



OTHER

TRANSACTION

AUTHORITY

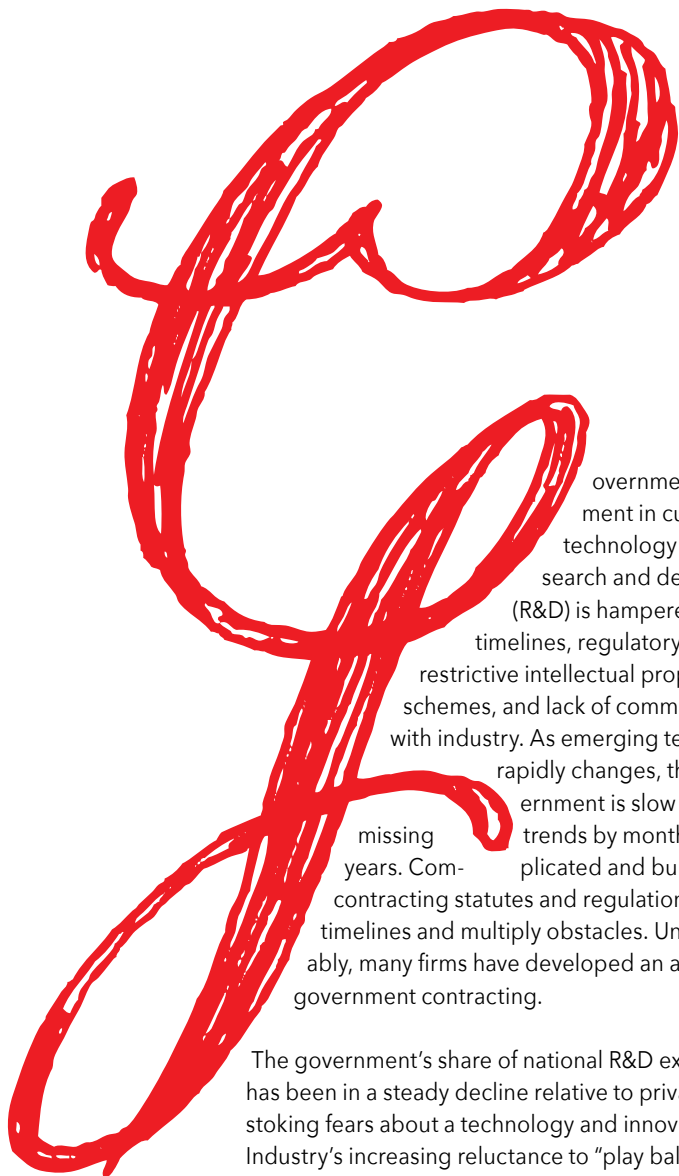
Acquiring Innovative Technology
and Research by Avoiding the
Regulatory Burden of Traditional
Government Contracting

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Government involvement in cutting-edge technology and research and development (R&D) is hampered by slow timelines, regulatory hurdles, restrictive intellectual property (IP) schemes, and lack of communication with industry. As emerging technology rapidly changes, the government is slow to react, missing trends by months if not years. Complicated and burdensome contracting statutes and regulations extend timelines and multiply obstacles. Understandably, many firms have developed an allergy to government contracting.

The government's share of national R&D expenditures has been in a steady decline relative to private industry, stoking fears about a technology and innovation gap. Industry's increasing reluctance to "play ball" within standard government procurement regulations is notable and measureable in the field of R&D, and the trend is not good for American technological superiority.

In 2013, only 27 percent of the \$469.3 billion total spent on R&D was attributed to government spending.¹ The government's share of R&D expenditures has gradually weakened over the past 50 years, rolling downhill from a mid-1960s peak of 67 percent.² With industry leaders in innovation like Apple and Google holding billions of dollars in cash on their balance sheets, the government R&D marketplace is even less enticing. Why look to the government if private industry already has the cash to spend on R&D?

Capitalizing on technological advances is critical to successfully executing the missions of many civilian and defense agencies. Within the Department of Defense (DoD), maintaining technological superiority is paramount to the overall science and technology (S&T) strategy. How can the DoD and government agencies shed this stereotype of being a slow-moving, inflexible bureaucracy? How can agencies become more agile and adaptive, thus attracting a more diverse pool of innovative R&D firms? Consider other transaction authority: a flexible option that comes with none of the regulatory baggage that scares off nontraditional contractors.

What is other transaction authority?

