WISE AND

Section 815 of the 2016 National Defense Authorization Act (NDAA) made several important amendments to the Department of Defense (DOD) authority to carry out prototype projects utilizing "other transactions." The previous authority to carry out other transactions (OT) for prototype, or "Section 845 OTs" (referencing the previous Section 845 of the 1994 NDAA), remained largely intact for the better part of two decades. In 2015, however, Congress made several changes to the authority, creating 10 U.S.C. § 2371b, and the new and improved Section 845 OT—now the "Section 815 OT," was born. The changes within Section 815 opened up the aperture for aggressive, streamlined acquisition between DOD and industry, provided that the acquisition professionals seeking to leverage this authority possessed a level of responsibility, business acumen, and judgment that enabled them to operate in this relatively unstructured environment.[1]

Focus

As a former agreements officer responsible for planning, soliciting, evaluating, awarding, and administering OTs under both the previous and current authorities, and DOD guidance, I've encountered great confusion among government and industry personnel alike in executing these agreements. In my current role managing such agreements from the requirements perspective, I continue to find the same areas of confusion across government and industry. As these OTs are customized legal arrangements, meant to provide flexibility and agility, there will of course arise new issues that require novel solutions, regardless of experience. The focus of this article, however, is simply to convey lessons learned and best practices for industry and DOD personnel seeking to leverage the OT authority.

Meeting the Basics—The Three P's

The basic requirements for exercising the authority under 10 U.S.C. § 2371b and entering into an OT for prototype are few, but are commonly confused or misinterpreted. My recommended methodology when reviewing a requirement for potential acquisition under a Section 815 OT is to identify the three P's—purpose, prototype, and participation. If the activity is able to identify presence of the three P's, then the OT authority is most likely a viable option for procuring the requirement. In determining whether the three P's are satisfied, the activity should consider the following:

"OTHER" WISE

By Benjamin McMartin

Best Practices in Leveraging DOD's "Other Transaction Authority" for Prototype

PURPOSE

Pursuant to 10 U.S.C. § 2371b(a)(1), transactions entered into under the Section 815 OT authority are limited to those efforts in which the purpose is to:

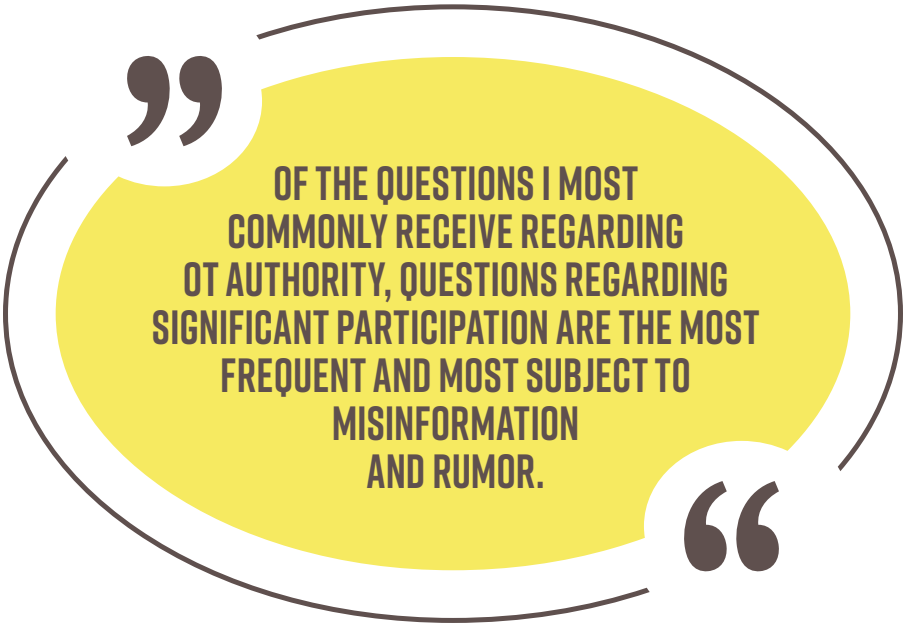
> [c]arry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces. [2]

