Other Transaction Agreements

DARPA Contracts Management Office

Look to https://acquisitioninnovation.darpa.mil for more information about Other Transactions and other innovative acquisition methods

Before We Begin . . . .

- Some things to consider
  - Logistics
  - The Agenda
  - The Materials
    - Briefing Charts
    - Attachments
  - Feel free to ask questions anytime
  - Introductions

Day One – February 7

- 08:00-12:00: OT Overview (10 U.S.C. §4021 & 10 U.S.C. §4021)
- 12:00-1:00: Lunch
- 1:00-2:00: Acquisition Strategy
- 2:00-2:45: Teaming
- 3:00-3:30: Resource Sharing
- 3:30-4:00: Milestone Payments

Day Two – February 8

- 08:00-09:30: Intellectual Property
- 09:30-10:15: Foreign Access to Technology
- 10:30-11:00: Property
- 11:00-11:45: Overview of Sample Agreement
- 11:45-12:00: Conclusion

OVERVIEW

Evolution of Federal Contracting

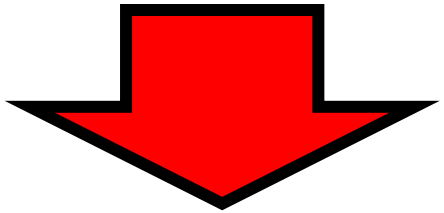
The early days

- Federal government contracted for goods and services well before there were any procurement statutes or regulations
- Almost all agencies have inherent contract authority in their originating legislation
- After World War II, the federal contracting world became more regulated

Armed Services Procurement Act (ASPA)

- When signing the act, Harry S. Truman pointed out these concerns:
  - Unprecedented freedom from specific procurement regulations
  - Permits flexibility and latitude
  - May lead to excessive placement of contracts by negotiation
  - Undue reliance on large concerns
  - All procurement personnel are enjoined to follow strictly the standards and requirements set forth in this regulation

Chronology of Events



1948	1951	1958	1959	1974	1977	1978
Armed Services Procurement Act/Armed Services Procurement Regulation (ASPR)	Procurement regulations double in size to 600+ pages	Grants Act NASA Space Act	GSA issues civilian procurement regulation	Procurement regulations now 3000 pages (about 2000 pages attributable to McNamara consolidations)	ASPR becomes Defense Acquisition Regulations (DAR)	Federal Grant and Cooperative Agreement Act

Chronology of Events (con.)

1984	1986	1989	1991	1993	1994	1996
Federal Acquisition Regulation (FAR) consolidates DAR, FPR, NASAPR	Packard Commission with focus on prototyping	Other Transactions (OT) Authority (10 U.S.C. 4021 (formerly 10 U.S.C. 2371) given to DARPA	OT Authority given to all DoD	Era of "procurement reform" – Section 800 Panel, Federal Acquisition Streamlining Act (FASA)	DARPA's OT authority expanded to prototype projects under Section 845 of P.L. 103-160	OT for Prototype authority expanded to include all of DoD

The Situation in the Science and Technology Community

PAST

Innovation fueled by the **Government**

Commercial sector **wanted to work** with the Government

DoD was primary driver of technology innovation by making substantial investments in R&D in the defense industrial base

DoD powered a **technology advantage** on the battlefield with its investments in R&D

PRESENT

Innovation fueled by **private sector**

Cutting edge commercial firms with large R&D investments are **reluctant to work** with the Government

Focus and pace of **S&T innovation** in leading technology areas have shifted from Government to **commercial sector**

DoD needs to **work with** and leverage **commercial sector** to maintain technology advantage on the battlefield

Impediments to Commercial Firm Participation

Traditional procurement process is **too slow**

Traditional procurement contracts are **based on "regulation"** rather than "negotiation"

Government's cost-based pricing system is **cumbersome**

- Specialized accounting and audit systems
- Actual and perceived oversight excesses

Government's approach to intellectual property can be **overreaching**

Changes Supporting Alternative Authorities

- **<u>Updates to Better Buying Power</u>**
  - BBP 1.0 (FY2010) – Challenged purchasers to **use best practices**
  - BBP 2.0 (FY2013)– Challenged purchasers to **use critical thinking** and **cost consciousness**
  - BBP 3.0 (FY2015) – Challenges purchasers to **incentivize productivity** and **innovation**

- **Technologies**, and technology companies, **advance so rapidly** that the DoD is finding it difficult to contractually engage, collaborate, and do business with high-tech companies

- **Congressional interest** in accessing new sources of technical innovation
  - Silicon Valley start-ups
  - Small commercial firms

Tool Box

Acquisition

Procurement Contracts

10 U.S.C. § 3201-3205
(formerly 10 U.S.C. § 2304)

31 U.S.C. § 6303

↓

Federal Acquisition Regulation

PART 15	PART 12 Commercial Items
Cost/ Price Based	Price Based

Non-FAR Contracts

Non Appropriated funds contracts

NASA Space Act

10 U.S.C. § 4022
(formerly 10 U.S.C. § 2371b)

10 U.S.C. § 4023
(formerly 10 U.S.C. § 2373)

Unique authority at 9 civilian agencies

USD(A&S) Policies

OT Guide

Exceptions to Bayh-Dole Act

Non-Acquisition

Grants

10 U.S.C. § 4001
(formerly 10 U.S.C. § 2358)

31 U.S.C. § 6304

2 CFR Part 200

DODGAR

Bayh-Dole Act

Cooperative Agreements

10 U.S.C. § 4001
(formerly 10 U.S.C. § 2358)

31 U.S.C. § 6305

2 CFR Part 200

DODGAR

Bayh-Dole Act

OTs

10 U.S.C. § 4021 (a) & (b) (formerly 10 U.S.C. § 2371 (a) & (b))	Other 10 U.S.C. § 4021 (formerly 10 U.S.C. § 2371)
Single/Multi-Party Recoupment Authority 10 U.S.C. § 4021 (d) (formerly 10 U.S.C. § 2371 (d)) USD(R&E) Memo (pending) Research OT Guide Exception to Bayh-Dole	New/Unique Arrangements Bailments Lease Arrangements Loan-to-Own Exception to Bayh-Dole

CRADA — A legal agreement between a federal laboratory and industry used for the transfer of commercially useful technologies from federal laboratories to the private sector and to make accessible unique technical capabilities and facilities.

10 U.S.C. 4023 Snapshot (formerly 10 U.S.C. 2373)

Procurement for experimental or test purposes

- Ordnance
- Signal
- Chemical Activity
- Transportation
- Energy
- Medical
- Space-flight
- Telecommunications
- Aeronautical

Appropriate acquisitions

- ❖ Supplies
- ❖ Parts
- ❖ Accessories
- ❖ Designs
- Intended for experimentation/technical evaluation/assessment of operational utility, safety or residual operational

Acquisition approach

- Can be by contract or otherwise
- Allows for award of a new kind of agreement
- Other Transaction agreements would not be appropriate
- Most acquisition statutes and regulations would not apply

No Follow-on to Production

Acquisition vs. Non-Acquisition

Acquisition Instruments

- Procurement contracts or Other Transactions (OTs) for Prototypes
- Used to acquire goods and services for the direct benefit of the Government
- Procurement contracts are traditionally subject to the acquisition statutes in Title 10 of the United Code and the Federal Acquisition Regulation and supplements. OTs for Prototypes are not.

Non-Acquisition Instruments

- Grants, cooperative agreements, and Research OTs
- Used to support and stimulate an activity for the general public good
- Traditionally subject to the assistance statutes and regulations in 2 CFR Part 200 and the DoD Grants and Agreements Regulations (DoDGARs)

Common Definitions

Procurement Contract

- A legally binding instrument which shall be used only when the principal purpose is the acquisition of supplies or services for the direct benefit or use of the Federal Government.

Grant

- A legally binding instrument used to transfer a thing of value to the Government or other recipient to carry out a public purpose of support of stimulation instead of acquiring property or services for the direct benefit or use of the Government.
- Substantial involvement is not expected between the Government and the recipient when carrying out the activities contemplated by the grant.

Cooperative Agreement

- A legally binding instrument used to enter into the same kind of relationship as a grant except substantial involvement between the Government and the recipient is expected when carrying out the activity contemplated by the cooperative agreement.

Common Definitions (continued)

Research OTs

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

OTs for Prototypes

- A legally binding instrument other than a procurement contract, grant, or cooperative agreement used for prototype projects proposed to be acquired by the DoD

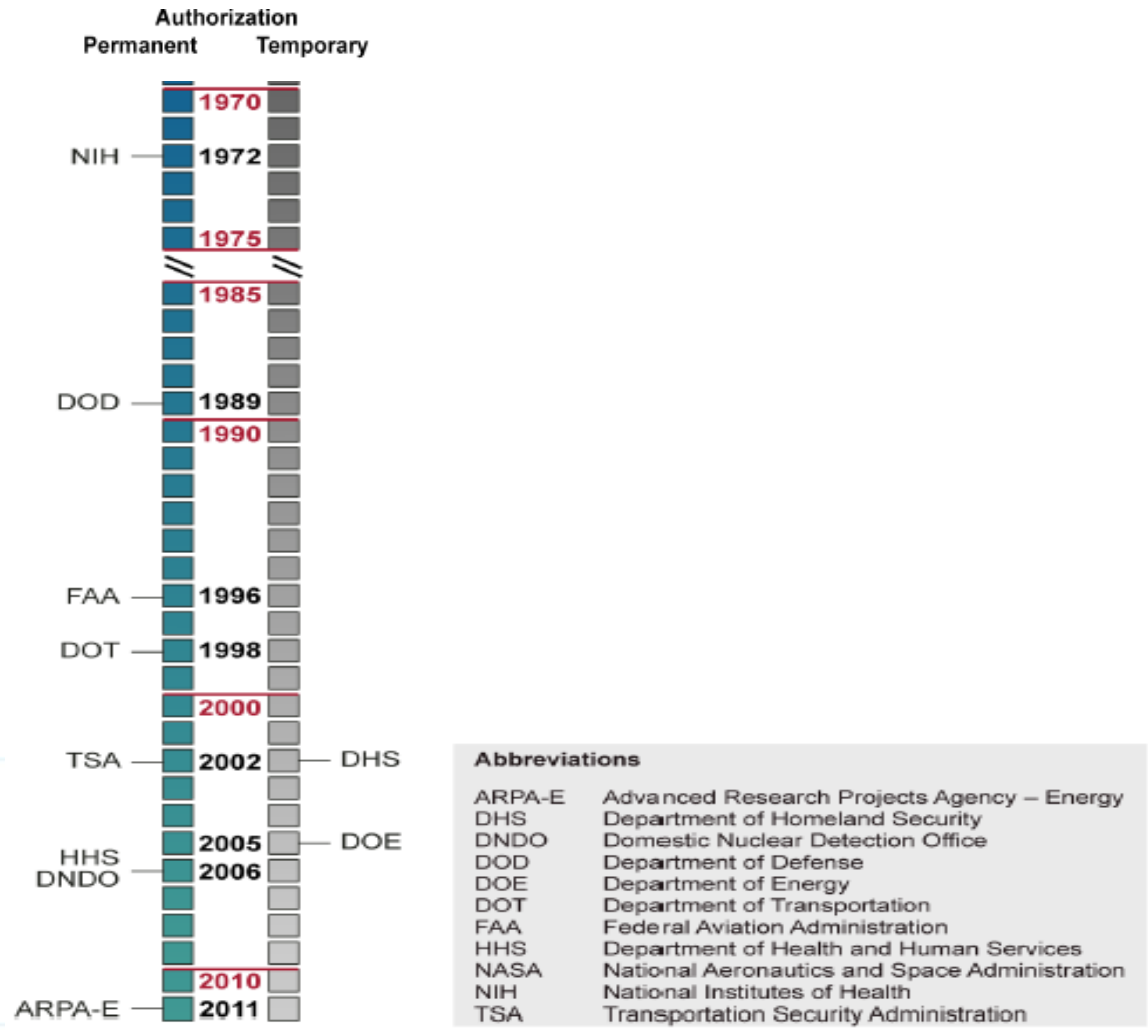
OTs for Other

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

Other Transactions Basics

- DoD has statutory authority for Other Transactions (OTs)
  - **Research OTs – 10 U.S.C. 4021** (formerly 10 U.S.C. 2371)
    - Allows DoD to enter into transactions other than procurement contracts, grants or cooperative agreements for basic, applied, or advanced research
    - This authority can be used for other purposes
  - **OTs for Prototypes – 10 U.S.C. 4022** (formerly 10 U.S.C. 2371b)
    - Allows DoD to enter into OT agreements to carry out prototype projects that are directly relevant to enhancing the mission effectiveness personnel of the Department of Defense or improving 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.
    - Considered an acquisition arrangement
    - No statutes or regulations specifically cover it other than the basic authority
  - **OTs for Production – 10 U.S.C. 4022(f)** (formerly 10 U.S.C. 2371b(f))
    - Allows programs begun as OTs for Prototypes to continue without additional competition into production

Permanent and Temporary OT Authority: Executive Agencies



Abbreviations

ARPA-E	Advanced Research Projects Agency – Energy
DHS	Department of Homeland Security
DNDO	Domestic Nuclear Detection Office
DOD	Department of Defense
DOE	Department of Energy
DOT	Department of Transportation
FAA	Federal Aviation Administration
HHS	Department of Health and Human Services
NASA	National Aeronautics and Space Administration
NIH	National Institutes of Health
TSA	Transportation Security Administration

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

ARPA-H est. 24 May 2022

Agencies Use of OT Authority: FY2010-2014

Agency	Types of activities		
	RD&D	Prototype	Other
Advanced Research Projects Agency – Energy (ARPA-E)	✓		
Department of Defense (DOD)	✓	✓	
Department of Energy (DOE)	✓		
Department of Health and Human Services (HHS)	✓		
Department of Homeland Security (DHS)	✓	✓	
Department of Transportation (DOT)	✓		
Domestic Nuclear Detection Office (DNDO)[a]			
Federal Aviation Administration (FAA)	✓		✓
National Aeronautics and Space Administration (NASA)[b]	✓		✓
National Institutes of Health (NIH)	✓		
Transportation Security Administration (TSA)			✓

Sources: GAO analysis of agencies' information. | GAO-16-209

[a]DNDO did not enter into any other transaction agreements for fiscal years 2010 through 2014.

[b]According to officials, NASA does not acquire RD&D services using other transaction agreements, but it does conduct collaborative RD&D activities with outside entities.

