under a procurement contract to adopt commercial practices and to tailor the agreement's terms and conditions to a particular program. According to DARPA, all of the articles or provisions in its model OT agreements are negotiable and subject to modification except for the "Civil Rights Act of 1964" article.⁷³ Experience has shown, however, that DARPA is generally unwilling to make major changes in the articles covering patents, disputes, and foreign access to technology.

DARPA's model *research* OT agreement with a *consortium* consists of a cover sheet, 13 articles governing the terms and conditions, and five attachments. The attachments include (1) the statement of work, (2) the specified reporting requirements, (3) a schedule of payments and payable milestones, (4) the funding schedule, and (5) a list of Government and consortium representatives. The key provisions in DARPA's model research OT agreement with a consortium are discussed below.⁷⁴

■ Scope

Article I, "Scope of the Agreement," is, in many respects, similar to the "recitals" section found in a commercial contract. It sets forth the research program's "vision statement," includes any terms to be defined, and incorporates by reference the statement of work. It is prepared jointly by DARPA and the consortium members.

Under this article, the Government is to have continuous involvement with the consortium, and both parties are bound by a duty of good faith and best research efforts in achieving the OT goals. The parties agree that the OT's principal purpose is to support and stimulate the consortium to provide its best efforts towards the research project and not to acquire property or services for the Government's direct benefit or use. The article states that the FAR and DFARS apply only if *specifically* referenced in the OT agreement.

Although the consortium agrees to perform "a coordinated research and development program" for a particular effort, it does not guarantee that the research goals will be accomplished. The consortium is only obligated to use its "best research efforts" to achieve these goals. In consideration for its efforts, the consortium is to be paid fixed

amounts as it accomplishes "payable milestones." (Use of payable milestones—under which payment is made for the accomplished tasks, not for actual incurred costs—enables the parties to eliminate any requirements for application of the FAR cost principles and for compliance with the unique Government accounting practices.) Since the OT is a "best efforts" agreement, the only penalty for failing to accomplish a milestone task is not getting paid. Thus, the key to success is to negotiate technical milestones that can be met with relatively little risk.

The DARPA model is a cost-share agreement, under which a total estimated project cost (covering both Government and consortium funding) is specified. If either DARPA or the consortium is unable to provide its respective total cost contribution, the other party is entitled to reduce its project funding by a proportional amount.

■ Term

Article II, "Term," specifies the period of performance. If all funds are expended before the end of the term, the parties have no obligation to continue further performance and may cease development at that point. (This right is similar to that found under the FAR "Limitation of Cost" clause for cost-reimbursement procurement contracts.⁷⁵)

In addition, this article provides that the OT may be terminated for the convenience of either DARPA or the consortium by written notice to the other party, subject to two limitations. First, the notice must be preceded by consultation between the parties. Second, a determination must be made that the project will not produce beneficial results commensurate with the expenditure of resources. In the event of termination, both parties are obligated to negotiate in good faith a reasonable and timely adjustment of all outstanding issues. If a negotiated adjustment is not possible, the issues are to be resolved under the "Disputes" article. The Government, however, has no obligation to reimburse the consortium beyond the last completed and paid milestone if the *consortium* terminates the OT.

■ Project Management

Article III, "Management of the Project," provides that the consortium is to be run by a Consor-

tium Management Committee (CMC) composed of one voting representative from each consortium member. The CMC is responsible for technical, programmatic, reporting, financial, and administrative matters. The DARPA Program Manager is to participate in all CMC meetings. The CMC's decisions are binding except for the following types of decisions that are subject to DARPA approval: (a) changes to the Articles of Collaboration if they substantially alter the relationship of the parties as originally agreed upon, (b) changes to, or elimination of, any DARPA funding allocation to any member, (c) technical or funding revisions to the OT, and (d) admission to the consortium of additional or replacement members.

Quarterly technical meetings are held between consortium members and the DARPA Program Manager. All technical decisions must be made by a majority or consensus vote of the CMC and the DARPA Program Manager.

The program management and planning process is subject to both quarterly and annual reviews by the CMC and the DARPA Program Manager. The CMC (with DARPA Program Manager review) is responsible for preparing an overall annual program plan in the first quarter of each year's performance. The plan should consolidate all prior adjustments in the research schedule, including revisions to payable milestones.

■ Administration

Under Article IV, "Agreement Administration," one representative of the consortium is appointed to be the Consortium Administrator, whose responsibilities are set forth in the Articles of Collaboration. This Administrator is the consortium's representative to DARPA for administrative and contractual matters. The Consortium Administrator's counterpart is the "DARPA Agreements Officer," who is responsible for granting all approvals required by the OT agreement. (This officer is equivalent to the Contracting Officer in a procurement contract under the FAR.)

Another representative is appointed to be the consortium's representative to DARPA for technical matters. This representative's counterpart is the DARPA Program Manager.

■ Accounting & Payment

Article V, "Obligation and Payment," requires the consortium to maintain an accounting system that complies with generally accepted accounting principles. In addition, the consortium is responsible for maintaining adequate records to account for Government funds. The article also notes that the parties recognize that the consortium is only a conduit and cannot incur or allocate any indirect costs of its own to a member's costs incurred directly pursuant to the OT.

Significantly, no statutory Government OT audit right exists, and many commercial companies will not permit such an audit of their own records as a matter of policy. Nevertheless, Article V gives the Government the right to examine or audit the *consortium's* (or any member's) relevant financial records for three years after expiration of the OT term. You should be aware that under appropriate circumstances, DARPA may be willing to modify this article to provide that any audit done on behalf of the Government will be performed by a *mutually* acceptable certified public accounting firm.

The article provides for periodic payments to be made for the accomplishment of payable milestones. Examples of payable milestones that could be negotiated include completion of a demonstration test, establishing program goals and objectives, delivery of preliminary design, and completion of preliminary design reviews. Quarterly payments are common, although more frequent payments can be negotiated. You should structure the payable milestones to provide an adequate supply of program funding. A sufficient supply of funding throughout the program is particularly important for consortium members that are small businesses or non-profit firms that cannot afford long delays in payment.