Although Section 815 OTs are limited to prototype projects for the purposes identified above, acquisition professionals should recognize that the scope of such efforts is relatively broad when considering that the purpose of such projects need only be directly relevant to "enhancing mission effectiveness" of current or proposed technologies; and/or directly relevant to "improving" current technologies in use by the armed forces. Pursuant to this language, a wide range of potential technology efforts will satisfy the purpose requirement. While the statute requires that prototype projects are "directly relevant" to enhancement or improvement, the term "directly relevant" is best understood in the context of distinguishing such efforts from those prototype projects better acquired under an assistance agreement, where the primary purpose is to further a public purpose, with any enhancement or improvement of mission effectiveness or platforms, systems, etc., realized as an indirect benefit.[3] Activities should further note that the statute does not require a quantitative metric for such enhancement or improvement. Thus any degree of enhancement or improvement would satisfy the purpose of the statute. Provided that the activity has identified a purpose that falls within the statute, the activity must next identify that the effort is a "prototype project."

PROTOTYPE

The second determination that must be made for parties seeking to leverage the Section 815 OT is to identify that the project is for the development of a prototype. While the authorizing statute does not provide a definition of the term prototype, the DOD guidance provides a broad, general description. Pursuant to DOD guidance:

> A prototype project can generally be described as a preliminary pilot, test, evaluation, demonstration, or agile development activity used to evaluate the technical or manufacturing feasibility or military utility of a particular technology, process, concept, end item, effect, or other discrete feature. Prototype projects may include systems, subsystems, components, materials, methodology, technology, or processes. By way of illustration, a prototype project may involve: a proof of concept; a pilot; a novel application of commercial technologies for defense purposes; a creation, design, development, demonstration of technical or operational utility; or combinations of the foregoing, related to a prototype.



The DOD guidance in this area provides for a wide array of potential efforts that are proper under the prescribed purpose of the statute. Activities should be cautious to not craft or adopt narrow definitions of "prototype projects" within their negotiated agreements issued under the OT authority. The lack of definition within the statute, and expansive DOD guidance, provides the opportunity to drive innovation through aggressive use of the OT authority in a vast array of areas. This is one of several areas where activities should work with legal counsel to define potential prototype projects through reference to the DOD guide rather than rely on preconceived notions of what a "prototype" is. Commonly, reference to the term *prototype* conjures images of hardware systems, which is not the understanding in analyzing the DOD guidance. Once an activity has identified both purpose and prototype, then the final basic requirement for leveraging the OT authority is to identify the required participation.

PARTICIPATION

Where a DOD activity identifies a prototyping requirement directly relevant to enhancing the mission effectiveness of military personnel or systems, or to improving materials in use by the armed forces (purpose), the activity must then satisfy the nontraditional defense contractor (NDC) participation or cost-sharing requirement in order to enter into a Section 815 OT (determining whether an entity is considered an NDC is covered below). Pursuant to 10 U.S.C. § 2371b(d)(1):

> The Secretary of Defense shall ensure that no official of an agency enters into a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section unless one of the following conditions is met:
>
> (A) There is at least one nontraditional defense contractor participating to a significant extent in the prototype project.
>
> (B) All significant participants in the transaction other than the federal government are small businesses or nontraditional defense contractors.
>
> (C) At least one third of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the federal government.
>
> (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

The NDC participation or cost-sharing requirement of subsection (d) is required for Section 815 OTs at all levels absent the SPE waiver identified at (d)(1)(D). Due to the broad definition of NDC, as described below, the majority of prototype projects should fall under (d)(1)(A) (at least one NDC participating to a significant extent). Those efforts that do not will most likely require the cost share under (d)(1)(C). The condition described at (d)(1)(B) is largely moot and unlikely to be used, as nearly all small business concerns are themselves NDCs under the statutory definition, thus satisfying (d)(1)(A).

➢ *IS MY FIRM A NONTRADITIONAL DEFENSE CONTRACTOR?*

Firms investigating entering into a Section 815 OT with the DOD should first identify whether their firm is considered an NDC.[4] This is because NDCs are afforded special treatment under the OT statute, being exempted from the cost-sharing requirement.[5] For entities who have never held a contract with the DOD, the answer is quite simply yes, they qualify as an NDC. For those companies who have performed DOD contracts, and those whose business model is exclusively defense based, you may be surprised to find that your firm is likely to be considered an NDC as well. Under the OT statute, the term *nontraditional defense contractor* is defined as:

> [a]n entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section.[6]