Acquisition Authorities and OTs

- **What doesn't apply to OTs?**
  - Competition in Contracting Act (CICA)
  - Truth in Negotiations Act (Truthful Cost and Pricing)
  - Cost Accounting Standards
  - Contract Disputes Act
  - Procurement Protest Process
  - Cost plus a percentage of cost prohibition
  - Buy American Act (in part)
  - Bayh-Dole Act (patents)
  - FAR/DFARS/Agency specific acquisition regulations
    - Termination for Convenience or Default
    - Changes Clause
    - Mandatory flowdowns to subcontractors
- **Some laws still do apply**
  - Criminal Laws (false claims/statements)
  - Laws of general applicability (Civil Rights Act)
  - Laws that would apply to anyone doing business in the U.S. (e.g. environmental laws, import/export control)
- **No supporting regime of commercial law** (i.e. Uniform Commercial Code) as in the private sector

Perception of OTs in Procurement Community

Advocates:

- Attractive to contractors looking for **elasticity** in their agreements
- Attracts companies that would normally avoid DoD business
- Any apparent risk allows parties to change the terms to be more suitable to the party absorbing most of the risk
- **Invokes commercial practices**, such as negotiating terms and conditions
- **Removes rigidity** of traditional Government procurement
- **Promotes trust** and a spirit of cooperation with industry

Perception of OTs in Procurement Community

Contrarians:

- Terms of agreement **may foster too many unknowns**, thereby creating more risk for the Government
- In removing the rigidity of traditional Government procurement, the **safeguards** may also be **removed**
- They can be **more time-consuming** than traditional R&D contracts, especially for inexperienced contracting personnel
- **Greater participation** on the part of the Government program manager is **required**

OTs for Research vs. OTs for Prototype

	Research OT	Prototype OT
Expected Outcome	Support and Stimulate Research	Buying goods and services Primarily military needs
Teaming	Co-managed with articles of collaboration	Generally prime/sub relationship because of focus on prototype development
Share ratio	Higher based on commercial market potential	Little or none depending on commercial spin-off potential
Intellectual property	Share of rights based upon resource share ratio and need for commercialization	Focus based on what is necessary for operations and maintenance of the prototype
Property	Conveyed to performer if their resource share is higher	Focused on what is necessary for operations and maintenance of the prototype

What Research and Prototype OTs Have in Common

- **Affordability** is an important consideration
- **Adherence** to **acquisition reform** goals and principles
- **Empowerment** of the executing agency and team
- **Reliance** on the Government team's knowledge, experience and good business sense

The goal is to use the authority and its flexibility to get our customers what they want, when they want it, and at an affordable price!

Other Transactions under 10 U.S.C. 4021 (formerly 10 U.S.C. 2371)

Tool Box

Acquisition

Non-Acquisition

Procurement Contracts		Non-FAR Contracts	Grants	Cooperative Agreements	OTs	
10 U.S.C. § 3201-3205 (formerly 10 U.S.C. § 2304) 31 U.S.C. § 6303 Federal Acquisition Regulation		Non Appropriated funds contracts NASA Space Act 10 U.S.C. § 4022 (formerly 10 U.S.C. § 2371b) 10 U.S.C. § 4023 (formerly 10 U.S.C. § 2373) Unique authority at 9 civilian agencies USD(A&S) Policies OT Guide Exceptions to Bayh-Dole Act	10 U.S.C. § 4001 (formerly 10 U.S.C. § 2358) 31 U.S.C. § 6304 2 CFR Part 200 DODGAR Bayh-Dole Act	10 U.S.C. § 4001 (formerly 10 U.S.C. § 2358) 31 U.S.C. § 6305 2 CFR Part 200 DODGAR Bayh-Dole Act	10 U.S.C. § 4021 (a) & (b) (formerly 10 U.S.C. § 2371 (a) & (b))	Other 10 U.S.C. § 4021 (formerly 10 U.S.C. § 2371)
					Single/Multi-Party Recoupment Authority 10 U.S.C. § 4021 (d) (formerly 10 U.S.C. § 2371 (d)) USD(R&E) Memo (pending) Research OT Guide Exception to Bayh-Dole	New/Unique Arrangements Bailments Lease Arrangements Loan-to-Own Exception to Bayh-Dole
PART 15 Cost/ Price Based	PART 12 Commercial Items Price Based					

CRADA — A legal agreement between a federal laboratory and industry used for the transfer of commercially useful technologies from federal laboratories to the private sector and to make accessible unique technical capabilities and facilities

Other Transactions under 10 U.S.C. 4021 (formerly 10 U.S.C. 2371)

➢ Purpose of Research OTs

- To engage nonfederal entities in working collaboratively with the Government on **basic, applied, or advanced research** projects
- To engage in **dual-use technology development**
- Increase the use of assistance instruments to attract for-profit firms, particularly **non-traditional contractors**
- Procurement contracts are not the best approach in this scenario since they are best suited for buyer/seller relationships
- **Flexibility and innovation is necessary for success**
- In these cases, impact of **Government funding** is often **more like investment** than the purchase of goods or services
- The goal is to do as much as possible to **integrate the military and commercial industrial bases**

Statutory Authority

- 10 U.S.C. 4021 (formerly 10 U.S.C. 2371)
  - Allows the Secretary of Defense and Secretaries of the military departments to enter into transactions (other than contracts, cooperative agreements, and grants) to carry out basic, applied, and advanced research projects
  - Allows for **advance payments**
  - Provides for **recoupment of funds**
    - The recouped funds would not be considered a miscellaneous receipt and would not have to go back to the Treasury
    - The funds would be a credited to the same account as the original federal funds and will be available for the same purposes and period
  - To the maximum extent practicable, the amount of funds provided by the Government should not exceed the amount of funds provided by the other parties **(i.e. 50/50 cost share)**
  - Agreements Officers no longer need to explain why a standard contract, grant, or cooperative agreement was not feasible or appropriate for this effort (removed in FY22 NDAA, Section 821(a)(2))
  - Information submitted during the award process (competitive or noncompetitive) is exempt from FOIA for 5 years from receipt

When is the use of a Research OTs appropriate?

- Factors to consider
  - **Nature of the Project**
    - Does it involve the support or stimulate of research?
    - Is it relevant to integrating the technology into the commercial industrial base?
  - **Type of Recipient**
    - Is a for-profit performer involved in the research?
    - Will the program be more successful with a team approach or a single performer?
      - These efforts often work well with teams to facilitate collaboration
      - Single firms are permissible, especially when there will be collaboration between their government and commercial divisions
  - **Recipient's Commitment**
    - Is there evidence of commitment to incorporate the technology into future products?
    - Are they prepared to cost-share and is the cost-share high quality?
  - **Degree of Government Involvement**
    - Is the expectation that the Government will be part of the team with insight into progress?
    - Is the recipient or team prepared to self-police and take a leadership role in managing the program?

- OUSD(R&E) issued the updated Research OT Guide in Sep 2023, Guide to Research Other Transactions 09132023.pdf

Advantages and Disadvantages of Research OTs

➢ Advantages

- Attracts technology firms that normally avoid working with the Federal Government
- Concentrates effort upon technical results to maximize tailoring and minimize "contractual" concerns
- Leverages research dollars through **cost sharing**
- Harnesses and encourages the incentive to develop and **commercialize technology**
- Invokes commercial-like practices, **reducing Government intrusion and red tape**
- Promotes **relationship of trust** and spirit of cooperation with industry

➢ Disadvantages

- Often more **time-consuming** than traditional cost-reimbursement R&D contracts
- Greater participation demanded of DoD program manager
- Can be **labor intensive** for acquisition personnel
- **Culture shock** and anxiety over lack of regulations and reduced DoD control
- **Increased scrutiny** by IG, GAO, and internal groups

Research Other Transactions Examples

Research OT Example 1
Joint University Microelectronics Program 2.0 (JUMP 2.0)

- Goal to **increase industry engagement** in addressing DoD microelectronics needs and **provide data-driven guidance** to DARPA and industry with respect to the direction and timing of key disruptive advances in microelectronic technology.

- **Drive long-range innovations in information and communication technologies (ICT)**
  - Establish a research agenda that addresses ICT grand challenges
  - Increase partner engagement and technology transfer

- **Supports 7 academic research centers**

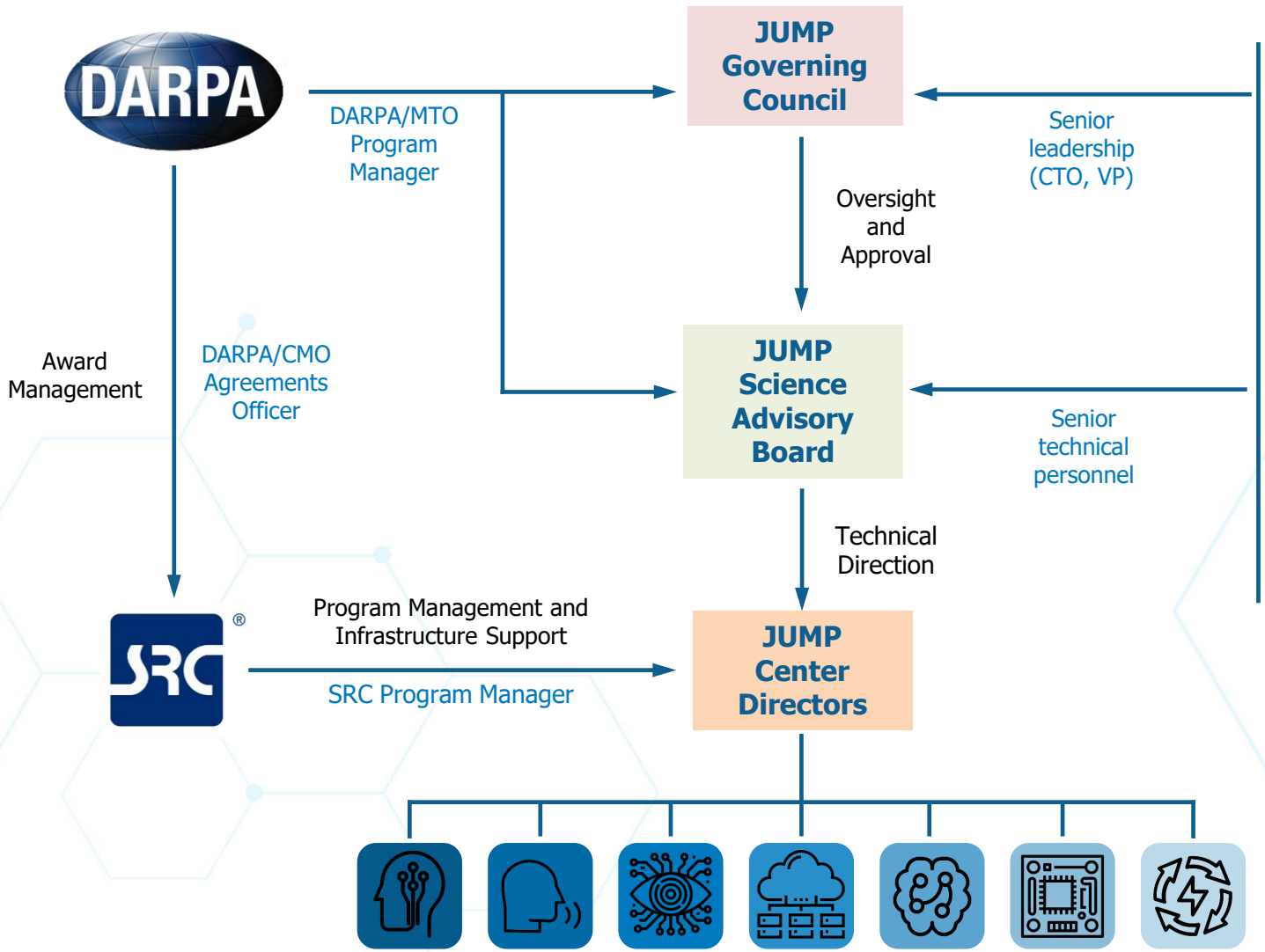
- **Co-funded and co-led by DARPA, the commercial semiconductor industry, and the defense industrial base (DIB) to encourage:**
  - Facilitation of leading edge research in semiconductors performed in U.S. academic research institutions;
  - U.S. semiconductor industry funding of disruptive research;
  - DoD funding of research that advances their goal of semiconductor technology use in deployed forces

- **Single source award to Semiconductor Research Center (SRC)**
  - SRC releases a competitive solicitation for the individual center awards
  - Governing Council conducts the evaluation and solicitation
  - SRC negotiates and makes awards to selected Centers

- **Key Characteristics:**
  - Fundamental Research
  - Research OT – public-private partnership
  - 50/50 cost share from industry membership contributions to SRC
  - 5-year effort with a mid-program realignment built in
  - Consistent engagement and Center reviews with DoD and commercial members

Example of a unique consortium-model Research OT designed to stimulate disruptive fundamental research in microelectronics through 7 multidisciplinary, university-led research centers.

Research OT Example 1 (cont.)
Joint University Microelectronics Program 2.0 (JUMP 2.0)



JUMP Governing Council:
Includes one representative from DARPA, SRC, and several member companies
DARPA PM's serve as SMEs only

JUMP Science Advisory Board: includes representatives from DARPA and 15 member companies (Micron, IBM, TSMC, Globalfoundries, and more!)

7 University Prime Centers:
Represent 42 Universities; 141 Faculty Researchers; 579 Students
Unique focus area: (1) Cognition, (2) Communications and Connectivity; (3) Intelligent Sensing to Action; (4) Systems and Architectures for Distributed Compute; (5) Intelligent Memory and Storage; (6) Advanced Monolithic and Heterogeneous Integration; (7) High-performance Energy-Efficient Devices for Digital and Analog Applications

Defense Industrial Base and Commercial Sponsors:
Member companies who are able to jointly define research needs, fund selected projects, etc.

Other Transactions under 10 U.S.C. 4022 (formerly 10 U.S.C. 2371b)

Packard Commission Findings (1986)

- All too often, requirements for new weapons systems have been overstated
- **Overstated specifications lead to higher cost equipment**
- Developmental and operational testing have been divorced
- **Prototypes** have been **used** and **tested far too little**
- **High priority** should be given to **building and testing prototype systems** and subsystems before proceeding with full-scale development
- **Streamlined procurement processes should be used**
- Demonstrating new technology through testing can substantially improve military capability
- In advanced development projects, the Services too often have duplicated each other's efforts and disfavored new ideas and systems
- **Prototype systems provide the basis for making realistic cost determinations**
  - **"Fly before you buy"**
- DoD should develop new or custom-made items only when it is established that those readily available items are clearly inadequate to meet military requirements

Tool Box

Acquisition

Non-Acquisition

Procurement Contracts		[illegible]R [illegible]s	Grants	Cooperative Agreements	OTs	
10 U.S.C. § 3201-3205 (formerly 10 U.S.C. § 2304) 31 U.S.C. § 6303 Federal Acquisition Regulation		Non A[illegible] funds N[illegible]Act 10 U.S.C. § 4022 (formerly 10 U.S.C. § 2371b) 10 U.S.C. § 4023 (formerly 10 U.S.C. § 2373) Unique authority at 9 civilian agencies USD(A&S) Policies OT Guide Exceptions to Bayh-Dole Act	10 U.S.C. § 4001 (formerly 10 U.S.C. § 2358) 31 U.S.C. § 6304 2 CFR Part 200 DODGAR Bayh-Dole Act	10 U.S.C. § 4001 (formerly 10 U.S.C. § 2358) 31 U.S.C. § 6305 2 CFR Part 200 DODGAR Bayh-Dole Act	10 U.S.C. § 4021 (a) & (b) (formerly 10 U.S.C. § 2371 (a) & (b)) Single/Multi-Party Recoupment Authority 10 U.S.C. § 4021 (d) (formerly 10 U.S.C. § 2371 (d)) USD(R&E) Memo (pending) Research OT Guide Exception to Bayh-Dole	Other 10 U.S.C. § 4021 (formerly 10 U.S.C. § 2371) New/Unique Arrangements Bailments Lease Arrangements Loan-to-Own Exception to Bayh-Dole
PART 15 Cost/ Price Based	PART 12 Commercial Items Price Based					

CRADA — A legal agreement between a federal laboratory and industry used for the transfer of commercially useful technologies from federal laboratories to the private sector and to make accessible unique technical capabilities and facilities

Delegation of Award Authority

- The authority is given to the Secretary of Defense, the **Secretaries of the Military Departments**, **MDA**, and **DARPA** in the statute

- OSD policy has delegated the authority further
  - Directors of the Defense Agencies
  - Commanding Officer of Combatant Commands (**CCMDs**) with contracting authority
  - Directors of Field Activities (**FAs**) with contracting authority
  - Director of the Defense Innovation Unit (**DIU**)

- The Department of Interior (**DOI**) Interior Business Center can use the authority when acting as a DoD agent

Statutory Definitions

New Definitions in FY23 NDAA

- "Covered official"
  - Service Acquisition Executive
  - Director of DARPA
  - Director of MDA
  - USD(A&S)
  - USD(R&E)
- "Prototype Projects"

Legacy Definitions

- "Nontraditional defense contractor"
- "Small business"

H.R.7776 - 117th Congress (2021-2022): James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 | Congress.gov | Library of Congress

Final FY23 NDAA Conf Highlights.pdf

What is an OT for Prototype?