After each milestone is accomplished, that milestone completion must be documented and provided to the DARPA Program Manager for review and verification. Thereafter, the DARPA Program Manager is responsible for providing notice of milestone accomplishment to the DARPA Agreements Officer, who will approve the invoice and process it for payment. The Government's liability to make payment, however, is limited to those funds obligated under the OT.

■ Disputes

Under Article VI, "Disputes," all disputes are to be resolved by discussion and mutual agreement of the parties "as soon as practicable." If negotiation does not resolve the dispute, the aggrieved party may document the dispute in writing, including the relevant facts, the unresolved issues, and the remedy sought, and request a joint decision of the DARPA Deputy Director for Management and a senior executive appointed by the CMC. The other party is then obligated to submit a response to the matter in dispute within 30 days. Thereafter, these two senior officials are to conduct a review and render a joint written decision (within 30 days) that is final and binding.

In the absence of a joint decision, the dispute can be submitted in writing to the Director of DARPA for a final and binding administrative decision. If the dispute involves a monetary claim, recovery is limited to "direct damages" (actual costs) incurred up to the amount of the funding DARPA has disbursed as of the time the dispute arose.

Because the DARPA Director's decision is final and binding to the extent permitted by law, to permit judicial review, it is advisable to modify the article so that any decision is subject to the Wunderlich Act, which precludes contract clauses from preventing judicial review of an agency decision on a dispute.⁷⁶ Although no court has yet so decided, Tucker Act jurisdiction of the Court of Federal Claims and the U.S. District Courts should be available. This Act provides, among other things, for broad court jurisdiction over claims founded upon any contract, express or implied, with the Federal Government.⁷⁷ (The Contract Disputes Act of 1978⁷⁸ probably does not apply to an OT, although this is not certain. For instance, in a prototype OT, where (1) the services or prototype are being acquired for the direct benefit of the Government *or* (2) the Government acquires and takes title to the prototype, the CDA might arguably apply because the CDA applies, among other things, to the "procurement of property" and the "procurement of services."⁷⁹)

■ Patent Rights

Article VII, "Patent Rights," is similar to the FAR "Patent Rights—Retention by the Contractor"

clause.⁸⁰ Under this article, the consortium retains title to any inventions conceived or first actually reduced to practice in performance of the OT—i.e., so-called “subject inventions.” DARPA receives a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced, on behalf of the United States the subject invention throughout the world. The consortium may elect to provide full or partial rights it has retained to any member or other third party. (Because the consortium is not a legal entity, it may be desirable in this article to revise the term “consortium” to read “consortium member.”) The article also includes “Preference for American Industry” and “Government March-In Rights” provisions corresponding to those in the FAR clause.⁸¹

The provisions in DARPA’s “Patent Rights” article are based on the requirements of the Bayh-Dole Act.⁸² While this Act does not apply to an OT, it is used by DARPA as a starting point in negotiations on patent rights under OTs.⁸³ The Act establishes a uniform policy on the allocation of patent rights to inventions made by universities and small businesses receiving Government support to conduct research. A 1983 presidential memorandum extended this statutory policy to cover large businesses as well.⁸⁴ Under the Act and presidential memorandum, the recipient of Government funding retains title to any inventions conceived or first reduced to practice under the contract, grant, or cooperative agreement that funds the research. In return, the Government retains (a) a paid-up license to use the invention for its own purpose (including competitive procurements)⁸⁵ and (b) march-in rights to license the invention for commercial purposes if the invention titleholder fails to take reasonable steps to achieve practical application.⁸⁶ There are other requirements under the Bayh-Dole Act that, if met, allow the recipient to maintain the invention as a trade secret for a short period of time *before* having to file a patent application.⁸⁷

Individual situations may warrant the consortium taking exception to the standard allocation of patent rights under the DARPA model agreement. You may be able to negotiate a change to the “Patent Rights” article based on a detailed explanation of the consortium’s needs.⁸⁸ Factors to be considered when negotiating patent licenses of a different scope include (1) past investments funded by the

consortium (or any member) or the Government, (2) present contributions, and (3) potential commercial markets.⁸⁹ If the Government has been the predominant contributor in prior years to the effort that provides the foundation for the planned research, DOD policy provides that the OT agreement “Patent Rights” article must include the Bayh-Dole Act requirements. If, however, a consortium (or any member) has contributed more substantially through prior investments in the particular technology, the “Patent Rights” article may be less restrictive to allow the consortium or a member to benefit more directly from its investments.⁹⁰

Experience has shown that DARPA will, if justified, (a) delay the effective date of the Government purpose license right (e.g., the Government license will begin five years *after* expiration of the OT term), (b) define what reasonable efforts toward practical application the consortium must make to preclude exercise of Government march-in rights, and (c) permit a member of the consortium to retain the invention as a trade secret for an unspecified period of time under certain circumstances.⁹¹ Other concessions that may be granted by DARPA include allowing a consortium member more time than permitted under the standard Bayh-Dole patent provisions to (1) notify the Government of a subject invention from the time the inventor discloses it within the commercial firm or (2) inform the Government whether it intends to take title to the invention.⁹²

In nearly all cases, however, DARPA will insist that the “Patent Rights” article provide for Government march-in rights to allow it to license subject inventions to third parties for commercial purposes if the title holder fails to take steps to achieve practical application of the invention within a reasonable time. Exceptions, however, may be made in certain circumstances (e.g., if the consortium member is providing most of the funding for a research project, and the Government is providing a much smaller share).⁹³

You should note that the DARPA model agreement “Patent Rights” article does *not* contain Paragraph (g) of the FAR “Patent Rights—Retention by the Contractor” clause. Under Paragraph (g), “Subcontracts,” (1) a subcontractor retains all rights provided to the prime contractor and (2) the prime contractor cannot, as part of the consideration for

awarding the subcontract, obtain rights in the subcontractor's subject inventions.⁹⁴ Languages similar to that in Paragraph (g) has been interpreted as prohibiting a prime contractor from taking even a nonexclusive license in the subcontractor's subject inventions.⁹⁵ Thus, where this provision is included, the only practical way a prime contractor can obtain such rights is to negotiate a separate licensing agreement with the subcontractor under which separate consideration is given by the prime for rights in the subcontractor's subject inventions. Under the DARPA "Patent Rights" article, however, the consortium members are free to negotiate rights in their subcontractors' subject inventions. The "Patent Rights" article must be "flowed down" to all subcontracts or lower-tier agreements for experimental, developmental, or research work.