Other transaction authority (OTA) is not defined in the *Federal Acquisition Regulation (FAR)*. It's not defined in any other section of the Code of Federal Regulations. Nor is it defined anywhere in statute. As there is no formal definition, OTA is defined in the negative. To grasp the fundamentals of OTA, one must understand what OTA is not. OTA is anything but a traditional government contract, grant, or cooperative agreement. The purpose of OTA is to avoid the regulatory burden associated with orthodox government contracting. By shedding the shackles of traditional government contracting, OTA mimics the flexibility and freedom of contract available in the private sector.

Is OTA subject to the FAR?

No, OTA is not a FAR-based contract, nor does it fit into the FAR definition of a contract. The FAR applies to "all acquisitions as defined in Part 2 of the FAR."³ The familiar definitions section in FAR Part 2 does not include OTA, "other transactions," or "other transaction agreements." Furthermore, another section of the FAR explicitly excludes OTA ("other transactions") from the definition of "contract action."⁴ No luck in FAR Part 16, Types of Contracts, either—it does not mention anything about OTA.

What is the statutory authority for OTA?

OTA falls under the authority of 10 U.S.C. 2371. That statute initially provided the DoD with the authority to enter into OTA agreements.

What is OTA specifically used for—what can be acquired?

OTA allows the government to acquire "basic, applied, and advanced research projects."⁵

Can OTA be used for anything other than R&D?

Yes, in some cases, OTA can be used to acquire prototypes. The OTA statute was supplemented by section 845 of Public Law 103-160,⁶ which allowed the DoD to acquire prototype projects directly relevant to DoD weapons systems. This is the origin of the term "section 845 prototype projects." Because the *Public Law* providing initial authorization for DoD OTA agreements for prototype projects was found in section 845, the casual terms "section 845," "section 845 projects," or "section 845 prototype projects" were a natural fit. This prototype authority has since been permanently codified at 10 U.S.C. 2371b. The authority for prototype projects was also expanded beyond direct relevancy to weapons systems to include anything to enhance the mission effectiveness of military personnel and supporting platforms, systems, components, or materials, and any improvements thereof.⁷

If OTA cannot be used to create a "contract," "grant," or "cooperative agreement," what is the vehicle that OTA creates called?

OTA allows the government to enter into "agreements" with the private sector. To avoid confusion with traditional government contracts, it's best to call the vehicles "OTA agreements" or "other

transaction agreements." The OTA agreement must be carefully distinguished from orthodox contracts, grants, and cooperative agreements. As always, contracting professionals must strive to use precise terminology to avoid misinterpretation.⁸

Those who perform traditional government contracts are called contractors. Those who perform government grants are often called grantees. What should those who perform OTA agreements be called?

It would be misleading to call them contractors or grantees, as these terms imply the procedures and authorities that OTA inherently avoids. Firms or entities that perform R&D or develop prototypes under OTA agreements should be referred to as OTA entities or OTA firms.

Contracting officers sign traditional government contracts. Grant officers sign grants. What should the government official who signs the OTA agreement on behalf of the government be called?

The OTA agreement officer—the government official with the authority to sign an OTA agreement on behalf of the government—is not a contracting or grant officer. Their authority and therefore name should be linked to OTA agreements.

What is the reason for using OTA?

The government needs cutting-edge R&D and prototypes from industry, but sometimes industry does not want to deal with government procurement statutes and regulations. This often precludes government involvement in advanced technology and R&D. OTA closes the gap by giving agencies the flexibility to create agreements not subject to the stifling procurement statutes and regulations. This, in turn, attracts entities that are nontraditional contractors or otherwise reluctant to participate in government contracting.

What is a nontraditional contractor?

Essentially, nontraditional contractors are entities that do not do business with the government. DoD defines *nontraditional defense contractor* as a firm which has not—for at least one year prior to the solicitation of sources for the OTA agreement—entered into or performed on any contract or subcontract subject to full cost accounting standards (CAS).⁹

What are some examples of statutes and regulations that do not apply to OTA agreements?

The Competition in Contracting Act (CICA) and Contract Disputes Act are two statutes that apply to government procurement, but not to OTA agreements. These statutes and others form the foundation of the FAR, the primary regulatory source for government procurement. As previously mentioned, the FAR does not apply to OTA agreements. Therefore, the data rights, patents, and IP clauses of the FAR, DFARS, and other agency supplements—which industry often complains about and studiously avoids—do not apply to OTA agreements.