Per the statutory definition, NDCs are all entities that have not performed under a narrowly defined set of circumstances within one year of solicitation of the current OT opportunity. In order for an entity to not qualify for NDC status, it would need to meet all elements of the prescribed definition within that time period. This includes performance of a DOD contract or subcontract subject to full cost accounting standards (CAS) coverage within one year prior to solicitation of the OT for prototype opportunity. The effect of this narrow definition is that a large number of entities will fall into the NDC category, including nearly all small business concerns, and even those firms that work exclusively with DOD. This is in part due to the exemptions to CAS coverage under 41 U.S.C. § 1502[7] and *Federal Acquisition Regulation* (*FAR*) Part 30,[8] which exempt commercial contracts, firm-fixed-price contracts based on adequate price competition, and any contract or subcontract with a small business concern, amongst other exemptions. Further, even where an entity is not outright exempt from CAS coverage, the entity may not have been subject to "full" CAS coverage. This is because full CAS coverage only applies to firms that receive a single CAS-covered contract award of $50 million or more; or received $50 million or more in net CAS-covered awards during its preceding cost accounting period.[9]

Once firms have determined their NDC status, they are in a better position to assess opportunities to engage with DOD through the OT authority, and to partner with firms who do not qualify for NDC status, taking advantage of the statute's exception to cost-sharing where there is at least one nontraditional defense contractor participating to a significant extent in the prototype project.

➢ *DOES THE EFFORT HAVE AT LEAST ONE NDC PARTICIPATING TO A SIGNIFICANT EXTENT?*

A common question in regard to 10 U.S.C. § 2371b(d)(1)(A) is the question of participation to a "significant extent." While *significant extent* is left undefined within the statute, DOD guidance provides some insight into the matter, providing:

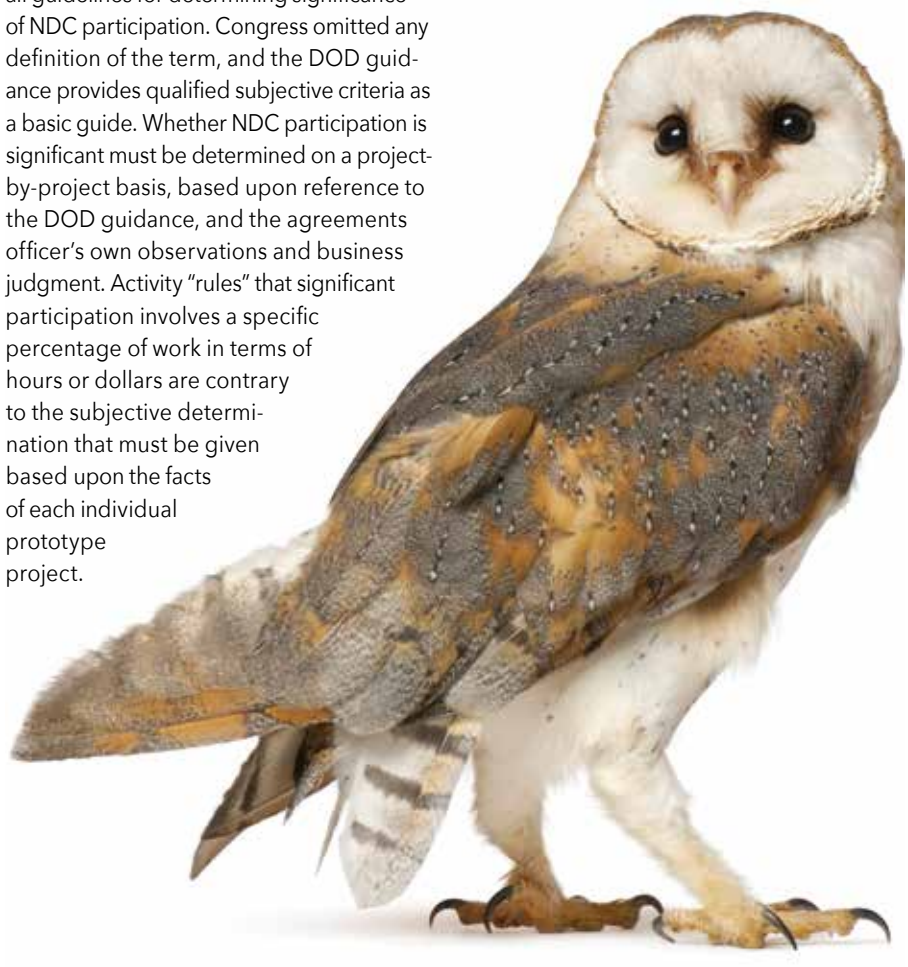
> Examples of what might be considered a significant contribution include, but are not limited to, supplying new key technology or products, accomplishing a significant amount of the effort, or in some other way causing a material reduction in the cost or schedule or increase in the performance.[10]