Similarly, the DARPA Model Research OT agreement does not contain a provision like that found in Alternate I to the FAR "Authorization and Consent" clause, under which a contractor is authorized to infringe any U.S. patent in the performance of a research contract.⁹⁶ DARPA's position is that it cannot legally include this type of provision because the research is not being performed "for" the Government within the meaning of 28. USC § 1498, which provides that when such authorization is granted, the patent owner can sue only the Government in the U.S. Court of Federal Claims for reasonable royalties. The patent owner cannot sue the contractor for damages or obtain an injunction against the contractor to block use of the patent. You may, however, be able to negotiate the inclusion of such a provision in a *prototype* OT agreement, where the research is being performed *for* the Government. If an "Authorization and Consent" clause is included in a prototype OT agreement, the contractor may be required to "flow down" the clause to all subcontracts over a certain dollar amount.

■ Data Rights

Article VIII, "Data Rights," provides that since mixed Government-consortium funding is involved, the Government will receive "Government purpose rights" in any data *delivered* under the OT. Also, as consideration for the Government funding, the consortium must reduce to practical application any items, components, and processes developed under the OT. The "Data Rights" article must be "flowed down" to all subcontracts or lower-

tier agreements for experimental, developmental, or research work.

"Government purpose rights" are defined as the rights to use, duplicate, or disclose data, in whole or in part and in any manner, for *Government purposes only* and to have or permit others to do so for Government purposes only. "Data" are defined to mean recorded information, regardless of form or method of recording, which includes, but is not limited to, technical data, software, trade secrets, and mask works (semiconductor integrated circuits). The term does not include financial, administrative, cost, pricing, or management information, and it does not include subject inventions. Note that the DARPA article places no time limit on the Government purpose rights in such data, in contrast to the DFARS "Data Rights" clauses. Under the DFARS clauses, the Government has Government purpose rights in technical data and computer software developed with mixed funding for five years (or other period negotiated) following execution of the contract, after which time the Government obtains unlimited rights in the data and software.⁹⁷

The DARPA model "Data Rights" article also provides that if the Government exercises its march-in rights with respect to subject inventions, the consortium agrees—upon written request from the Government—to deliver (at no additional cost to the Government) all data necessary to achieve practical application within 60 days from the date of the written request. With respect to the delivered data, the Government obtains "unlimited rights," meaning the right to use, duplicate, release, or disclose data, in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

In addition, under the "Data Rights" article, the consortium agrees that, with respect to data necessary to achieve practical application, DARPA has the right (similar to march-in rights) to require the consortium to deliver any data DARPA determines is necessary (a) because the consortium (or assignee) has not taken effective steps, consistent with the OT agreement, to achieve practical application of the technology developed during OT performance, (b) to alleviate health or safety needs that are not reasonably satisfied by the consortium, assignee, or their licensee, or (c) to meet require-

ments for public use that are not reasonably satisfied by the consortium, assignee, or licensee. The consortium further agrees to retain and maintain in good condition—for a specified number of years *after* OT completion or termination as agreed to by the parties—all data necessary to achieve practical application.

■ Foreign Access To Technology

Article IX, "Foreign Access to Technology," restricts access by foreign firms or institutions to technology developments made under the OT. The purpose of this provision is to ensure that the principal economic benefit of the OT research will be to the U.S. economy.⁹⁸ The controls established by this article, which are not found in a procurement contract, are in addition to those imposed by the International Traffic in Arms Regulations,⁹⁹ the DOD Industrial Security Regulation,¹⁰⁰ and the Department of Commerce Export Regulations.¹⁰¹ Like the "Patent Rights" and "Data Rights" articles, this article must be "flowed down" to all subcontracts for experimental, developmental, or research work.

Under the article, any transfer by the consortium of "technology" developed under the OT to a foreign firm or institution is subject to DARPA approval. The transfer may be prohibited if there are adverse consequences to the national security interests or economic vitality of the United States. "Technology" is broadly defined to include discoveries, innovations, know-how, inventions (whether patentable or not), and computer software to which ownership rights accrue. A "technology transfer" includes the sale of a company and a sale or licensing of technology. However, a "transfer" does not include (1) the sale of a product or component, (2) the license of software or documentation related to the sale of a product or component, (3) a transfer to a foreign subsidiary of a consortium member for purposes related to the OT, or (4) a transfer that provides access to technology to a foreign entity that is an approved source of supply or source for the conduct of OT research, provided that this transfer is limited to that necessary to allow the foreign entity to perform its approved role under the OT agreement.

Under the terms of this article, the prohibition on technology transfers to a foreign firm or institu-

tion applies for a negotiated time period, such as up to three years after OT expiration. If a technology transfer is made without DARPA approval during the period the restrictions on transfer are in effect, the consortium (a) will be forced to refund the DARPA funds paid for the development of the technology, and (b) the Government will obtain a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced, on behalf of the United States the technology throughout the world for Government and any and all other purposes.

Although DARPA prefers to use its standard "Foreign Access to Technology" article without modification, the article's provisions are open to negotiation. To effect a change, however, the consortium will be required to establish that any proposed modification will retain most of the manufacturing capability and know-how associated with the developed technology in the United States. Any existing licensing agreement that any consortium member has with a foreign entity can be addressed in an amendment to the article or in a side agreement. DARPA's preferred method for addressing industry's concerns about planned foreign access is to negotiate advance approval within the article's terms.

■ Title & Disposition Of Property

The DARPA model research OT agreement has two versions of Article X, "Title and Disposition of Property." The first covers research programs where no "significant" property (i.e., tangible personal property with an acquisition value less than \$50,000) is expected to be acquired by the consortium to perform OT work. The second version covers research programs under which the consortium expects to acquire property with an acquisition value greater than \$50,000. (In this event, the DARPA Agreements Officer's prior written approval is required.)