DoD may use the authority of 10 U.S.C. 4021 (formerly 10 U.S.C. 2371) to carry out **prototype projects** that are **directly relevant** to **enhancing the mission effectiveness** of personnel of the Department of Defense or improving platforms, systems, components, or materials proposed to be acquired or developed by the DoD, or improvements of platforms, systems, components, or materials in use by the armed forces

Section 845 has been repealed and replaced

~~P.L. 103-160, Section 845~~

10 U.S.C. § 4022 (formerly 10 U.S.C. 2371b)

What's a Prototype?

- There is **no established definition** in the statute
- FY23 NDAA added to the statute the definition of "prototype project", which includes:
  - **Proof of concept, model or process, including a business process**
  - **Reverse engineering to address obsolescence**
  - **A pilot or novel application of commercial technologies for defense purposes**
  - **Agile development activity**
  - **Creation, design, development, or demonstration of technical or operational utility**
  - **Combinations of the above**
- Additional follow-on development may be required
- Development of a pre-production prototype
- A prototype may be more than one
- A prototype may be **virtual or physical**
- FY23 NDAA pilot authority for installation and facility prototyping

Basic Statutory Requirements

- **Further development** of the prototype or acquisition in production is **not required**
  - "Proposed to be acquired or developed" does not mean a formal requirement has been established or budgeted
  - Could be sub-systems, components or technologies of a larger system
  - Something DoD could buy if the prototype proves successful
- Use **competitive procedures** to **maximum extent practicable**
- Allows use of OT authority **without having to justify why procurement contract, grant, or cooperative agreement is not feasible** or appropriate
  - In fact, FY18 NDAA (P.L. 115-91, Section 867) required the Secretary of Defense to establish a preference for the use of OTs and experimental authority under 10 U.S.C. 4023 (formerly 10 U.S.C. 2373) in the execution of S&T and prototype programs
- Comptroller General's access to information and review thresholds
  - Total agreement amount in excess of $5,000,000
- Procurement Integrity Act applies
- FOIA exemption applies
- DoD issued the OT Guide in July 2023, TAB A1 - DoD OT Guide JUL 2023_final.pdf

Who can participate?

10 U.S.C. § 4022 (formerly 10 U.S.C. 2371b)

At least one non-traditional defense contractor participating to significant extent; or

All significant participants in the transaction are small businesses or non-traditional defense contractors; or

At least 1/3 of the total cost of the prototype project is paid by the non-Federal parties; or

The agency SPE determines exceptional circumstances justify the use of the authority.

What does "significant participation" mean?

- It is not defined in the statute

- **It can include, but is not limited to:**
  - The participation causes a material reduction in the cost or schedule
  - The participation causes an increase in the performance of prototype
  - The performer is responsible for a new key component, technology, or process on the critical path
  - The performer is accomplishing a significant amount of the effort

- What should **not be the focus** of a significant participation analysis is **how much money** the performer is getting

- The agency's analysis must be documented

What is a non-traditional defense contractor?

- Definition of **"non-traditional defense contractor"** is in 10 U.S.C. § 3014 (formerly 10 U.S.C. § 2302(9))
  - An entity that is not currently performing or has not performed for at least the last one-year period preceding the solicitation of sources by the Department of Defense (DoD), any contract or subcontract for the DoD that is subject to full coverage under the cost accounting standards

Production OTs

PREVIOUS STATUTORY LANGUAGE

Pre-award determination requirement for specific number of units at specific target prices that would be acquired at production stage.

CURRENT STATUTORY LANGUAGE

Allows agreement to be extended into production with production details determined at the time of production decision

Notice Requirements

- OSD policy guidance requires that advance consideration and notice be given to industry of the potential for a noncompetitive follow-on effort
  - This is required regardless of the award vehicle chosen for the follow-on effort
  - This notice must (Guide states should) be included in the solicitation documentation for the OT for Prototype award
  - The language about the potential or planned follow-on effort must (Guide states should) also be included in the subsequent awarded Prototype OT agreement

- FY23 NDAA added new language to subsection (f)(2)(add under 10 USC 4022)
  - "A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of chapter 221 of this title and **even if explicit notification was not listed within the request for proposal for the transaction"** (emphasis added)
  - It remains to be seen if this will change the recent COFC position on their authority over OTs

Successful Completion

- Determining **"successful completion"** of the OT for Prototype phase
  - The appropriate approving official determines in writing that the Prototype OT
    - Met the technical goals,
    - Satisfied established Agreement success metrics, or
    - Accomplished a particularly favorable or unexpected result that justifies transition
  - Completion of a particular aspect of the project can occur prior to conclusion of the entire project to allow the Government to transition that aspect before completion of the prototype phase
  - Each OT for Prototype award will have a provision describing conditions of successful completion

Why use a Prototype OT?

- **Reduced Government oversight** will produce savings by eliminating -
  - Certified cost and pricing data
  - Government-specific accounting systems
  - Complicated Government quality assurance processes

- It can be a **natural extension of commercial item** and performance based contracting

- Predominately **commercial companies** are pursuing the technology and you want or need them to **participate**
  - Biotech industry
  - Cyber industry

Production OTs

- The FY16 NDAA changed the follow-on production section of 10 U.S.C. 4022 (formerly 10 U.S.C. 2371b) to be more practical and useful

- It now allows for follow-on production transactions under the following conditions:
  - The follow-on effort will be awarded to the participants in the OT transaction
    - This now includes subawards under an IDIQ OT consortium sample
  - Competitive procedures were used for the selection of the participants in the OT transaction
  - Prototype phase was successfully completed

- The follow-on effort can be awarded as an extension to the original OT, as a new OT, as a procurement contract, or under other procedures the Secretary of Defense may establish
  - You are not required to recomplete
  - It is not considered a sole source award

- FY23 NDAA added new approval requirements for follow-on production awards

FOR REFERENCE

Approval Levels

Organization	Prototype OTs Up to $100M	Prototype OTs $100M to $500M	Prototype OTs Over $500M	Follow-on Production Over $100M
CCMDs with contracting authority	Commanding Officer	USD(R&E)* or USD(A&S)*	USD(R&E)* or USD(A&S)*	Covered Official
DAs/FAs with contracting authority/DIU	Director	USD(R&E)* or USD(A&S)*	USD(R&E)* or USD(A&S)*	Covered Official
Military Departments	Senior Procurement Executive	Senior Procurement Executive*	USD(R&E)* or USD(A&S)*	Covered Official
DARPA MDA	Director	Director*	USD(R&E)* or USD(A&S)*	Covered Official

***The determinations at these levels are nondelegable**

Examples of DARPA's OTs for Prototype Projects

- DARKSTAR (Tier III -)
- GLOBAL HAWK (Tier II+)
- Common Ground Station (CGS)
- Arsenal Ship
- Laser Communications
- Commercial Operations and Support Savings Initiative (COSSI)
- Submarine Payload and Sensors
- Airborne Communications Node (ACN)
- Small Unit Operations: Situational Awareness System (SUO/SAS)
- Unmanned Combat Air Vehicle (UCAV)
- Advanced Logistics Project (ALP)
- Robotic Servicing of Geosynchronous Satellites (RSGS)

- Vertical Takeoff and Landing Unmanned Aerial Vehicle (VTOL UAV)
- Hummingbird
- Reconnaissance and Targeting Vehicle (RST-V)
- Tactical Common Data Link (TCDL)
- Canard Rotor/Wing (CRW)
- Future Combat System (FCS)
- Hypersonic Test Vehicle (HTV) I and II
- High Performance Computing

- Aircrew Labor In-Cockpit Automation System (ALIAS)
- Experimental Space Plane
- Tactically Exploited Reconnaissance Node (TERN)

Prototype OT Example 1
Program Name: HAE UAV ACTD Tier II+ (Globalhawk)

- **Type of Other Transaction:** Prototype (Award Fee provision)
- **Type of Solicitation method:** Program Solicitation
- **Period of Performance:** 7 years
- **Focus area:** Develop a first-ever affordable high altitude endurance unmanned aerial vehicle to provide intelligence, surveillance, and reconnaissance information to the warfighter.
- **Key Issues Considered**
  - New acquisition approach to prototype development
  - Delivery of affordable UAV to the Air Force
  - Contractor as opposed to Government-driven requirements for on-time performance and cost.
- **Lessons Learned – Best Practices**
  - Seamless transitioning between phases critical
  - Government team integrated
  - Early involvement of operational users

Problem

30-year history of poor outcomes in UAV development efforts.

Desired Outcome

Successful basic development and prove the flightworthiness of the new system concept.

Key Aspects – Acquisition Strategy

- ❑ First use of performance based streamlined specifications
- ❑ All awards are OTs for Prototypes
- ❑ Total program cost estimate: $512M; Actual: $501M
- ❑ Period of Performance
  - Three Phase Project
    - Phase 1 – 6-month concept exploration/development efforts
    - Phase 2 – 27-month design and develop the Tier II+ system
    - Phase 3 – 36-month operational demonstration, build 8 preproduction aerial vehicle systems.
- ❑ Only firm requirement: 10M each vehicle, Unit Flyaway Price (UFP).

Prototype OT Example 2
Program Name: Force Application and Launch from CONUS (FALCON), Task 1

- **Type of Other Transaction:** Prototype
- **Type of Solicitation method:** Broad Agency Announcement
- **Period of Performance:** 36 months
- **Focus area:** Develop a prompt global reach capability to deliver substantial payloads from within CONUS to any location in less than two hours
- **Key Issues Considered**
  - Intellectual Property / Data rights – Government Purpose Rights
  - Economic Feasibility => Rocket developed solely with SpaceX's private funding
  - Competition with ULA => bringing NDCs into launch industry
- **Lessons Learned – Best Practices**
  - New Competitors => Affordable Projects for DARPA
  - NDCs spark commercial advancements over time
  - Unsuccessful tests but helped launch SpaceX into future government-funded projects

Problem

Current weapon systems cannot reach hypersonic speeds necessary for advanced warfighter operations

Desired Outcome

Developing Small Launch Vehicles (SLVs) for low-cost responsive launches capable of accelerating hypersonic gliding weapons & launch satellites into low Earth orbit

Key Aspects – Acquisition Strategy

- ❑ Reduce total cost of each launch NTE $5M (not including payload costs)
- ❑ Performers provide FAR & OT Prototype Proposals
  - ❑ SSA determines benefits for OT
  - ❑ CO pursues negotiations after SSA's approval
- ❑ Two-Task Opportunity – SLVs & Hypersonic Weapon Systems (HWS)
- ❑ Period of Performance (Task 1)
  - Three Phase Project
    - Phase 1 – 6-month System Definition
    - Phase 2 – 36-month Design and Development
  - Total Estimated POP of 36 months
- ❑ Total Award Value - $22.1M

Prototype OT Example 3
Program Name: Nucleic Acids On-Demand Worldwide (NOW)

- **Type of Other Transaction:** OT for Prototype Agreement
- **Type of Solicitation method:** Broad Agency Announcement
- **Period of Performance:** 36-month Phase I; 36-month Option 1; 12-months each for Options 2, 3, & 4
- **Focus area:** Rapid access to effective medical countermeasures is critical to protect local populations, as well as DoD personnel, to ultimately contain and control an outbreak before it becomes a pandemic.
- **Key Issues Considered**
  - Prototype - mobile medical countermeasure (MCM) manufacturing platform
  - Actual end goal of effort – develop a mobile MCM manufacturing platform to rapidly produce, formulate, and package hundreds of doses of nucleic acid therapeutics in days – rather than months or years.
  - Intellectual Property -proposal evaluations took into consideration the extent to which the proposed intellectual property (IP) rights will potentially impact the Government's ability to transition the technology.
  - Security Requirements –None noted

Problem

The DoD relies on an outdated manufacturing paradigm that limits rapid access to medical countermeasures (MCMs) against chemical, biological, radiological, or nuclear (CBRN) threats in austere environments.

Desired Outcome

Develop a mobile, adaptable manufacturing platform capable of rapidly synthesizing and deploying pure, sequence-accurate, GMP quality MCMs in days and easily operated by non-expert users in far forward settings.

Program sought non-traditional defense contractors for purpose of developing a medical countermeasure manufacturing platform for the use in stabilization/humanitarian ops.

Prototype OT Example 3 (cont.)
Program Name: Nucleic Acids On-Demand Worldwide (NOW)

Key Aspects – Acquisition Strategy

- ❑ Solicited via BAA with multiple awards anticipated - contract, cooperative agreement, or other transaction.
- ❑ Two performers were chosen
- ❑ Period of Performance
  - Three Phase Project
    - Phase 1 – Phase 1 : Development and Engineering
    - Phase 2 – Integration
    - Phase 3 – Clinical Study

- **Lessons Learned – Best Practices**
  - Make sure everyone understands the OT authority being used. Is it an Other Transaction for Research, Other Transaction for Prototype, etc.
  - Craft clear, severable payable milestones that articulate what is required for milestone completion & therefore payment.
  - Make sure IP assertions are specific & clearly express what was funded at private expense.
  - If your arrangement includes resource sharing, is the performer's share enough so that they have a vested interest in the effort.
  - For expenditure –based arrangements, make sure to review progress and make any needed adjustments to future milestones to account for overpayments/underpayments to the milestone plan on an annual basis.
  - Because most everything is up for negotiation in an OT, it is imperative that your documentation be detailed. Will someone not involved in the award negotiations understand the story of how you got to the final terms and conditions of the agreement?