The ultimate determination as to whether significant participation of an NDC will be achieved under the prototype project is the agreements officer's to make and to document within the OT Acquisition Approach, subject to appropriate approval levels. Activities should avoid developing one-size-fits-all guidelines for determining significance of NDC participation. Congress omitted any definition of the term, and the DOD guidance provides qualified subjective criteria as a basic guide. Whether NDC participation is significant must be determined on a project-by-project basis, based upon reference to the DOD guidance, and the agreements officer's own observations and business judgment. Activity "rules" that significant participation involves a specific percentage of work in terms of hours or dollars are contrary to the subjective determination that must be given based upon the facts of each individual prototype project.

Of the questions I most commonly receive regarding the OT authority, questions regarding significant participation are the most frequent, and most subject to misinformation and rumor. At a recent industry day, I was asked whether I followed the 33 percent rule for significant participation. Believing the questioner was confused, I asked, "Are you referring to the one-third cost share requirement in absence of significant participation by an NDC in the project?" To which the individual replied, "No. I'm referring to the requirement that NDC participation represent 33% of the total dollars of the project in order to be considered 'significant' under (d)(1)(A)." Further discussion with this individual revealed that this rumored rule was in place at another activity.

Where Next?

Provided that an activity has met the basic requirements by satisfying the three P's (purpose, prototype, and participation), the OT authority is likely to be a viable



instrument for acquisition of the prototyping effort. Moving forward, the activity will then need to research, plan, solicit, evaluate, negotiate, and award an OT agreement, as well as administer the agreement through its period of performance. Activities moving forward with an OT strategy must be mindful of statutory competition, approval, and other requirements, while developing customized terms and conditions to meet their mission.

Competition, Publicizing Requirements, and Solicitation Methods

COMPETITION

While the Competition in Contracting Act (CICA) and the *FAR* do not apply to OTs, the authorizing statute for OTs does require that, "To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out projects under [the OT authority]."[11] The DOD guidance regarding competitions of prototype projects provides further that "Competitions for OTs should be structured in a common sense manner that treats offerors fairly and, when applicable, be consistent with industry practice for that market segment. The multi-functional acquisition team is responsible for maximizing competition;"[12] and "While there is tremendous flexibility in how a competition is conducted, opportunities for OT awards must be handled in a manner that is fair, transparent, and ethical."[13] As such, activities should develop competitive criteria which provide a level playing field, and fully identify all competitive submission requirements, timelines, and award requirements as a best practice. The object being to establish a fair competition, which makes sense in light of the practical concerns of both the industry norms and particulars of the requirement. What is not required, and what activities should avoid, is adopting federal acquisition processes and DOD source selection procedures borne out of CICA. This is the primary area, in my experience, where acquisition officials and legal advisors feel out of their comfort zone and can revert to federal contracting norms of evaluation. Procurement norms such as multi-page Section L&Ms, source selection plans, source selection evaluation boards, source selection advisory councils, source selection authorities, clarifications, initial SSA briefings, competitive range determinations, evaluation notices, discussions, more discussion, even more discussions, interim SSA briefings, requests for final proposal revisions, final evaluations, final SSA briefings, selection notices, decision memoranda, debriefings, etc., should be avoided unless appropriate based upon the nature, size, and complexity of the prototype project. OT prototype projects are targeted at NDC technologies and leveraging industry practices using common sense approaches as understood within the given industry. Activities engaging in one to three to six-month evaluation timelines will quickly find that they have no technologies to evaluate. Ditch the *FAR* thinking and adopt commercial practices, or suffer a drought of innovation.