Both versions contain the following two requirements: (1) title to each item of property greater or less than \$50,000 vests in the consortium (with no further obligation of the parties, unless otherwise determined by the DARPA Agreements Officer), and (2) the consortium must maintain, repair, protect, and preserve all property acquired at its own expense. Also, both versions provide that, at

completion of the OT term, property with an acquisition value greater than \$50,000 is to be (a) purchased by the consortium at an agreed-upon price, based on fair market value, and the sale proceeds given to DARPA, (b) transferred to a Government research facility, with title and ownership being transferred to the Government, (c) donated to a mutually agreed-upon university or technical learning center for research purposes, *or* (d) disposed of by any other DARPA-approved disposition procedure. This disposal process precludes the consortium or its members from obtaining (a) title to property at no cost, unless the property is determined to have little or no value and (b) an unfair competitive advantage.¹⁰²

There is no statutory requirement that the Government obtain title to property under 10 USC § 2371. DARPA's policy is that property should not be acquired under a research OT (or a prototype OT) *unless* the property is specifically necessary to accomplish the OT's statement of work. Even when necessary, however, the property acquisition costs may be so prohibitive that Government cost sharing is needed to acquire the property under the research OT. In such cases, even though the property is acquired with Government funding, an individual consortium member is usually allowed to retain title to the property and is encouraged to use existing commercial or Government systems for property control.¹⁰³ While the Government does not obtain title to the property, it retains the right to participate in the determination of the property's disposition, as specified in Article X. You should note that many commercial companies are unable to (1) track items of property by acquisition value purchased under research programs or (2) comply with certain requirements of Article X. Bear in mind, however, that the language of this article is negotiable:

Unlike property acquired under a research OT, property acquired under a *prototype* OT is for the primary benefit of the DOD. Thus, if the prototype OT is a cost-reimbursement agreement, the Government usually takes title to property upon acquisition. However, if the prototype OT is a fixed-price-type agreement and payments are made upon accomplishment of technical milestones, the Government may only require title to deliverable end items and not to ancillary property.¹⁰⁴

■ Civil Rights Act

The only socioeconomic requirement included in the DARPA model is Article XI, "Civil Rights Act." This provision requires each consortium member to (a) comply with Title VI of the Civil Rights Act of 1964 concerning nondiscrimination in federally assisted programs¹⁰⁵ and (b) provide a certification to that effect. There is no requirement that the "Civil Rights Act" article be "flowed down" to subcontractors.

■ Order Of Precedence

Article XII, "Order of Precedence," provides that in the event of any inconsistency between language in the OT agreement and the consortium's Articles of Collaboration, the inconsistency is to be resolved by giving preference in the following order: (1) the OT agreement, (2) attachments to the OT agreement, and (3) the consortium Articles of Collaboration.

■ Execution

The final provision, Article XIII, "Execution," points out that the written OT agreement supercedes all prior and contemporaneous agreements and discussions of the parties, whether oral or written. Also, the OT agreement is to be revised only by *written* consent of the CMC and the DARPA Agreements Officer.

There is no particular requirement as to who must sign the OT agreement on behalf of the consortium. The agreement could, for example, be executed by all the consortium members individually or signed by one member so authorized by the Articles of Collaboration.¹⁰⁶

■ Report Requirements

The DARPA model OT agreement includes "Report Requirements" (Attachment 2) under which reports must be "delivered or otherwise made available" to the Government. This allows DARPA to have access to relevant information without creating an "agency record" that could be subject to release to third parties under the Freedom of Information Act (FOIA). Access to instead of delivery of proprietary data is used to keep the DARPA Program Manager and the DARPA Agreements Officer informed of research progress (e.g., through meet-

ings, briefings, and summary reports).¹⁰⁷ You should note that the National Defense Authorization Act for FY 1998 amended 10 USC § 2371 to expressly exempt OT (and cooperative agreement) proposals, business plans, and confidential technical information from disclosure under FOIA for a period of five years.¹⁰⁸

■ Other Provisions

At least three FAR clauses regularly found in procurement contracts are absent from the DARPA model research OT agreement. These are the "Default," "Changes," and "Excusable Delay" clauses. In particular, you should consider adding an "Excusable Delay" provision to an OT agreement so that the consortium members will not be considered to be in default where an excusable delay (e.g., a strike) in performance has occurred.

Cost Sharing

As earlier noted, research OTs are required by statute to provide for 50-50 cost sharing between the Government and the OT recipient to the extent determined practical.¹⁰⁹ This 50% cost-sharing requirement can be waived,¹¹⁰ but such waivers are difficult to obtain in practice. In contrast, prototype OTs by statute do *not* require any cost sharing.¹¹¹ But cost sharing is not prohibited, and prototype OTs have on occasion required some form of cost sharing—although frequently much less than 50%. In certain competitive selections, a proposal with a cost share in excess of 50% may receive a higher score than one with 50% or less.¹¹²

Where a consortium is performing the research OT, the 50% cost-sharing requirement must be met by the consortium *as a whole*. Thus, one or more members can make larger cost-sharing contributions to make up for any shortfall by another member. For example, a large commercial firm could costshare on behalf of a nonprofit organization and use that cost-sharing contribution as leverage to obtain intellectual property license rights from the nonprofit entity.

■ Acceptable Contributions

Cost-sharing requirements may be satisfied with either cash or concurrent in-kind contributions.

The value of past research may also be an acceptable contribution.