Acquisition Strategy/Solicitation
Other Transactions

DoD Solicitation and Award Approaches

Everything is negotiable w/ OTs

➢ Procurement Contract

- Solicitation - RFP/BAA/Commercial Solutions Opening (CSO)
- Type - Cost-based pricing
- Recipient - Any organization
- Requirement - Government defined

➢ Grant/Cooperative Agreement

- Solicitation - BAA/Research Announcement (RA)
- Type - Typically fixed sum
- Recipient - Typically university or non-profit
- Requirement - Basic research, state-of-the-art problem

➢ Research OTs

- Solicitation - BAA/Research Announcement (RA)/Program Announcement (PA)
- Type - Typically milestone payments
- Recipient - Typically consortium or commercial firm
- Requirement - Broad scientific problem, little or no predetermined solution

➢ Other Transaction for Prototype

- Solicitation - BAA/RA/PA/Program Solicitation (PS)/CSO
- Type - CPFF, CPIF, milestone payment
- Recipient - Typically team or commercial firm
- Requirement - Few or no requirements/broad government goals/performer solutions through cost, schedule and technical trades

Tips

- Collaboration across all stakeholders early & throughout the process is key!
- Consider Industry Days; Draft Solicitations; Oral Presentations
- Be clear & detailed (phases, schedule, budget, management process)
- Selection Process: keep it simple!

Things to consider before choosing a path

- Technical Program Scope - Flexibility (desired deliverables – prototype vs. research)
- Targeted pool of performers
- Pool of available performers
- Cost sharing requirements
- Negotiation timeframe & flexibility
- Cost accounting system requirements
- Administrative Scope – Competition Program Phases
- Intellectual property concerns
- Level of documentation
- Rolling Down Selections
- Fundamental Research
- # of anticipated awards
- Follow On Production & Transition
- Security Clearance requirements
- Protest consideration

*Other agency specific requirements

Rolling Downselections

- Because **OTs are not subject to CICA**, there is no issue of scope or competition issues as the program continues

- Programs can be structured into phases without having to pre-negotiate options at the time of award – additional phases will be negotiated and included in the agreement at the end of the prior phase

- **Advantages**
  - Allows the negotiation process to move more quickly
    - In the early phases, the terms and conditions are simpler or some can be deferred
    - Cost/price is generally lower and easier to estimate
  - Allows the Government to **watch and learn during each phase** before soliciting for the next phase
  - Maintains the Government's competitive leverage until much later in the program
    - Low dollar value initial phases allows for award to multiple competitors
    - Puts off the decision of "the winner" until later in the program
  - Allows for **discrete programmatic** decision points

- **Disadvantages**
  - Can be time-consuming to track multiple teams, issue multiple solicitations, and/or renegotiate at various decision points
  - Too much work for small programs

Sample Structure of a Rolling Downselect

Phase I

- **Scope** = design concepts and/or trade studies
- **Duration** = generally 6 months or less
- **Payment terms** = often payable milestones with fixed Government obligation
- **Terms and Conditions** = usually simple and flexible/little need to address difficult negotiation issues yet like IP rights as long as competition is maintained
- **Awards** = multiple

Phase II

- **Scope** = Detailed design
- **Duration** = Generally longer duration (can be 12 months or more)
- **Payment terms** = Milestone payments are often the most reasonable/specific approach should consider program, cost and technical risks
- **Terms and conditions** = If there's still on-going competition, terms will be more detailed but many difficult negotiation issues (i.e. IP) may not be addressed/finalized
- **Awards** = Multiple

Phase III

- **Scope** = Prototype build
- **Duration** = Will depend on the complexity and number of prototypes (often 12 months or more)
- **Payment terms** = Milestone payments often still most reasonable/specific approach should consider program, cost and technical risks
- **Terms and Conditions** = terms and conditions must be fully negotiated before competition leverage is lost
- **Awards** = One

Phase IV

- **Scope** = Test and Evaluation
- **Duration** = Usually based on negotiated test plan
- **Payment terms** = fixed price with incentives or reasonable approach to address risk
- **Terms and Conditions** = no additional terms generally needed
- **Awards** = One

Phase V

- **Scope** = fabrication of additional prototypes or production quantities
- **Duration** = Dependent on complexity and quantity
- **Payment terms** = firm fixed price, payable milestones
- **Terms and Conditions** = If any, additional terms might be necessary relating to production
- **Awards** = One

Phase VI

- **Scope** = life-cycle operations and support

Additional Considerations

- If the program is a **Major Defense Acquisition Program** (MDAP)
  - Requirement for USD(A&S) approval
  - Applicability of the DoD 5000 series will be determined by the size and complexity of the program, regardless of the award vehicle chosen

- **Transitioning from prototype to production**
  - The Prototype OT authority allows the Government to decide about whether to go into the production phase and the details of that phase as late as the end of the Prototype OT agreement

  - The production phase can be awarded through a variety of vehicles and need not be recompeted if the Prototype OT award was competitively awarded and appropriate notice was given in the Prototype OT solicitation and agreement

  - **Recent OSD Policy has some new requirements**
    - Prototype OT solicitations and agreements must include notice that a follow-on Production OT is possible
    - The Prototype OT agreement must include language defining successful completion
    - Production decisions will require an additional review and approval process

  - A transition plan should be included in the OT acquisition strategy addressing the approach to move into production

Acquisition Strategy Example: Advanced Research Concepts (ARC)

https://www.darpa.mil/ARC

- OT for Research
- Process:
  - ARC Opportunity Topics released under Master Solicitation & open for 6 months (established evaluation criteria)
  - Call for Abstracts (5 pages); Reviewed for Selectability
  - If Abstract is selected = Invitation to submit Oral Program Package & Oral Presentation
    - Includes guidelines & scheduling spreadsheet for Oral Presentation
    - Includes templates for supporting documentation
    - A Cost Proposal & Spreadsheet to complete
    - Administrative Requirements
    - A Task Description Document (TDD)
    - Schedule of Payments and Milestones
    - Certifications for Agreement
    - Model Other Transaction (OT) for Research Agreement
  - If selected for award, signed copy due back within 15 days

Focus
Targeted/limited scope investments on rapid exploration

Goal
Fund research that may lead to revolutionary new capability

New acquisition tool to rapidly explore large volumes of high-risk, high-reward, early-stage ideas.

Key Take-aways

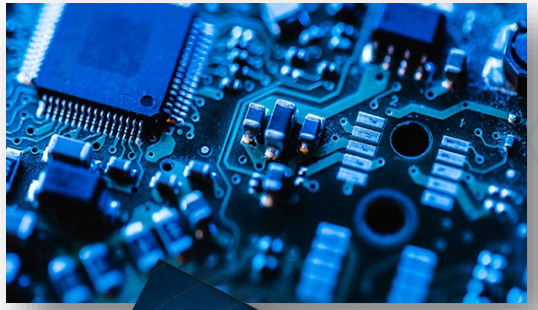
- 8 topics per year
- Select approximately 30 ideas/topic
- 200 ideas annually

- ARC will have a straightforward application process & streamlined docs
- Negotiation-free agreement

- For maximum flexibility, ARC will use OTs and fund one FTE for one year up to $300K
- Performers retain ownership of IP

Acquisition Strategy Example: Artificial Intelligence Explorations / Microsystems Explorations / Disruptioneering

- Rapid Other Transactions
- Artificial Intelligence Exploration (AIE)
  - DARPA-wide Program
  - Program Announcement posted for 1 year (sam.gov)
  - AIE Opportunities released via targeted pre-solicitation notices
    - Focus on technical domains important to DARPA's goal RE: AI
    - Each opportunity posted for 30 days
- Microsystems Explorations (μE)
  - Microsystems Technology Office Program (specific DARPA tech office)
  - Program Announcement posted for 1 year (sam.gov)
  - μE Topics released via targeted pre-solicitation notices
    - Focus on technical domains important to MTO
    - Each topic posted for 30 days
- Disruptioneering
  - Defense Science Office (DSO) Program (specific DARPA tech office)
  - Program Announcement posted for 1 year (sam.gov)
  - Disruption Opportunities released via targeted pre-solicitation notices
    - Focus on technical domains important to DSO mission
    - Each opportunity posted for 60 days



Key Aspects – Acquisition Strategy

- ❑ All 3 programs limited to $5M per topic
- ❑ Process Duration (idea to exploration)
  - AIE/μE: < 90 days
  - Disruptioneering: < 120 days
- ❑ Total award NTE $1M w/cost share
- ❑ All awards are OT for Prototypes
- ❑ Period of Performance
  - Two Phase Project
    - Phase 1 – Feasibility Study
    - Phase 2 – Proof of Concept
  - NTE 18 months
    - AIE/μE
    - Disruptioneering
- ❑ Does not include follow-on acquisition post Phase 2

New acquisition tool to rapidly explore large volumes of high-risk, high-reward, early-stage ideas.

Teaming

The Essence of Teaming Relationships

- In complex acquisitions or programs, it is **rare** that all tasks can be accomplished by a **single contractor**

- Contractors come together to accomplish a contract or program for a variety of reasons
  - Most common reason is to make money
  - Goal may also be to create strategic alliances – either short or long term – in both the government and commercial sectors

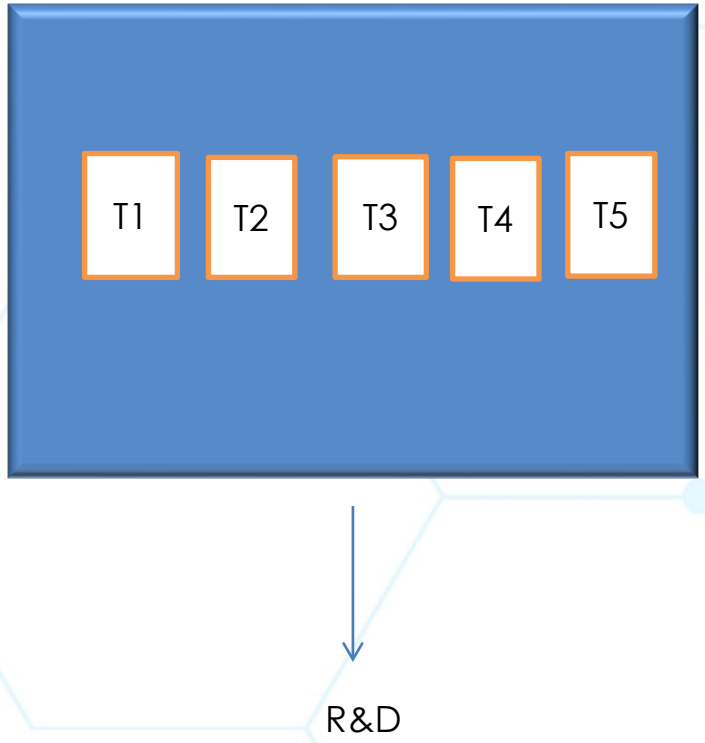
- **Commercial companies often work together** in structures based on two different sets of market forces

The Appropriate Kind of Team Depends on the Strategic Direction

Horizontal Teaming

Multiple competitors who come together to accomplish a common goal or solve a common problem

- **Advantages**
  - The joining of major players in an industry can bring a lot of resources to bear on a common issue
- **Disadvantages**
  - Competitors in the same industry are suspicious of each other and generally don't like to share with each other

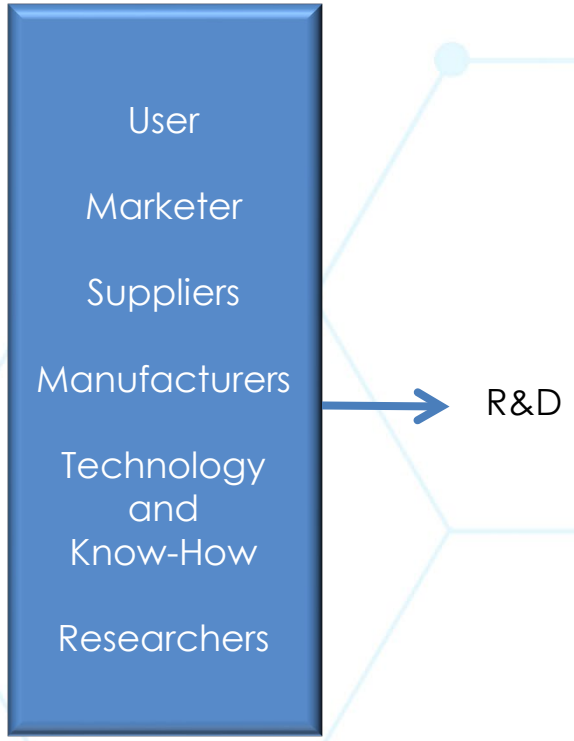


The Appropriate Kind of Team Depends on the Strategic Direction

Vertical Teaming

Multiple companies who each play a role at a different stage of a product's lifecycle

- **Advantages**
  - The players are not competitors but are part of a symbiotic relationship
- **Disadvantages**
  - Finding each other and establishing these relationships can take time working toward a common goal



Team Structures

- Generally the team structure should be the decision of the team members and form organically

- There may be **reasons** for the Government to **dictate** a particular structure but teams tend to work together better if the decision is left to them

- There is a variety of team structures that might evolve but they tend to fall under three basic groupings
  - Prime/subcontractor relationship
  - Partnership
  - Multi-party relationship

- **Each has its advantages and disadvantages**
  - Some are more familiar to the Government
  - Some work better in certain types of arrangements
  - Some are easier to manage – either by the team itself or the Government

- Regardless of the structure, **before entering** to the agreement, the Government needs to **understand the legal relationship** it will have with the team
  - With whom will the Government have privity of contract?

Privity of Contract

- A contract law doctrine that prevents any person from seeking the enforcement of a contract or suing on its terms, unless they are a party to the contract
- **In general, this means that the signatories to the contract are the parties and only they will be bound to the contract terms**
- Who does the Government have privity of contract with in our three basic examples?