> **ACTIVITIES ENGAGING IN ONE- TO THREE- TO SIX-MONTH EVALUATION TIMELINES WILL QUICKLY FIND THAT THEY HAVE NO TECHNOLOGIES TO EVALUATE. DITCH THE *FAR* THINKING AND ADOPT COMMERCIAL PRACTICES, OR SUFFER A DROUGHT OF INNOVATION.**

PUBLICIZING REQUIREMENTS

Along the same line as creating a competition with common sense and industry norms in mind, activities must go outside their comfort zone in publicizing their requirements to industry. This means going outside of FedBizOpps and taking the requirement directly to the industry leads. Per DOD guidance, "Agreements officers should publish opportunities where they are most likely to reach solution providers. This includes publishing opportunities outside traditional government venues—beyond the governmentwide entry point (i.e., FedBizOpps)."[14] I would go a step further than the DOD guidance in this area and say agreements officers *must* publish opportunities outside of FedBizOpps. Publishing in trade journals, holding an industry day in concert with industry trade shows, using social media, or industry blog posts are just a few mechanisms that agreements officers should consider. Activities must engage industry where they are. If the companies you are seeking were on FedBizOpps, you would already be doing business with them. Get out there and bring the requirement to the solution!

SOLICITATION METHODS

With solicitation methods, activities have free rein to innovate, streamline, and accelerate the process, and are encouraged to do so. Pursuant to DOD guidance:

> Innovation is encouraged for identifying and competitively selecting sources. Agencies who intend to award only OTs off a solicitation are free to create their own process to solicit and assess potential solutions provided it is a fair process and the rationale for making the government investment decision is documented. Just keep in mind that terms of art that are already well-known or understood in

> traditional contracting should be avoided (e.g., do not call it an RFP, even though "request for proposal" is a generic phrase).[15]

Use of problem statements, source surveys, requests for solutions, requests for white papers, etc., are all viable methods provided that the solicitation approach is fair and properly documented. As explained above, if the requirement has been publicized appropriately to reach the potential offerors, and the competitive procedures are fair, transparent, and ethical, then the solicitation need only document and convey the requirement and process to adequately inform potential offerors. Depending on the nature, size, and complexity of the requirement, the solicitation may not be more than a single page document. As described within the *DOD OT Guide*, and as conceived by DOD's Defense Innovation Unit Experimental (DIUx), activities may also issue a commercial solutions opening (CSO),[16] similar to a broad agency announcement, as a solicitation method. As provided within the *DOD OT Guide*:

> One example of a solicitation method is the Commercial Solutions Opening (CSO) technique. In general, a CSO uses a broad solicitation method, much the same as a Broad Agency Announcement (BAA), to identify particular Government problem areas and solicit solution ideas from industry. Problem areas can be broad or specific. Upon receiving solution ideas, the Government can select an offeror to demonstrate (or "pitch") its solution or submit a proposal based on the merit of the idea. Upon receiving a proposal that the team determines is a good investment for the Government to pursue, the acquisition team can negotiate and award an OT to the company for the prototype project. Other flexible solicitation methods include Research Announcements, Program Announcements, and Program Solicitations.[17]

Solicitation approaches are ever evolving, with activities creating new approaches to meet their needs. Continuing to streamline by creating new approaches to reduce procurement lead time and increase timely government access to emerging technologies should be the object of government personnel when developing solicitation methods for their prototype projects. Forget what you know; do what makes sense.

Maximizing the OT Authority

One item that remains unchanged from the prior Section 845 OT to the new Section 815 OT is the government's ability under the authority to come to terms with industry as any other commercial entity would. The *FAR* (and associated supplements) do not apply to OTs entered into under the statute unless specifically adopted. Of particular note, many burdensome and restrictive statutes that make the government an unattractive business partner are not applicable to agreements entered into under 2371b, such as the Bayh-Dole Act covering government rights in patentable inventions; the Contract Disputes Statute providing for resolution of claims; and 10 U.S.C. § 2320 providing for government rights in technical data, among others.

> IF THE COMPANIES YOU'RE SEEKING WERE ON FEDBIZOPPS, YOU WOULD ALREADY BE DOING BUSINESS WITH THEM. GET OUT THERE AND BRING THE REQUIREMENT TO THE SOLUTION!