(1) *Cash Contributions*—This category of cost share includes the contribution of funds to acquire material, buy equipment, pay for labor (including benefits and direct overhead associated with that labor), and for other cash outlays—all for the performance of the OT's statement of work. The cash contribution can be derived from your own company funds or from outside sources (such as donations from state or local governments or funds from venture capitalists). The cash may also come from nonfederal contract or grant revenues or from profit or fee on a federal procurement contract. A company's own source of funds may include corporate retained earnings, current or prospective independent research and development (IR&D) funds, or any other indirect cost pool allocation.¹¹³ In a competitive selection, DARPA will evaluate cash contributions more favorably than in-kind contributions because cash contributions demonstrate a stronger commitment.¹¹⁴

IR&D funds are considered a company's own in-house funds and may be used as a source of OT cash cost share, even though these same funds remain eligible for reimbursement by the Government under a FAR-covered contract. The relevant FAR cost principle specifically lists IR&D effort performed under cooperative arrangements with DARPA pursuant to 10 USC § 2371 (e.g., an OT) as allowable IR&D costs, if the work performed would have been allowed as contractor IR&D cost had there been no cooperative arrangement.¹¹⁵ The IR&D project, however, must be *relevant* to the OT project to be eligible for cost sharing.¹¹⁶ In a competitive selection, concurrent IR&D projects that are relevant to the OT project will be evaluated as high quality cost share.¹¹⁷

(2) *In-Kind Contributions*—In-kind cost-share contributions include the reasonable fair market value of equipment, materials, intellectual property, and other property used in performance of the OT's statement of work. "Fair market value" is defined to mean what a prudent businessman would pay for the use of the property—not the cost of development or manufacture of the property.¹¹⁸ Notwithstanding this definition, in-kind cost-share contributions are difficult to quantify (e.g., determining the value of the *use* of capital equipment or facilities).

(3) *Value of Past Research*—Although cash or concurrent in-kind contributions are the preferred types of cost share, DARPA will accept the value of prior research under certain circumstances—e.g., where the OT recipient possesses significant technical knowledge but is unable or unwilling to provide other cash or in-kind contributions.¹¹⁹

■ Nonqualifying Costs

Certain types of costs will *not* qualify as cash or in-kind contributions to cost sharing. For instance, DARPA's OT guidance provides that the forgone profits or fees for the instant efforts and the cost of work done on past or concurrent procurement contracts or subcontracts are unallowable as a cost-share contribution.¹²⁰

Pros & Cons Of OTs

OTs, particularly when compared with procurement contracts, present both benefits and concerns for participants, as highlighted in an extensive study of DARPA's use of research OTs performed by the Institute for Defense Analysis (IDA) in 1995. In its report, the IDA summarized the pros and cons of OTs based on the experiences of OT participants.¹²¹ Among the *benefits* of using OTs noted by the participants were the following:

(1) *Project Feasibility*—Participants in a number of OT projects reported that their projects would never have been attempted under a procurement contract. The reasons cited included procurement contract requirements regarding mandated intellectual property rights, compliance with Government cost accounting systems, and subcontracting.

(2) *Project Administration*—The elimination under an OT of administrative burdens found in a procurement contract generally made project administration simpler and increased research productivity.

(3) *Consortium*—The self-governing OT consortium structure made possible information-sharing

based on mutual trust—even with diverse or competing participants. Contract disputes were rare. Use of a consortium sometimes led to new business opportunities. The consortium structure was often more effective for carrying out research than the prime-subcontractor relationship in a procurement contract.

(4) *Payable Milestones*—Use of payable milestones focusing on progress rather than on expenditures was universally well regarded.

(5) *Patent Rights*—The OT flexibility regarding patent rights was beneficial since the Bayh-Dole Act does not apply to OTs.¹²²

(6) *Self-Policing Structure*—OTs were no more susceptible to waste, fraud, and abuse than procurement contracts despite the absence of many "protective" rules. Since consortia police themselves, they tend to prevent "misbehavior" by individual members.

(7) *Cost Sharing*—Cost sharing helped ensure commitment, enabled consortium members to use higher quality employees than they could normally afford using only their own funds, and allowed companies to do research they were interested in—all with the Government paying half the cost (in a research OT).

The IDA study also reported the *concerns* of OT participants, including the following:

(a) *Consortium Formation*—Forming a consortium was difficult and time consuming. Critical decisions must be made early, and a detailed Articles of Collaboration document was important to establish the roles and responsibilities of all members clearly. The choice of an effective consortium leader was essential to its success.

(b) *Cost Sharing*—Cost sharing was seen negatively by certain consortium members that did not have the resources to cost share, particularly small firms and traditional defense contractors.

★ GUIDELINES ★

These *Guidelines* are designed to assist you in understanding what an OT is and how an OT agreement is used. They are not, however, a substitute for professional representation in any specific situation.

1. Remember that under a *research* OT the Government will, to the extent practicable, require you to cost-share a minimum of 50% of the funding. Under a *prototype* OT for a military project, although there is no statutory mandate for cost sharing by the recipient, the Government may encourage (or even require) some cost sharing.

2. If you are a Government contractor, remember that *IR&D costs*—as defined in the FAR cost principles—qualify as *OT cost-share contributions* if the IR&D project is *relevant* to the OT's statement of work.

3. Before offering to cost share on a *prototype OT* as a competitive measure, be sure you understand the DOD's plan to transition the program to *production*, if one exists. Currently, the DOD must convert a prototype project to a FAR-covered procurement contract for production, which may affect planning and pricing of the prototype OT phase.

4. When you are offered the opportunity to comment on an OT draft solicitation, suggest that a *protest procedure* be included. A process using an independent agency official (at least one level above the Agreements Officer) as the protest officer will likely be acceptable to the DOD.

5. If you are considering a *foreign entity's participation* in a consortium to carry out an OT, begin an open discussion with the DOD Program Manager *before* entering into the Articles of Collaboration or expending any proposal costs. With sufficient justification, the Government may permit a foreign entity to work on a project.

6. Remember that selection of an effective *Consortium Administrator* is one of the keys to a well-run consortium. The Administrator must be willing and able to dedicate significant time and effort to coordinating each member's activities and to keeping each member's interests in mind when negotiating the OT agreement and any modifications.

7. Take advantage of the OT's flexibility to *negotiate* terms and conditions that make sense given the particular circumstances involved. Unlike under a procurement contract or cooperative agreement, you should be able to negotiate changes to the "*Patent*" and "*Data Rights*" articles of the OT agreement. Also, be sure in your negotiations to address issues not covered in a model OT agreement, when applicable (e.g., "risk of loss" and "suitability for use" of any Government-furnished property).