Privity of Contract in a Prime/Sub Relationship

- Government enters into a contract under federal law with prime contractor (single signatory)
- Prime enters into commercial contracts under applicable state law with subcontractors
- As the only other party to the contract, prime is the only one responsible to the Government for performance
- Government has no contractual relationship with the subcontractors

Prime/Sub Relationships

Advantages

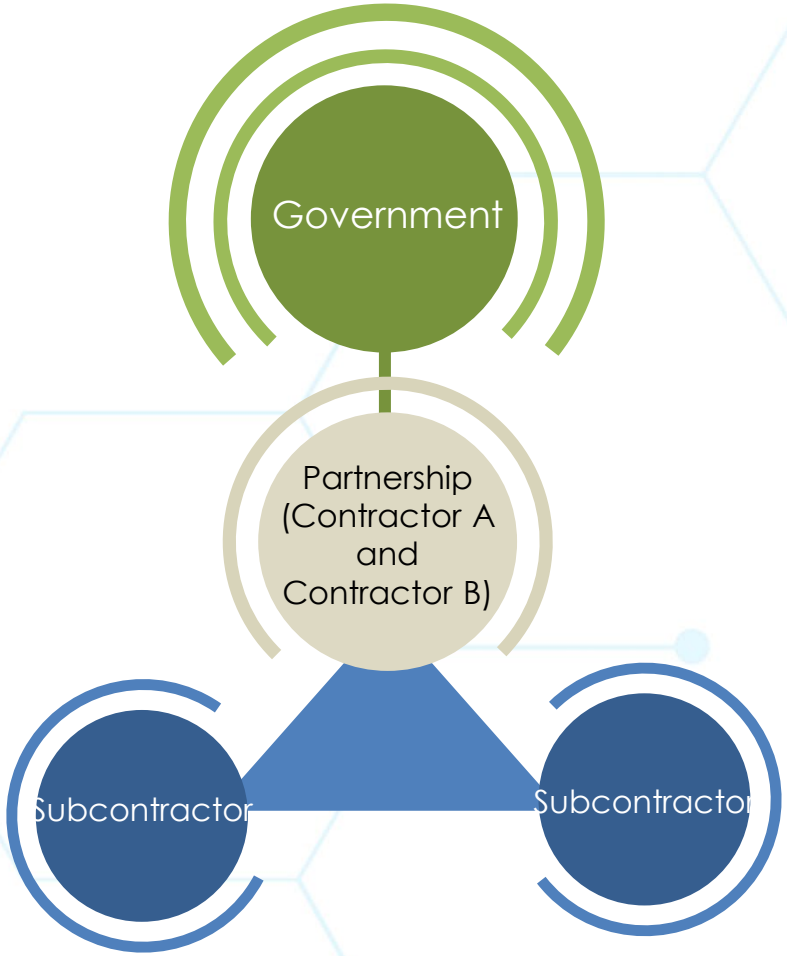
- The most familiar arrangement for most people
- There is one person is clearly responsible to the Government
- There is only one person with whom to negotiate
- The prime is responsible for managing the subcontractors and addressing any issues
- Only the prime can file suit with the Government

Disadvantages

- This structure creates an artificial separation between the Government and the sub-tier participants
- If the prime doesn't perform, the whole thing falls apart
- If the prime doesn't manage the team well, it can either fall apart or the Government finds itself in the middle
- You cannot change leadership mid-program
- There is a cost to having a prime – pass-through fee

Privity of Contract in a Relationship with a Partnership

- Contractor A and Contractor B enter into a partnership relationship governed under state law
- Partnership becomes a **separate legal entity** and is treated like a separate person
- Both partners **share jointly** in the responsibilities and rewards of the partnership
- Government enters into a federal contract with the partnership
- Partnership enters into commercial contracts with the subcontractors
- Government has **privity of contract with the partnership** – and by extension each partner
- Government has **no privity of contract** with the **subcontractors**



Partnership Relationships

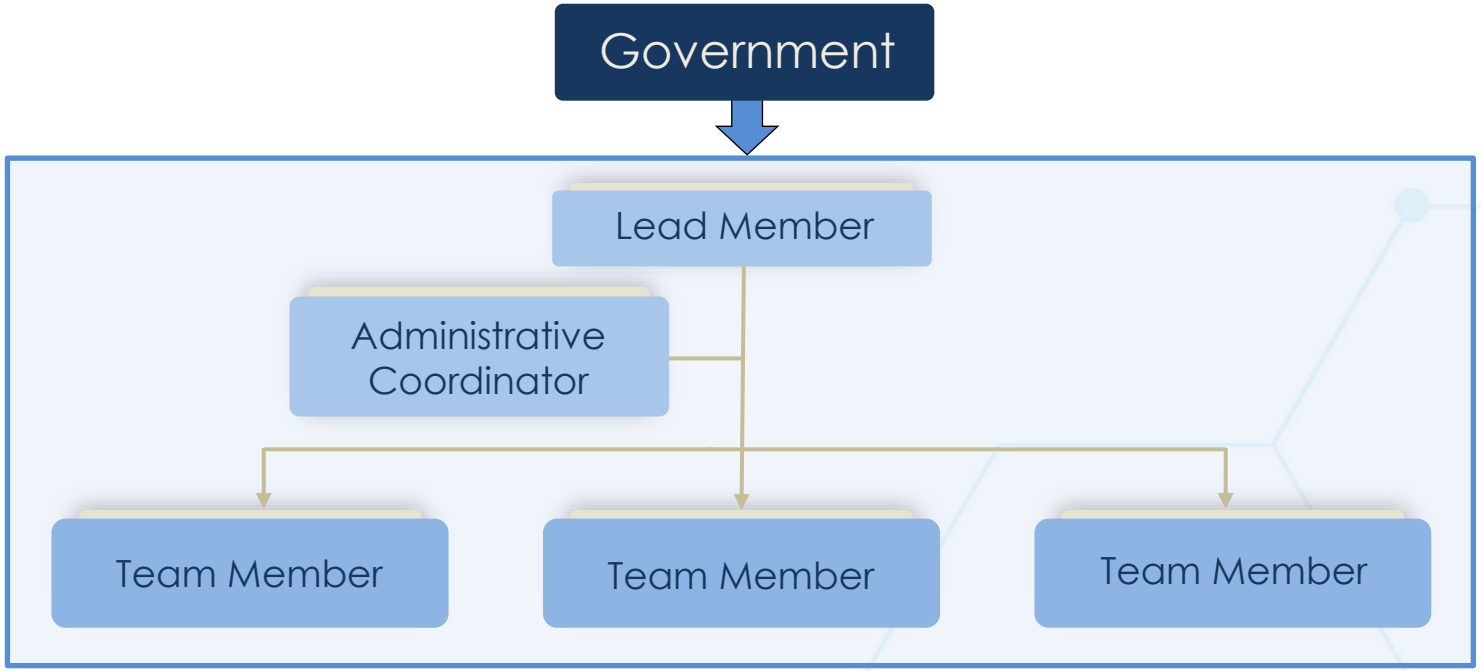
➢ Advantages

- The partnership is a legal entity so, in many ways, it's like dealing with a prime
- It can leverage the resources and talents of all the partners
- The partnership determines how it will internally manage itself and present a united front to the Government
  - The terms of the partnership may allow new members to be added or some to leave the partnership
  - Leadership of the partnership can adjust and evolve with program progression
- The partners are generally jointly and severally liable for the performance of the partnership

➢ Disadvantages

- The relationship of the partners can cause internal conflict
  - If the partners are usually competitors, they may not easily share information or work between them
  - If the partners don't have an equal relationship – either in voting on partnership decisions or in benefits received – it can make for a difficult relationship
- The partnership needs to be established and formalized before negotiating with the Government, which can add time to the process

Privity of Contract in a Relationship with a Multi-party Team



- Team membership and dynamics defined by a contract signed by all members (i.e. **Articles of Collaboration**)
- Team **elects one member** to act as their **agent with the Government** or hires an administrative coordinator
- Government **signs agreement with the team as a whole** – the team agent actually signs the agreement
- Government has direct **privity with all team members**

Multi-Party Relationships – Consortia, etc.

- **Key attributes for success**
  - The team/consortium does not have to be a legal entity (i.e. partnership, joint venture) but must be bound together legally before signing the OT with the Government

    - **This binding document will be some type of teaming agreement or Articles of Collaboration**
      - Includes a set of terms and procedures which will govern the activities and relationships of the participants in the team and how they will interact as a group with the Government under the agreement
        - Management structure
        - Process for inclusion or removal of team members
        - Disputes procedure
        - Technology and information sharing
        - Intellectual property handling
        - Payment mechanisms
        - Agent election

    - **The Government is not a party to the document and should not dictate its terms**
      - It's a commercial arrangement
      - At most, we want to know it's been signed and that the Government does not have any responsibilities under it

    - **The binding document needs to be in place and executed by the members before the agreement with the Government can be signed**
      - Ideally it should be in place prior to negotiations with the Government
      - The team needs to address how risks, rewards, and responsibilities will handled internally before they can effectively negotiate terms with the Government

Multi-Party Relationships – Consortia, etc.

- **To function properly, the parties to the agreement must be the Government and the Team**
  - The Team will generally elect one of the members to act as its agent
  - The team agent will sign documents on behalf of the Team and will receive payment from the Government
  - The Team's binding document will explain the agent relationship and the duties and responsibilities of the agent
  - The Team agent can change over the life of the relationship
  - The Team leader and the Team agent can be two separate members
- **Everyone** in the Team should play an **active role** in the program
- Depending on the binding document, the **membership** of the Team **can change** over time
- **The Team is responsible for performance of the members**
  - It should be monitoring progress and schedules
  - If a performing member should fail, it is the responsibility of the remaining Team members to address and remedy the problem

Multi-Party Relationships – Consortia, etc.

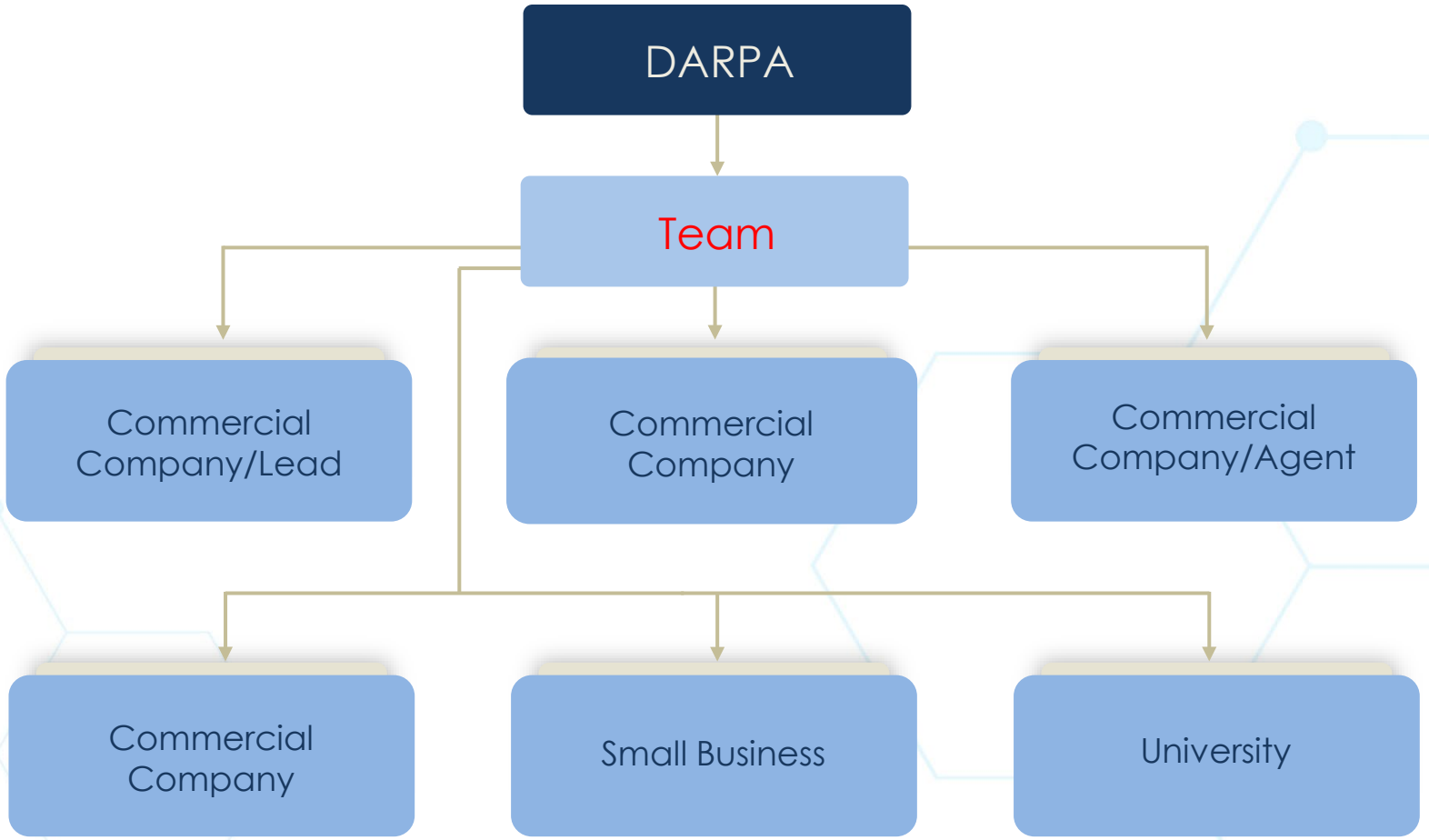
Advantages

- Because the team has chosen to work together in a collaborative way, the hope is that the alliance will be advantageous to all members and continue past this agreement
- Since the Government has signed the agreement with the entire team, it can have technical insight and visibility into all levels of technical and managerial actions
- If any cost sharing is required or leveraged, it will come from the team as a whole – how they choose to allocate the cost share internally is up to them
- Since the team as a whole is bound to the Government and responsible for performance, the responsibility is on the team to self-police the effort and quickly take action if there are issues
- Leadership of the effort can change as the effort evolves

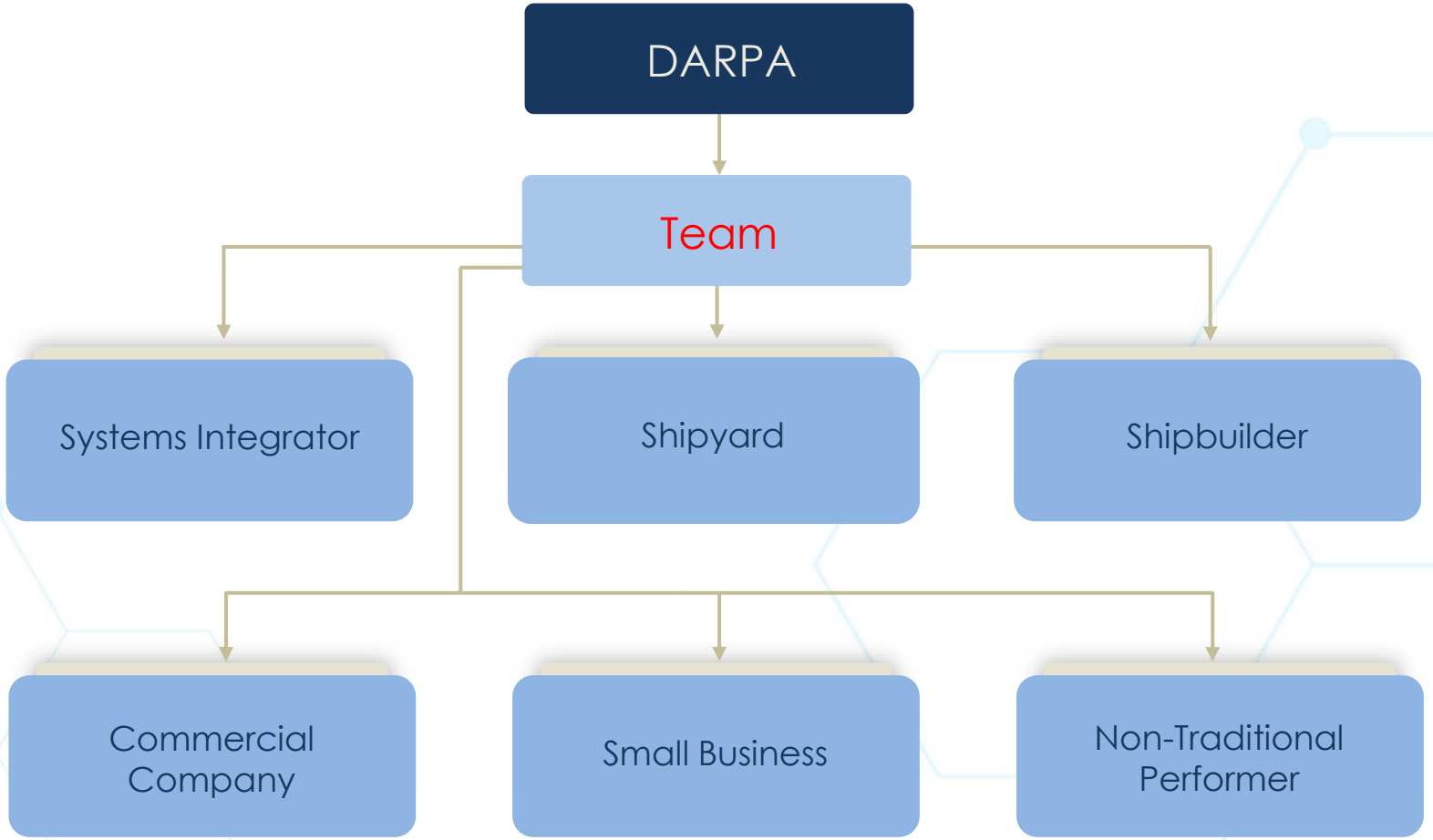
Disadvantages

- While the team as a whole is the party to the agreement and the Government has privity with all the members, it is still important that the membership select a strong leader to maintain the vision and direction of the efforts
  - Loose confederations and management by committee doesn't really work well
  - The larger the team membership, the more important strong leadership and management is
- This type of relationship is relatively unfamiliar to the Government and may cause some cultural problems for us