Parties to Section 815 OTs, therefore, negotiate terms that are in the best interests of the parties. For the Department of Defense, this means gaining access to technologies, including commercial technologies, that can be utilized, or modified to meet military needs, and dramatically reducing the time between research, development, production, and fielding. For industry, this means gaining access to government funding, while avoiding unduly burdensome government oversight, and maintaining ownership of intellectual property. The changes provided by Congress through the FY16 NDAA have expanded the opportunities available to government and industry to craft agreements that provide for aggressive, streamlined acquisition and rapid prototyping and production. The Section 815 OT is not the solution for rapid innovation and DOD access to commercial technologies in and of itself, but it provides a framework and broad discretion for government and industry to craft such solutions. Where the parties have the skill, vision, ambition, and drive to move outside of standard government procurement, there are many successes to be found through investment into an OT agreement. CM

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ENDNOTES

1. Office of Defense Procurement and Acquisition Policy (DPAP), *Department of Defense Other Transactions Guide for Prototype Projects*, version 1.2.0 (January 2017).
2. 10 U.S.C. § 2371b(a)(1) (2015).
3. *See* DPAP OT Guide, *supra* n. 1 at § C1.6, [¶ 1], 4, stating "resulting OT awards are acquisition instruments since the Government is acquiring something for its direct benefit. Terms such as "support or stimulate" are assistance terms and are not appropriate in OT agreements for prototype projects."
4. *See* 10 U.S.C. § 2371b(e)(1) (2015), "The term "nontraditional defense contractor" has the meaning given the term under section 2302(9) of this title." See also 10 U.S.C. § 2302(9) (2015), stating "The term "nontraditional defense contractor", with respect to a procurement or with respect to a transaction authorized under section 2371(a) or 2371b of this title, means an entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section."
5. *See* 10 U.S.C. § 2371b(d)(1)(A), (d)(1)(B) (2015).
6. 10 U.S.C. § 2302(9) (2015).
7. *See* 41 U.S.C. § 1502(b)(1)(B)-(C) (2016): "(B) When standards are to be used.– Cost accounting standards prescribed under this chapter are mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the Federal Government in excess of the amount set forth in section 2306a(a)(1)(A)(i) of title 10 as the amount is adjusted in accordance with applicable requirements of law.

   (C) Nonapplication of standards. - Subparagraph (B) does not apply to -

   (i) a contract or subcontract for the acquisition of a commercial item;

   (ii) a contract or subcontract where the price negotiated is based on a price set by law or regulation;

   (iii) a firm, fixed-price contract or subcontract awarded on the basis of adequate price competition without submission of certified cost or pricing data; or

   (iv) a contract or subcontract with a value of less than $7,500,000 if, when the contract or subcontract is entered into, the segment of the contractor or subcontractor that will perform the work has not been awarded at least one contract or subcontract with a value of more than $7,500,000 that is covered by the standards."
8. *See* FAR Part 30, 30.000 -- Scope of Part (48 C.F.R. § 9900.000 (1992)), stating "This part describes policies and procedures for applying the Cost Accounting Standards Board (CASB) rules and regulations (48 CFR Chapter 99 (FAR Appendix)) to negotiated contracts and subcontracts. This part does not apply to sealed bid contracts or to any contract with a small business concern (see 48 CFR 9903.201-1(b) (FAR Appendix) for these and other exemptions)."
9. 48 C.F.R. § 9903-201-2 (2011) - Types of CAS Coverage. "(a) Full coverage. Full coverage requires that the business unit comply with all of the CAS specified in Part 9904 that are in effect on the date of the contract award and with any CAS that become applicable because of later award of a CAS-covered contract. Full coverage applies to contractor business units that –

   (1) Receive a single CAS-covered contract award of $50 million or more; or

   (2) Received $50 million or more in net CAS-covered awards during its preceding cost accounting period."
10. DPAP OT Guide, *supra* n. 1, at § C1.5.1, 3-4.
11. 10 U.S.C. § 2371b(b)(2) (2015).
12. DPAP OT Guide, *supra* n. 1, at § C2.1.1.6, 7.
13. *Id.* at § C2.1.3.1.6, 10.
14. *Id.* at § C2.1.1.6.1, 7.
15. *Id.* at § C2.1.1.6.2, 7.
16. See Defense Innovation Unit Experimental (DIUx), *DIUx Commercial Solutions Opening How-to Guide*, version 1.0 (November 2016), *available at* https://www.diux.mil/CSOguide/.
17. DPAP OT Guide, *supra* n. 1, at § C2.1.1.6.2, 7