8. Be careful to protect proprietary patents and technical data developed by your company *before* entering into the OT. The Government should obtain only *limited* or *restricted rights* in such intellectual property.

9. Take advantage of the model OT's "*Report Requirements*" provision under which required reports may be either "delivered or otherwise made available" to the Government. This will allow the DOD to have access to relevant documents and proprietary data without unnecessarily creating "agency records" that may be subject to release under FOIA. Keep the DOD Program Manager and the DOD Agreements Officer informed of research progress through meetings, briefings, and delivery of summary reports but do *not* deliver the data unless there is no alternative.

10. Consider proposing an *alternative* to the "Disputes" article in the model OT agreement that specifies binding arbitration or some other form of alternative dispute resolution.

★ REFERENCES ★

1/ National Defense Authorization Act for FYs 1990 and 1991, P.L. 101-189, § 251(a), 103 Stat. 1352, 1403 (Nov. 29, 1989) (adding 10 USC § 2371).

2/ See Under Secy. of Defense for Acquisition & Technology, Memorandum to Secys.

of the Military Depts. & Dir. of Defense Agencies, "10 U.S.C. 2371, Section 845, Authority To Carry Out Certain Prototype Projects" (Dec. 14, 1996) (listing statutes inapplicable to OTs).

3/ National Defense Authorization Act for FYs 1992 and 1993, P.L. 102-190, § 826,

105 Stat. 1290, 1442 (Dec. 5, 1991) (amending 10 USC § 2371).

4/ National Defense Authorization Act for FY 1994, P.L. 103-160, § 845, 107 Stat. 1547, 1721 (Nov. 30, 1993); 10 USC § 2371 (note).

- 5/ Note 3, *supra*, § 826(a) (amending 10 USC § 2371); National Defense Authorization Act for FY 1997, P.L. 104-201, § 804(a), 110 Stat. 2422, 2605 (Sept. 23, 1996) (amending P.L. 103-160, note 4, *supra*, § 845(a)).
- 6/ DOD, "Annual Report on Cooperative Agreements and Other Transactions Entered Into During FY97 Under 10 USC 2371." See 40 GC ¶ 81.
- 7/ P.L. 85-568, 72 Stat. 426 (1958) (codified at 42 USC § 2451 *et seq.*).
- 8/ 42 USC § 2473(c)(5) (emphasis added).
- 9/ P.L. 95-224, 92 Stat. 3 (1978), as amended by P.L. 97-258, 96 Stat. 877, 1003 (1982) (codified at 31 USC § 6301 *et seq.*).
- 10/ 31 USC §§ 6304, 6305.
- 11/ 31 USC § 6303 (emphasis added).
- 12/ Note 1, *supra* (emphasis added).
- 13/ Note 1, *supra*.
- 14/ Note 3, *supra*.
- 15/ Federal Acquisition Streamlining Act of 1994, P.L. 103-355, § 1301(b), 108 Stat. 3243, 3285 (Oct. 13, 1994) (amending 10 USC § 2371).
- 16/ 10 USC § 2371(e)(1)(A).
- 17/ 10 USC § 2371(e)(1)(B).
- 18/ See Senate Comm. on Armed Services, Report on the National Defense Authorization Act for FY 1997, S. Rep. No. 267, 104th Cong., 2d Sess. 314 (May 13, 1996); House Armed Services Comm., Report on the National Defense Authorization Act for FY 1995, H.R. Rep. No. 499, 103d Cong., 2d Sess. 285 (May 10, 1994).
- 19/ 10 USC § 2371(e)(2) (emphasis added).
- 20/ See 10 USC § 2371(e)(3) (1995) (emphasis added).
- 21/ P.L. 104-201, note 5, *supra*, § 267(a)(5) (amending 10 USC § 2371(e)).
- 22/ See DOD, Final Report of the Integrated Product Team, "The Services' Use of 10 USC 2371 'Other Transactions' and Section 845 Prototype Authorities" (1996) (available at <<http://www.afmc/wpa.fb.af.mil/HQ-AFMC/PK/pkt/otjump.htm>>); Asst. Secy. of the Navy for Research, Dev. & Acquisition, Memorandum for Chief of Naval Research, "Guidance on the Use of Other Transaction Authority Under 10 USC 2371," Enclosure 1 (July 11, 1997) (available at <<http://www.abm.rda.hq.navy.mil/otpolicy.html>>).
- 23/ 10 USC § 2371(g).
- 24/ See Dir. of Defense Research & Engrg., Memorandum to Secys. of the Military Depts. & Dir. of ARPA, "Grants, Cooperative Agreements, and Other Transactions" & Attachment 1, "Interim Guidance for Military Departments and Advanced Research Projects Agency on Grants, Cooperative Agreements and 'Other Transactions'" (Feb. 8, 1994); Dir. of Defense Research & Engrg., "Supplement to 1994 Interim Guidance Memorandum for 10 U.S.C. § 2371" (June 5, 1996); Dir. of Defense Research & Engrg., Memorandum for Secys. of the Military Depts., "Instruments for Stimulation or Support of Research" & Attachment, "Supplement to 1994 Interim Guidance for 10 U.S.C. § 2371" (Dec. 2, 1997) (available at <<http://alpha.lmi.org/dodgars/>>) (addressing "technology investment agreements" combining cooperative agreements and research OTs).
- 25/ P.L. 103-160, note 4, *supra*, § 845(a).
- 26/ P.L. 104-201, note 5, *supra*, § 804(b) (amending P.L. 103-160, note 4, *supra*, § 845(c)).
- 27/ P.L. 104-201, note 5, *supra*, § 804(a) (amending P.L. 103-160, note 4, *supra*, § 845(a)).
- 28/ Note 2, *supra*.
- 29/ E.g., Navy: Asst. Secy. of the Navy for Research, Dev. & Acquisition, Memoranda, "Delegation of Authority To Enter Into Grants, Cooperative Agreements, and 'Other Transactions'" (May 9, 1996), "Delegation of Authority To Enter Into Grants, Cooperative Agreements, and 'Other Transactions'" (Feb. 21, 1997), and "Guidance on the Use of 'Other Transactions' Authority Under 10 USC 2371" (July 11, 1997); Air Force: Air Force Order 751.1 (Jan. 27, 1994); Commander, Air Force Materiel Command, Memorandum to Dir. of Contracting, Air Force Materiel Command, "Delegation of Authority To Enter Into and Vest Title to Equipment Purchased Under Contracts, Grants, Cooperative Agreements, and Other Transactions" (Feb. 15, 1994); Dir. of Contracting, Air Force Materiel Command, Memorandum to Research & Dev. Commanders, "Delegation of Authority To Enter Into 'Other Transactions' for Research Projects" (July 25, 1996); Asst. Secy. of the Air Force for Acquisition, Memorandum, "Section 845 of Public Law 103-160, as Modified by Section 804 of Public Law 104-201, Authority To Carry Out Certain Prototype Projects" (May 6, 1997).
- 30/ P.L. 103-160, note 4, *supra*, § 845(b)(2), as amended by P.L. 104-201, note 5, *supra*, § 804(a)(2).
- 31/ P.L. 103-160, note 4, *supra*, § 845(b)(1), as amended by P.L. 104-201, note 5, *supra*, § 804(c).
- 32/ See note 2, *supra*.
- 33/ 10 USC § 2371(e)(1)(B).
- 34/ See Institute for Defense Analysis, Participant Views of Advanced Research Projects Agency Other Transactions 4 & app. A (Nov. 1995) (available at <<http://www.darpa.mil/d1793/>>).
- 35/ DOD, note 6, *supra*.
- 36/ ARPA, Draft Guidance for Use of Other Transactions 1 (Feb. 1995); "Supplement to 1994 Interim Guidance for 10 USC § 2371" (Dec. 2, 1997), note 24, *supra*, at 3, ¶ II.B.1.
- 37/ ARPA, note 36, *supra*.
- 38/ "Supplement to 1994 Interim Guidance for 10 USC § 2371" (Dec. 2, 1997), note 24, *supra*, at 3, ¶ II.B.2.
- 39/ P.L. 103-160, note 4, *supra*, § 845(a), as amended by P.L. 104-201, note 5, *supra*.