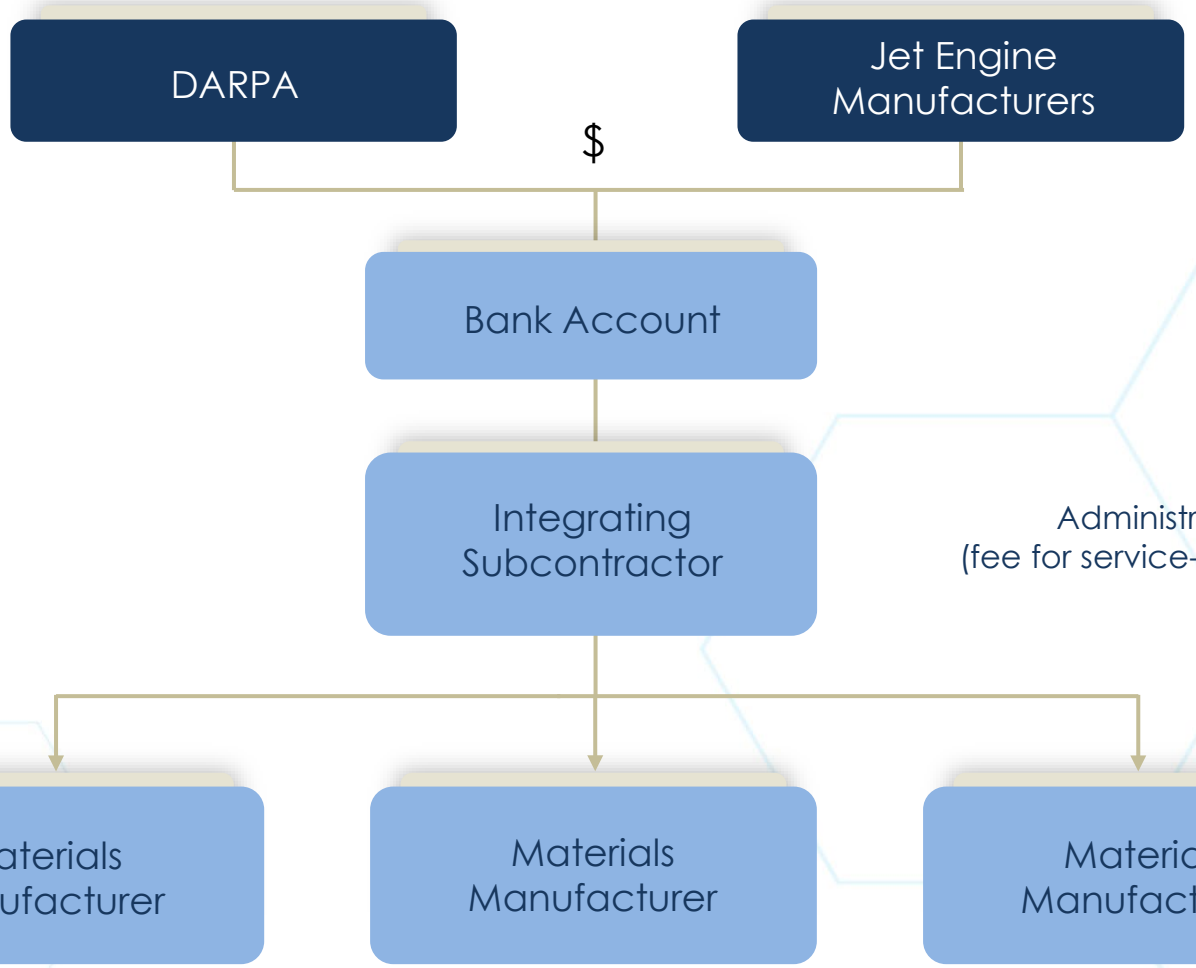
R&D Performance Agreement - Team



Major System Development - Team



Joint Funding Agreement



Funding Sources and Overall Management (funds pass through – no burden)

Administration (fee for service-no burden)

R&D Teams

Consortia Specific Information

Consideration for use of Consortia under 10 USC 4022

- No preference or policy dictating use of consortium model for OTs
- AO's have broad discretion to leverage consortia in using authority of 10 USC 4022
- Encourage a specific type of consortium in solicitation best suited to program goals, BUT allow the performer to determine the best was to organize their team(s)
- Consortia can be structured in a wide variety of ways and may include technical performers, financial contributors, potential end users, or other interested parties in the project
- Considerations:
  - Does the business model promote collaboration and efficient business practices?
  - How does the structure facilitate the Government's planned purpose?
  - What are the costs associate with the consortium? How will AO determine payments are fair and reasonable?
  - How will the Government monitor the consortium's performance?
  - How will the Government ensure the 10 U.S.C. § 4022 statutory requirements are met?
  - What information does the Government need to satisfy reporting requirements and who will be responsible for providing it?

See Appendix F of the Other Transactions Guide (July 2023) for more information on Use of Consortia in Prototype and Production Other Transaction Agreement

Unique Issues when utilizing Consortium Management Organization (CMO)

- Government must ensure that it tracks fees subject to reporting & that the fees charged to the Government are fair & reasonable.

- The agreements officer should also consider the following:

  - What are the duties and responsibilities of the CMO? Where are those defined?
  - Does the OT agreement include terms that provide for renegotiation of the fee on a periodic basis or under specified circumstances?
  - What is the rationale for the fee as compared to the CMO's duties? Are the fees commensurate with the perceived benefit to the Government?
  - Is an appropriate mechanism in place for the agreements officer to identify and avoid duplicate or erroneous payments for individual components of the fee?
  - If milestone-based, advance, or interim payments are allowed, is there a mechanism in place to track financing payments and other relevant data at the appropriate level (for example, for each individual project)?
  - Does the Government anticipate enough throughput to make use of a consortium beneficial from the perspective of cost, schedule, and performance?

Additional Considerations & Resources

- GAO Report "Other Transaction Agreements: DoD Can Improve Planning for Consortia Awards" (GAO-22-105357, September 20, 2022)
- DoD Inspector General Report "Audit of Other Transactions and the Use of Nontraditional Contractors and Resource Sharing" (DODIG-2022-127, September 8, 2022)
- DoD Inspector General Report "Audit of Other Transactions Awarded Through Consortiums" (DODIG-2021-077, April 21, 2021)
- GAO Report "DoD Use of Other Transactions for Prototype Projects Has Increased" (GAO-20-84, November 22, 2019)

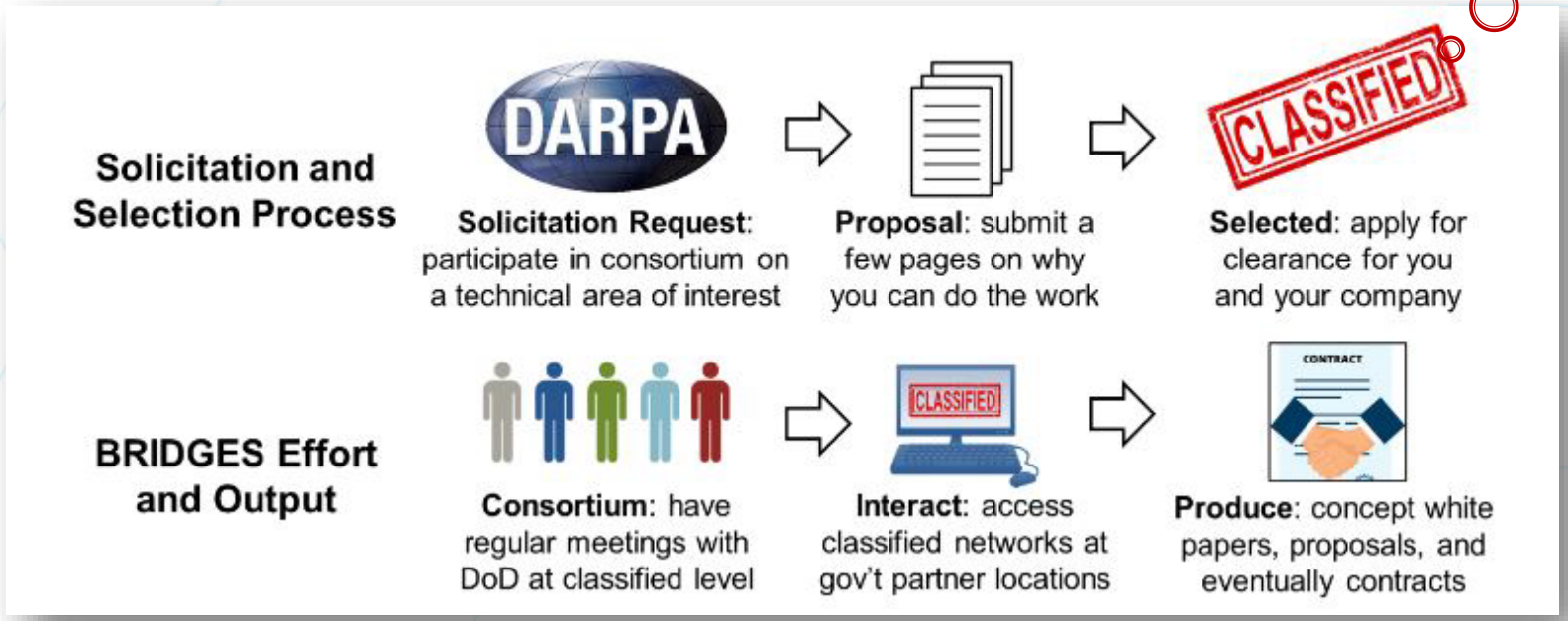
Teaming Arrangement Example: Bringing Classified Innovation to Defense and Government Systems (BRIDGES)

BRIDGES Initiative:

- Single OT for Research w/ "BRIDGES Consortium" – PoP: 30 months
- BRIDGES Consortium established/defined by Articles of Collaboration
- As members join Consortium (by invitation of USG), members are added to the OT agreement & the attached DD254
- No fee to join – Each member invited must match USG funding ($50k/1 yr)

Potential Payoff

- Innovation to solve DoD Classified Hard Problems
- Leveraged consortia teaming arrangement to create pathways in expanding pool of "cleared" performers



Key Issues Considered

- ❑ Type of OT
  - Actual end goal of effort
  - Prototype or Research
- ❑ Timing
  - Processes for USG/Performer Team
  - Each effort/arrangement may be different; different stakeholders
- ❑ Other Considerations
  - Intellectual Property
  - Security Requirements
  - Consortium Agreement language vs. what the team can decide

Teaming Arrangement Example: Constellation Program – I2O Cyber Operations Thrust Area

- "IDIQ Like" Consortium OT for Prototype
- Consortium Composition = research teams and end-user developers
- Base OT valued at $150M – expandable up to $249.9M (or greater with OSD approval)
- Individual Technical Project Agreements (TPAs) placed against Base OT
  - Obligate funds & specify work
  - Various consortium members will execute individual TPAs
- DARPA/Consortium open communication prior to TPA proposal submission (i.e., "Alpha Contracting")
- New research teams making future breakthroughs can join consortium – no costs or fees to join

Leveraging consortium teaming arrangement to maximize flexibility to solve stated problem

Problem

Valley of Death: Long transition from R&D project to Program of Record

Desired Outcome

Create agile timeline to transition R&D tailored to PEOs needs & provide DARPA feedback on future research opportunities

Key Issues Considered

- ❑ Benefits of OT Prototype Acquisition Strategy
  - Bypass certain FAR requirements
  - Deconflict to max competitiveness/flexibility team formation
- ❑ Funding Challenges
  - Different colors of money vs. timing
  - Bona fide needs/OT Authority compliance
  - Tracking milestone payments
- ❑ Management Risks
  - AoR vs. TAOR
  - OTA PM vs. TPA PM vs. Consortium Management
  - Procurement Writing Systems limitations
- ❑ Security Requirements

Resource Sharing in Other Transactions

Resource Sharing

- There should be evidence in industry's proposal or management plan of its **commitment** to and **self-interest** in the success of the program
  - Reduces the need for Government oversight
  - Reflected in the resource share proposals

- Proposing team needs to **meet the resource sharing** requirement
  - It does not need to be uniformly imposed on all team members

Resource Sharing under 10 U.S.C. 4021 (formerly 10 U.S.C. 2371)

- Private sector resource sharing is required by the original OT statute for all Research Other Transactions
  - Statute requires **50/50** resource sharing to the **extent deemed practicable**
  - Variances from the 50/50 requirement may be reasonable in certain circumstances
    - To attract participants, particularly small businesses or inventors
    - Unusual technical or business risk
    - Prior substantial investment
    - Technology has strong military relevance
- What's important is evidence of commitment to pursue the technology into commercialization

Resource Sharing under 10 U.S.C. 4022 (formerly 10 U.S.C. 2371b)

- Originally the **OT for Prototype** authority did not have a resource sharing requirement because it was intended for primarily military items

- In FY01, the requirement for **1/3 resource share** was added to dissuade large defense contractors from participating in Prototype OTs without finding non-traditional subcontractors

- It is **not the** Government's **goal to get resource sharing** in Prototype OTs
  - The goal is for the large defense contractors to also seek out non-traditional partners and innovative solutions at the sub-tier levels
  - If a large defense contractor is cost sharing, it is by choice and the question should be is whether an OT is the appropriate vehicle if there is no nontraditional participation

General Principles

Good resource sharing is straightforward and clear

- The proposer's specific statement of work or TDD should dictate the appropriate amount and type of resource share
- We are looking for **"resource sharing"** and not "resource matching"
  - The goal is to bring to the program assets that will be used in performance of the program, not just items with inherent value

Evaluation of Resource Sharing

Two components of resource sharing

- **Cash**: Outlays of funds to support the total program
- **In-Kind**: Reasonable value of equipment, materials, or other property used in the performance of the work to be done under the agreement

What constitutes cash?