- 40/ DARPA, Memorandum of Law for Distribution, "Subject: Scope of Section 845 Prototype Authority" 6-7 (available at <<http://www.darpa.mil/cmo/pages/scope.html>>).
- 41/ Note 40, supra.
- 42/ Note 40, supra, at 7-8; Dunn, "Prototype Projects Under Section 845 of the National Defense Authorization Act" 5 (unpublished manuscript on file with the authors).
- 43/ See Civil Rights Act of 1964, P.L. 88-352, §§ 601-605, 78 Stat. 241 (1964); ARPA, note 36, supra, at 10.
- 44/ Compare 28 USC § 2371(e)(1)(B) with P.L. 103-160, note 4, supra, as amended by P.L. 104-201, note 5, supra, § 804.
- 45/ Dunn, note 42, supra, at 6-9.
- 46/ DOD, note 22, supra, at 24.
- 47/ See COSSI website at <<http://www.darpa.mil/jdupo/index.html>>.
- 48/ DOD, note 6, supra.
- 49/ Dunn, "Using Other Transactions in Co-operative Government-Industry Relationships To Support the Development and Application of Affordable Technology" 7 (unpublished manuscript on file with the authors); ARPA, note 36, supra, at 2.
- 50/ See 10 USC § 2304(f).
- 51/ FAR 35.016.
- 52/ FAR 35.016(a).
- 53/ See 10 USC § 2301 et seq.
- 54/ 41 USC § 423. See generally Arnavas, "The Procurement Integrity Act/Edition II," Briefing Papers No. 97-12 (Nov. 1997).
- 55/ 41 USC §§ 51-58.
- 56/ See 31 USC § 3551 et seq.
- 57/ Telephone conversation between Richard L. Dunn, DARPA General Counsel, and Richard N. Kuyath (Aug. 1997). See Energy Conversion Devices, Comp. Gen. Dec. B-260514, 95-2 CPD ¶ 121 (denying a protest regarding DARPA's use of an OT instead of a procurement contract because the protester failed to prove a procurement contract was required). See also note 2, supra.
- 58/ Telephone conversation, note 57, supra. See Materials from DARPA Contracting Officer Representative Course (Dec. 1997).
- 59/ See Draft Air Force Guide, "Section 845 of Public Law 103-160, 'Other Transactions for Prototype'" 9 (July 10, 1997).
- 60/ Air Force Materiel Command FAR Supplement pt. 5335.90. See also Air Force, The PRDA/BAA Guide (rev. ed. Mar. 29, 1996) (available at <<http://www.wl.wpafb.af.mil/contract/prdag.htm>>).
- 61/ "Supplement to 1994 Interim Guidance for 10 U.S.C. § 2371" (Dec. 2, 1997), note 24, supra, at 4, ¶ II.B.
- 62/ See 31 USC § 3551 et seq.; 4 CFR pt. 21. See also note 2, supra.
- 63/ See Energy Conversion Devices, note 57, supra.
- 64/ See 10 USC § 2301 et seq. See also note 2, supra.
- 65/ 28 USC § 1491(b).
- 66/ 5 USC § 706. See American Bar Assn., Draft Ad Hoc Working Group Analysis on the Applicability of Certain Procurement-Related Statutes to Utilization of Other Transactions Authority for Production of Prototypes of Weapons or Weapons Systems app. A, at A-46, A-47 (July 25, 1997).
- 67/ Note 40, supra, at 10.
- 68/ Note 34, supra, at 4.
- 69/ P.L. 98-462, 98 Stat. 1815 (1984), as amended by P.L. 103-42, 107 Stat. 117 (June 10, 1993) (codified at 15 USC §§ 4301-4305).
- 70/ DARPA Model Research OT Agreements (Jan. 31, 1997) ("Company Model" and "Consortium Model") in Materials from DARPA Acquisition Conference (Mar. 17-18, 1997), "Use of the 10 USC 2371 and Section 845 Authorities" at Tab N. See Bolos, "A Report on the Use of 10 USC 2371 'Other Transaction' Authority and 10 USC 2371 Section 845 Prototype Authority in the Department of Defense" 26-32 (Mar. 1997).
- 71/ The Air Force Model Research OT Agreement is available at <<http://www.afmc.wpafb.af.mil/organizations/HQ-AFMC/PK/pk/index.htm>> at Assistance Regulations and Guides, Module 2—Awards & Consortia. The Air Force Model Prototype OT Agreement is available at <<http://www.afmc.wpafb.af.mil/HQ-AFMC/PK/pk.ot.jump.htm>>.
- 72/ See note 47, supra.
- 73/ ARPA, note 36, supra, at 3, 10.
- 74/ For a discussion of a prior version of this model agreement, see Kuyath, "The Untapped Potential of the Department of Defense's 'Other Transaction' Authority," 24 Pub. Cont. L.J. 521, 542-560 (Summer 1995).
- 75/ FAR 52.232-20.
- 76/ 41 USC §§ 321, 322.
- 77/ See 28 USC §§ 1346(a)(2), 1491(a).
- 78/ 41 USC §§ 601-613.
- 79/ See 41 USC § 602.
- 80/ FAR 52.227-12.