Components of cash contributions

- Direct labor
  - Benefits
  - Direct overhead
- Materials expenses

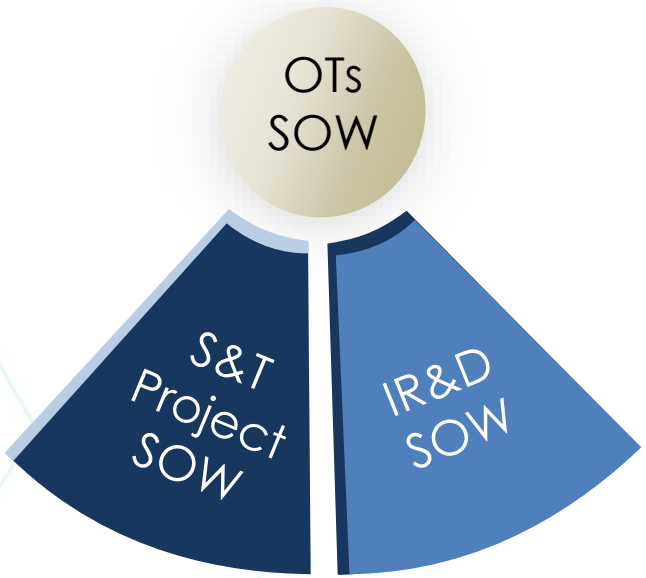
Sources of cash

- IR&D pool
- Profit or fee from another Government contract
- Overhead or capital equipment expense pool

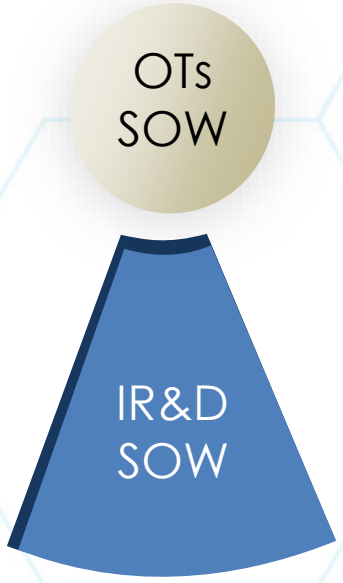
Independent Research and Development (IR&D)

- Described in FAR 31.205-18
- Equivalent to commercial industry use of internal R&D
- Funds are under the discretion of the contractor

Sample



WRONG



CORRECT

What constitutes in-kind?

- **Components of In-Kind**
  - Equipment/space/land – fair market value
  - In-house materials
  - Intellectual Property
    - Must be central to the program
    - Real or incidental resource
    - Fair market value
- **Valuation of In-Kind**
  - Burden of proof is on the proposer to make a case
  - Key elements will be the relevancy to and method of use in the program, as well as proof of commercial value
- **Constraints**
  - No foregone profit or fee
  - No cost of money or profit/fee
  - No sunk costs of prior research unless a reasonable valuation and relevance to the current program can be established

Key Considerations Before Accepting In-Kind Resources

- Is the proposed in-kind necessary to the overall statement of work of TDD?
- Is it under the control of the proposer's program management team?
- Is this the only source for the in-kind?
- How has the in-kind been valued?
  - Is it reasonable?
  - Is it supported by verifiable data?

Quality of Sources of Resource Sharing

- **Highest Quality**
  - Cash or other liquid assets
- **Moderate Quality**
  - In-kind commitments of resources
  - Fair market value of facilities and equipment dedicated to the program
- **Low Quality**
  - Non-dedicated personnel
  - Non-dedicated in-kind
- **Poor Quality**
  - Cash or in-kind which availability is not clearly or convincingly demonstrated

Resource Sharing Lessons Learned

- **You need to be knowledgeable about:**
  - Availability
  - Timeliness
  - Control of Resources

- **Document your file**
  - What sources of resource sharing you accepted
  - How you determined the value of in-kind contributions

- **Document** the value of **in-kind contributions**, by team member, in the agreement

- Do not overvalue in-kind contributions
  - It can change the risk ratio

- **Performers** entering into agreements **with resource sharing don't get fee** – it would change the share ratio

Milestone Payments

A Different Way to Pay

- **Why** create a different payment methodology?
  - There is a concern in the private sector over the way the Government pays
    - Firm Fixed Price
    - Cost Reimbursement

- We needed to **foster a new relationship** with industry that included getting them paid more quickly using their own internal systems
and processes

What are Milestone Payments?

- Methods of financing the Government's share of agreement expenditures
- Milestone schedule based on key observable events in the critical path to accomplish program objectives
- **Payments are triggered by successful performance of observable technical events**
  - Generally quarterly events (i.e. key test, PDR, CDR, demonstration)
  - Some activity significant to the progress of the program
  - "Success" does not necessarily mean the technology was successful
    - Establish accomplishment criteria for each milestone
    - Focus on the necessary effort to reach the milestone and perform the event
    - Even if the event is a failure, they should still be paid if they did all the necessary effort to be fully prepared for the event
- **Each milestone has a value that is negotiated at the time of award**
  - Value is typically based on a good faith estimate of the level of effort necessary to reach the milestone
  - Milestones may have to be prospectively adjusted as the program progresses for both value and performance objectives

Sole submission of reports not appropriate for pmt

Clear entry-exit criteria = vital to program success

Milestone schedule development on Program OTs is a collaborative effort!

Two Types of Milestone Payments

- **Fixed Milestones**
  - Each milestone amount is fixed at the time of award
  - If the performer achieves the milestone, it is paid the fixed milestone amount, regardless of actual costs
  - Ability to adjust milestones prospectively (not retroactively) based on SOW changes
  - Milestones don't generally match actual expenditures
    - Generally the team will be simultaneously working toward future milestones
    - The payment they receive will only represent the effect to get to the milestone event at issue

Misconception
Expenditure-Based OT is a Cost Reimbursable Contract

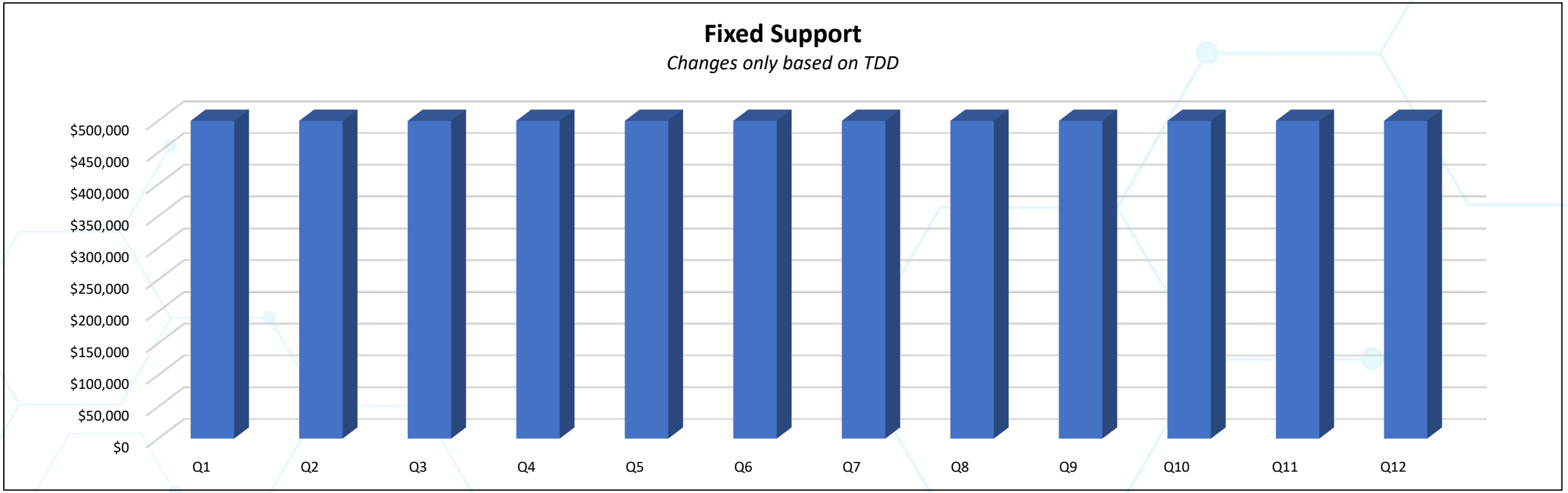
- **Expenditure-based Milestones**
  - Each milestone has an estimated amt agreed upon before award w/ overall ceiling amount for the OT
  - Milestone pmt is still dependent upon achieving the milestone & is paid at the agreed upon amt (no adjustments made on a per milestone basis)
  - Ability to adjust future milestones based on actual expenditures vs. SOW changes (cumulative at approximately annual period)
  - Overall ceiling amount would only be adjusted, if additional work was warranted

- You can leverage both types + combination between program phases

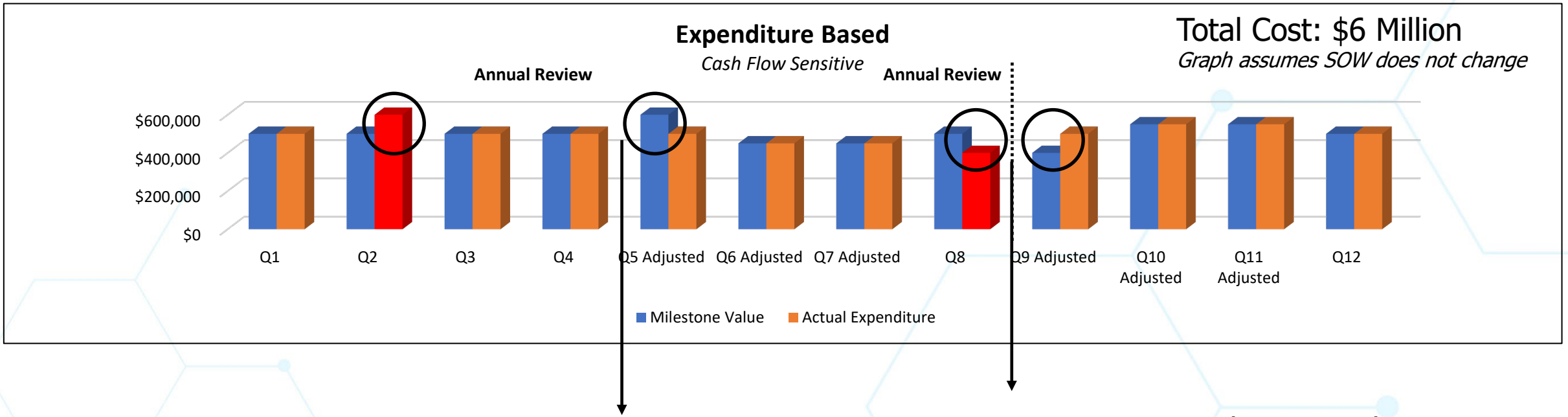
Milestone Adjustments by OT Type (Fixed)

Total Cost: $6 Million

Graph assumes SOW does not change



Milestone Adjustments by OT Type (Expenditure-Based)



- Q2 overruns milestone value.
- At the end of Q4, Q5-12 may be adjusted; total cost remains unchanged.
- Q5 milestone value accounts for Q4 overrun when annual review completed.

- Despite previous annual review adjustment, Q8 underruns milestone value.
- At the end of Q8, Q9-12 may be adjusted; total cost remains unchanged.
- Q9 milestone value accounts for Q8 underrun when annual review completed.

I-STAR Program

- I-STAR Program demonstrates state-of-the-art military capabilities
  - Initial design phase activities (SRR, PDR, CDR, & Risk Reduction Testing)
  - Prototyping phase activities (Material ordering, Manufacturing, Integration & Checkout)
  - Prototype Testing in representative operational environment with a Final Report
- 13 Payable Milestones were constructed across a 36-Month PoP
- Balance Milestone Payment amounts against forecasted Expenditures
- Reasonable Share of OT Costs between Government and Contractor

Financial Summary	
Total Proposal	$135.0M
Total In-Kind (In-House Equipment)	$10.0M
Total Estimated Cash Expenditures	$125.0M
Government Cash Share	$110.0M (88%)
Contractor Cash Share (IR&D)	$15.0M (12%)

Some key events to consider

I-STAR Program - Milestones

Milestone (M/S)	MAA[1]	M/S Event	M/S Criteria	Gov't Share	Ktr Share	Gov't %	Ktr %
1	1	Kickoff	• Deliver Project Plan (Technical, Staffing, Resources, IMS, GFE, etc.) for all Tasks & Deliverables across Milestones • Establish secure file-sharing website for Contractor and Government program data • Presented Program Risks and Opportunities Plan	$913,671	$0	100.0%	0.0%
2	3	SRR	• Held a System Requirements Review (SRR) with Government • Plan for completing SRR Action Items • Update the Program Risks and Opportunities Plan • Finalize entrance/exit criteria for PDR	$1,483,924	$162,351	90.1%	9.9%
3	6	PDR	• Held a Preliminary Design Review (PDR) with Government • Plan for completing PDR Action Items • Update the Program Risks and Opportunities Plan • Initial entrance/exit criteria for CDR	$2,945,737	$345,986	89.5%	10.5%
4	9	TIM 1	• Held a Technical Interchange Meeting (TIM) with Government • Provide progress on risk mitigation and testing done to date • Update the Program Risks and Opportunities Plan • Finalize entrance/exit criteria for CDR	$4,839,612	$618,652	88.7%	11.3%
5	12	CDR	• Held a Critical Design Review (CDR) with Government • Plan for completing CDR Action Items • Provide progress on risk mitigation and testing done to date • Update the Program Risks and Opportunities Plan • Initial plan for ordering materials and labor, tooling, facilities, etc. needed for all	$8,947,325	$1,034,982	89.6%	10.4%
6	15	TIM 2	• Held second Technical Interchange Meeting (TIM) with Government • Provide progress on risk mitigation and testing done to date • Update the Program Risks and Opportunities Plan • Status of material, labor, tooling, facilities, etc. needed for all prototypes	$9,715,294	$1,289,635	88.3%	11.7%
7	18	TIM 3	• Held third Technical Interchange Meeting (TIM) with Government • Provide progress on risk mitigation and testing done to date • Update the Program Risks and Opportunities Plan • Status of material, labor, tooling, facilities, etc. needed for all prototypes	$10,170,436	$1,307,650	88.6%	11.4%
8	21	TIM 4	• Held fourth Technical Interchange Meeting (TIM) with Government • Provide progress on risk mitigation and testing done to date • Update the Program Risks and Opportunities Plan • Status of material, labor, tooling, facilities, etc. needed for all prototypes • Plan for handling and transportation of all prototypes to the system test locations	$12,490,020	$1,401,027	89.9%	10.1%
9	24	Prototype Checkout	• Status of the integration, testing, and checkout of all prototypes • Update plan for handling and transportation of all prototypes to the system test locations	$12,150,045	$1,399,674	89.7%	10.3%
10	27	Prototype Delivery	• All Prototypes delivered to system test locations • Finalize entrance/exit criteria for TRR	$13,682,456	$1,508,340	90.1%	9.9%
11	30	TRR	• Held a Test Readiness Review (TRR) with Government • Plan for completing TRR Action Items • Update the Program Risks and Opportunities Plan	$10,034,592	$1,693,005	85.6%	14.4%
12	33	Prototype Testing	• Completed all prototype testing • Captured test data and began data reduction efforts	$12,229,032	$2,011,405	85.9%	14.1%
13	36	Final Report	• Completed prototype testing data reduction • Deliver final test reports to Government • Disposition of GFE and I-STAR prototypes finalized with Government • Establish OTA Close-out procedures	$10,397,856	$2,227,293	82.4%	17.6%
[1] MAA = Months After Award			**Total**	$110,000,000	$15,000,000	88.0%	12.0%