- 81/ See FAR 52.227-12, paras. (i), (j).
 82/ 35 USC §§ 200-212.
 83/ ARPA, note 36, supra, at 9. But see NASA Memorandum, "Technology Reinvestment Project (TRP): Funded Space Act Agreements and Intellectual Property Rights" (May 28, 1993) (insisting that funded Space Act agreements need not be restricted by the Bayh-Dole Act and that invention rights may be freely negotiated).
 84/ President's Memorandum for Heads of Exec. Depts. and Agencies, "Government Patent Policy" (Feb. 19, 1983). See also Exec. Order 12591, § 1(b)(4) (Apr. 10, 1987).
 85/ See 35 USC § 202; FAR 52.227-12, para. (b).
 86/ See 35 USC § 203; FAR 52.227-12, para. (j). The Government's march-in rights with respect to subject inventions made under a contract, grant, or cooperative agreement have apparently not been exercised in any reported instance. See Nash, Schooner & O'Brien, The Government Contracts Reference Book 339 (1998).
 87/ See 35 USC § 202(c)(1); FAR 52.227-12, para. (c).
 88/ ARPA, note 36, supra, at 9.
 89/ "Supplement to 1994 Interim Guidance for 10 USC § 2371" (Dec. 2, 1997), note 24, supra, at 6, ¶ II.D.2; DARPA Memorandum, "Intellectual Property" 8 (available at <<http://www.darpa.mil/cmo/pages/intellectual.html>>).
 90/ "Supplement to 1994 Interim Guidance for 10 USC § 2371" (Dec. 2, 1997), note 24, supra, at 6, ¶ II.D.2; DARPA Memorandum, note 89, supra.
 91/ GAO, DOD Research: Acquiring Research by Nontraditional Means 7 (GAO/NSIAD-96-11, Mar. 29, 1996).
 92/ DARPA Memorandum, note 89, supra; "Supplement to 1994 Interim Guidance for 10 USC § 2371" (Dec. 2, 1997), note 24, supra, at 6, ¶ II.D.3; note 91, supra.
 93/ DARPA Memorandum, note 89, supra; "Supplement to 1994 Interim Guidance for 10 USC § 2371" (Dec. 2, 1997), note 24, supra, at 6, ¶ II.D.4.
 94/ FAR 52.227-12, para. (g).
 95/ Rawicz & Nash, Patents and Technical Data 220, 221 (1983).
 96/ FAR 52.227-1, at I.
 97/ See DFARS 252.227-7013, para. (b)(2) ("Rights in Technical Data—Noncommercial Items" clause); DFARS 252.227-7014, para. (b)(2) ("Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" clause).
 98/ ARPA, note 36, supra, at 10; "Supplement to 1994 Interim Guidance for 10 U.S.C. § 2371" (Dec. 2, 1997), note 24, supra, at 6, ¶ II.D.5.
 99/ 22 CFR pt. 121 et seq.
 100/ DOD Directive 5220.22-R, "Industrial Security Regulation."
 101/ 15 CFR pt. 770 et seq.
 102/ DARPA Memorandum, "Acquisition of Property Under Other Transactions for Research and Other Transactions for Prototypes" 3 (available at <<http://www.darpa.mil/cmo/pages/property.html>>).
 103/ Note 102, supra, at 2.
 104/ Note 102, supra.
 105/ See 42 USC § 2000-d.
 106/ ARPA, note 36, supra, at 5-6.
 107/ Dunn, "Cooperative Government-Industry Relationships To Develop and Commercialize Technology" 16 (unpublished manuscript on file with the authors).
 108/ P.L. 105-85, § 832, 111 Stat. 1629, 1841 (Nov. 18, 1997) (adding 10 USC § 2371(l)).
 109/ 10 USC § 2371(e)(1)(B).
 110/ "Supplement to 1994 Interim Guidance for 10 U.S.C. § 2371" (Dec. 2, 1997), note 24, supra, at 4, ¶ II.B.3.
 111/ 10 USC § 2371 note.
 112/ DARPA Memorandum, "Cost Sharing" 3 (available at <<http://www.darpa.mil/cmo/pages/cost.html>>).
 113/ Note 112, supra, at 2.
 114/ Note 112, supra.
 115/ FAR 31.205-18(e).
 116/ Note 112, supra.
 117/ Note 112, supra.
 118/ Note 112, supra, at 2.
 119/ Note 112, supra. But see "Supplement to 1994 Interim Guidance for 10 U.S.C. § 2371" (Dec. 2, 1997), note 24, supra, at 5, ¶ II.C (prohibiting the use of past research as cost share).
 120/ Note 112, supra, at 2.
 121/ Note 34, supra, § 5, "Findings and Participant Suggestions."
 122/ S. Rep. No. 267, note 18, supra; H.R. Rep. No. 499, note 18, supra; H.R. Rep. No. 311, 102d Cong., 1st Sess. 576 (1991), reprinted in 1991 U.S.C.C.A.N. 1132.