Intellectual Property

The Basics of Intellectual Property

- An intangible creation of the human mind, usually expressed or translated into a tangible form, that is assigned certain rights of property

- **Why is it important?**
  - Protection of intellectual property is one of the few specific topics mentioned in the United States Constitution
    - Article I, Section 8, Clause 8, grants Congress the right to create the patent and copyright systems
  - The Patent and Trademark Office (PTO) and the Copyright Office in the Library of Congress are two of the oldest civilian agencies in the Federal Government
  - The Founding Fathers wanted authors and inventors to share their creative works with society at-large with the understanding that their rights in those works would be protected for a limited period of time

- **What protects it?**
  - A myriad of federal and state laws
  - As to regulatory guidance, the FAR provides the main coverage of patentable inventions for all agencies while DoD looks to the DFARS for coverage of technical data and computer software

Basic Protection Methods

- Over the years, four basic intellectual property (IP) protection methods have been created
  - **Patent**
    - Protects new, unobvious and useful inventions
    - Can include utility, design, and plant/animal patents
  - **Copyright**
    - Protects original works of authorship embodies in a tangible medium of expression
  - **Trademark**
    - Establishes exclusive rights to use marks that distinguish one's goods and services from another
  - **Trade Secret**
    - Protects secret business information from unauthorized use or disclosure

- In exchange for making their IP public, authors and inventors are granted a limited monopoly to use that IP and prevent others from doing so without their permission

- Once the **limited monopoly period expires**, however, the **IP becomes available** to society for any one to use without restriction

Patents

- **To qualify for a patent, an invention must be:**
  - Be within the statutory subject matter
  - Must be useful and novel
  - Must not be obvious from the prior art to a skilled person

- **Types of patents**
  - Utility – covers processes, machines and methods of manufacturing
  - Design – covers visual ornamental characteristics of an item
  - Plant and Animal – covers asexually reproduced plants and animals

- **What can't be patented?**
  - Laws of nature or scientific principles (i.e. biology, chemistry, physics, math)

- **Duration of patents**
  - Utility and plant/animal patents – 20 years from the filing date of the application (before 6/8/95 – 17 years from issue date or 20 years from filing date)
  - Design patents – 15 years from issuance (before 05/13/15 – 14 years)

The Bayh-Dole Act

- Major **statutory framework** governing **ownership** and use of **patentable inventions** in Government contracts
- Passed in 1980 and codified at 35 U.S.C. 200, et seq.
- The statutory language **applies to non-profits, including universities and small businesses**
- In **1983**, by executive order, the President extended **coverage to large business** as well
- Applicable to **procurement contracts, grants and cooperative agreements**
- General policy of the Act
  - Promotion of **commercialization** and public availability of inventions created under Government contracts
  - Assurance that the **Government would receive sufficient rights** in the inventions for its use

The Bayh-Dole Act

- **What rights does the Government get in the invention?**
  - A license that is Federal Government-wide and:
    - Non-exclusive
    - Nontransferrable
    - Irrevocable
    - Paid up

- **What does the license allow the Government to do?**
  - Practice the invention itself
  - Have it practiced for or on behalf of the Government throughout the world

- This type of license is commonly referred to as a **"Government Purpose Right"** or GPR

Copyrights

What is covered under copyright?

- Original works of authorship embodied in a tangible medium of expression
- Confers a bundle of rights
  - Reproduce the work
  - Make derivative works of the work
  - Distribute copies of the work
  - Publicly perform the work
  - Publicly display the work
- The owner can give away one right in the bundle, any combination of rights or the whole bundle

Unique aspects of copyright

- You can only copyright your expression of the idea, not the idea itself
- You cannot prevent someone else from independently creating and disseminating the work
- Your work must be embodied in a tangible medium to be protected
- To be protected it must be original
- It can include published or unpublished works that are marked or unmarked
- U.S. Government employees can never get a copyright for works created during the course of their official duties

Copyrights

- **Duration of a copyright**
  - For works created after July 1, 1978
    - Life of the author plus 70 years
    - For joint works, the 70 year period begins with whoever dies last
  - For works for hire, anonymous works and pseudonymous works
    - 95 years from first publication or
    - 120 years from creation, whichever is shorter
- **Copyright is also unique in that the law allows for infringement in certain situations called fair use**
  - Factors to consider if a use is fair
    - The purpose and character of the use (commercial vs nonprofit vs educational)
    - The nature of the work (factual vs creative/published vs unpublished)
    - The amount and substantiality of the portion used in relation to the whole, AND
    - The effect on the potential market for the work

Technical Data and Computer Software

- **The two main DFARS clauses**
  - 252.227-7013 – Rights in Technical Data – Noncommercial Items
  - 252.227-7014 – Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation

- **Four basic levels of license rights**
  - **Unlimited** – Right to use, modify, reproduce, perform, display, release or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and have or authorize others to do so
  - **Government Purpose Right** – same as GPLR in patents
  - **Limited (applies only to technical data)** – Right to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government
  - **Restricted (applies only to noncommercial computer software)** – basically a shrink-wrap license

- There is always the **option to specially negotiate rights** and DoD encourages it with a small limitation
  - Don't get less than limited rights for technical data or restricted rights for computer software

Technical Data and Computer Software

- What rights do you get when?
  - **Unlimited rights**
    - Data or software developed exclusively with Government funds
    - Software documentation required to be delivered under the contract
    - Studies, analyses, test data and similar data produced for this contract
    - Form, fit and function data – data describing overall physical, functional, and performance characteristics of an item
  - **Government Purpose Rights (GPR)**
    - Software, items, components, or processes developed with mixed funding
    - The Government gets GPR for five years or other negotiated period, after which the right converts to unlimited
  - **Limited Rights (technical data only)**
    - Items, components, and processes developed exclusively at private expense
    - This category does allow for release to Government support contractors and gives the owner the right to ask for NDAs executed directly with the support contractors
  - **Restricted Rights (computer software and software documentation only)**
    - Noncommercial computer software developed exclusively at private expense
    - This category does allow for release to Government support contractors and gives the owner the right to ask for NDAs executed directly with the support contractors

IP Coverage

	FAR/DFARS	Bayh-Dole	2 CFR 200	Negotiable?
Grants	NO	YES	YES	Somewhat
Cooperative Agreements	NO	YES	YES	Somewhat
Research OTs	NO	NO	NO	YES
OTs for Prototypes	NO	NO	NO	YES

Intellectual Property and OTs

Negotiation Factors

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

Some items to consider

- Dealing with the Freedom of Information Act (FOIA)
- Government support contractors

Intellectual Property and OTs for Prototypes

- In negotiating for Prototype OTs, the Government **should consider leveraging intellectual property rights for cost savings**
- The level of intellectual property rights offered by the team can be considered in the evaluation of the overall business deal
- **Negotiating intellectual property** can be a **cultural challenge** for both traditional defense contractors and the Government team
- Remember, the intellectual property rights given to the Government live on forever, long after the agreement is over
  - As you plan your acquisition, you need to consider the life cycle of the technology, not the period of performance of the OT
  - You want to negotiate as complete an intellectual property package as you can while you still have competitive leverage
- If you are **flexible** with regards to intellectual property (or cannot be), be **upfront** and **clear** with industry and clearly articulate the Government's position in the solicitation

Foreign Access to Technology

History of the Foreign Access to Technology Article

- There is **no statutory or policy requirement** for it

- It was included in the early days of OTs to alleviate Congressional concerns about taxpayer investment drifting offshore
  - The intent was to restrict the flow of technology to foreign sources for a limited period of time
  - Default period is generally three years but is adjustable and negotiable

- **It was always intended to be flexible**
  - Many companies, then and especially now, are global competitors
  - Some have strategic alliances with foreign entities to facilitate foreign sales
  - We don't want to prevent global sales or even foreign manufacturing necessarily
  - The goal is to have the primary or substantial economic benefits flow to U.S.

The Sample Article

- **Definitions**
  - "Foreign Firm or Institution"
  - "Know-How"
  - "Technology"

- This article is **in addition to** existing statutory and regulatory requirements
  - International Traffic in Arms Regulations (ITAR) (22 C.F.R. Part 120 *et seq*)
  - National Security Program Operating Manual (NISPOM) (DoD 5220.22-M)
  - Department of Commerce's Export Administration Regulations (EAR) (15 C.F.R. Part 730 *et seq*)

The Sample Article

- What **IS CONSIDERED** a transfer of technology under the article?
  - Sale of a company and all its assets
  - Sale or licensing of the technology and its underlying intellectual property
  - Foreign access to the technology without prior agency approval

- What **IS NOT** considered a transfer of technology under the article?
  - Sale of products or components
  - Licenses of software or documentation related to the sale of the products or components
  - Transfer to foreign subsidiaries of the awardee for purposes related to the agreement
  - Limited transfer to an approved source for conduct of research or a source of supply

The Sample Article

- The terms provide for a **pre- or post-award approval** by the Agreements Officer after consideration of performer's rationale

- If the agency were to withhold approval and the performer disagrees with the decision, the issue may revert to the disputes process in the agreement

- If the performer transfers the technology **without agency approval**:
  - All Government funds paid under the agreement would be returned to the agency
  - A technology license sufficient to accomplish the intent of the agreement would be given to the agency

- **DARPA's experience to date**
  - There have been many requests under the article
  - All but one have been granted
  - No one has ever transferred without approval

Example Scenarios

- U.S. Company
  - Manufactures in the U.S. only
  - Sells both in the U.S. and abroad

Example Scenarios

- U.S. Company
  - Manufactures abroad only
  - Sells both in U.S. and abroad

Example Scenarios

- U.S. Company
  - Manufactures in U.S. for domestic sales only
  - Manufactures abroad for foreign sales

Example Scenarios

- U.S. Company
  - Manufactures a component abroad
  - Inserts component into higher value product manufactured in the U.S.
  - Sells product in both the U.S. and abroad

Example Scenarios

- U.S. Company
  - Plans to build manufacturing plants in U.S. and abroad
  - Desires no foreign access restrictions

Acquisition of Property Under OT Agreements

Property in General

Definition

- The term "property" shall mean any tangible personal property other than property actually consumed during the execution of work under the OT
- Does not include intellectual property
- Generally does not include the prototype under 10 U.S.C. 4022 (formerly 10 U.S.C. 2371b)

Government Property in General

➢ Background statutes and decision

- Disposal provisions of Title II of the Federal Property and Administrative Services Act of 1949 (P.L. 81-152) will apply to both types of OTs
- Federal Grant and Cooperative Agreement Act of 1977 (P.L. 95-224, as amended) will apply to Research OTs
- Comptroller General Decision (51 Comp. Gen, 162, 165 (1971))
  - Officers of the Government have no authority to give away the money or property of the U.S.
  - Per the Federal Property and Administrative Services Act, through the disposal process, property may be donated to state and local governments, universities and non-profit entities

Property under OT Agreements

General Considerations

- Do not acquire property under OT unless specifically necessary
  - The Government is not required to take title to the property acquired or produced by the Performer
  - Focus on the deliverables
- The majority of the dollars should be used for scientific and engineering labor
- The appropriate consideration is whether known or future efforts will be fostered by the Government owning the property
- Once the Government takes title, or if the Government furnishes Government property to the team, then the Federal Property and Administrative Services Act applies
  - The traditional property identification, maintenance, and disposal procedures will be applicable

Property in OTs (continued)

- **Property Considerations**
  - If possible, acquire property outside of the OT Agreement unless the property is to be part of a deliverable military prototype
  - If the Government is funding the effort when the property is acquired, the Government will typically delay taking title until the end of the agreement
    - Contractor assumes risk of loss until delivery

- **Regardless of the type of OT**
  - Contractor retains title and responsibility until delivery or agreement end
  - Contractor retains responsibility for day-to-day maintenance of the property until delivery or agreement end
  - Contractor may use best commercial practices in their maintenance activities

Property as Resource Share

- If the Performing team provides physical property as in-kind resource sharing, the property will become a program asset, will need to be valued, and dispositioned upon completion of the Agreement.

- If property is acquired, try to do it outside the OT and allow for a portion of the investment in the form of in-kind usage/depreciation fee contributions

Review of Sample OT for Prototype Agreement

Conclusion

Lessons Learned

- The **primary goal** of OTs is to **attract nontraditional performers**
  - Awarding more quickly may be a side effect of using OTs, but it is not the main reason to use the authority

- In fact, **awarding OTs initially may not be faster**
  - Unless the awarding organization fully embraces the inherent flexibility and streamlines its award processes, there may not be much of a time savings
  - It may take some time for the Government team to get used to the new paradigm and learn how to negotiate terms and conditions
  - There is a learning curve with OTs

Lessons Learned

- To be truly efficient, the Government participants must work from the start as a team, including program, contracting, legal, and financial members

- **Marketing your solicitation may be the hardest part**
  - Publishing in SAM is not enough
  - It is important to get the solicitation to the nontraditional performers
  - The program office will be an important resource

- OTs are **not appropriate for all acquisitions** – at its heart, it is an R&D tool

- Fairness and transparency is paramount to success

Lessons Learned

- There are no templates or checklists, so use good business judgment
- With purposely little guidance, OT practice is ever evolving
- **The new follow-on production language is still in its infancy**
  - Expect some failures
  - Best practices are yet to come
  - It may not be appropriate or wise to do a follow-on in every situation
- With the renewed popularity of OTs, expect some oversight to follow, both internal and external
  - Don't be afraid of it – just make sure the decisions made are thoughtful and documented

Lesson Learned

- OTs have **inherent flexibility** but that will only be a benefit if the people using them are willing to embrace the flexibility
  - Senior management buy-in
  - Coordinated team of agreements officers, legal counsel, technology program staff
- **Educating industry is also key**
  - Traditional contractors may be resistant
  - Non-traditional contractors may not believe that the Government is willing to behave differently
- Utilizing **discretion and good business sense** can be a difficult cultural change
- We must change or we will continue to miss out on important opportunities

Look to https://acquisitioninnovation.darpa.mil for more information about OTs & other innovative acquisition methods

You're only limited by your imagination.