Are OTA agreements subject to bid protests to the Government Accountability Office?

No, the Government Accountability Office (GAO) does not have bid protest authority for OTA agreements because OTA agreements are not considered to be procurement.¹⁰

Is there any GAO bid protest risk at all with using OTA?

The only possible GAO bid protest risk concerns the improper use of OTA. The GAO will review "a timely protest that an agency is improperly using...[a] non-procurement instrument...where a procurement contract is required."¹¹ This risk materializes only if the agency is "attempting to avoid the requirements of procurement statutes and regulations."¹² Therefore, as long as the government is properly using OTA, there is no GAO bid protest risk.

Are OTA agreements subject to cost accounting standards?

No, this is a major benefit of using OTA. In traditional procurement contracts, cost-reimbursement contracts (or "cost-type" contracts) are generally subject to the heavy administrative, accounting, and oversight burdens of cost accounting standards (CAS). CAS involves different accounting standards than traditionally used by industry. This is a major reason many companies avoid government contracts and CAS-covered contracts specifically. OTA agreements avoid the risks and headaches of CAS coverage, enticing nontraditional contractors.

Other than the DoD, what other government agencies can use OTA agreements?

Only DoD and the Department of Homeland Security have the authority to use OTA agreements for prototype projects. However, other civilian agencies such as the National Aeronautics and Space Administration, Federal Aviation Administration, Department of Transportation, and Department of Energy can use OTA agreements for R&D.¹³

What are the distinct advantages of using OTA agreements, according to the government?

Avoidance of CAS and mandatory IP and data rights provisions of the FAR are two specific hurdles that OTA agreements avoid, and that can therefore attract nontraditional contractors, according to government officials interviewed by the GAO.¹⁴

How many OTA agreements occur each year?

In fiscal year 2014, there were more than 4,000 active OTA agreements across eleven government agencies.¹⁵ The DoD had between 69 and 88 active OTA agreements in each fiscal year from 2010 to 2014. National Aeronautics and Space Administration (NASA) accounted for a majority of OTA agreements during the same time frame, having between 2,217 and 3,223 active agreements.¹⁶

How does OTA relate to other streamlined acquisition procedures or rapid-insertion R&D programs?

OTA is certainly its own breed of animal, to be distinguished from other types of government contracts subject to the FAR. But OTA can also be viewed as another link in the larger chain of integrating R&D into government programs, much like the Small Business

Innovation Research (SBIR) program. SBIR is a special program that pairs promising technologies and R&D offered by small businesses with federal agencies. First developed in 1982 under the Small Business Innovation Development Act, SBIR is specifically designed to increase participation of innovative small businesses in government R&D programs.¹⁷ While SBIR contracting authority derives from its own statute,¹⁸ much of the FAR and other traditional contracting regulations still apply.

What does industry think about the use of OTA?

Predictably, many in industry would leap at the chance to win lucrative government contracts, without the baggage of excessive contracting regulations. This is one of the primary advantages of OTA—attracting R&D and high-technology firms that are otherwise averse to government

contracts. Alex Martinez, CEO of ByteCubed, believes that OTA represents tremendous untapped potential for integrating innovation and R&D into government programs: "There is significant demand for streamlined R&D procedures in government contracts. ByteCubed helped streamline the DoD SBIR solicitation process and launched a program that guides R&D firms through confusing bureaucracy to achieve the ultimate goal—commercialization of their innovative technology."¹⁹

Yet, as mentioned previously, even the SBIR program—streamlined as it may be—can present some of the same regulatory challenges found in other government contracts, (e.g. CAS coverage for accounting or the requirement to provide certified cost and pricing data). Furthermore, while SBIR works on a faster timeline than

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some other government contracts, SBIR can still seem sluggish compared to contractual arrangements made between private sector firms. On the topic of contracting delays, Martinez adds, "That's where a game-changer like OTA makes a huge impact. Speed is often the biggest hurdle, and the accelerated timelines of OTA can attract valuable firms that wouldn't otherwise consider government contracts."²⁰

Is OTA "on-trend" with recent DoD initiatives for faster integration of cutting-edge technology?

The DoD has made a recent push for more innovation to provide superior technology for United States military forces. Recognizing that some of the best innovators steer clear of government contracts, the DoD has turned its gaze toward regions considered to be hotspots for high technology, but not necessarily engaged in government contracting. For example, the DoD's Defense Innovation Unit Experimental (DIUx) established outposts in both Silicon Valley in California and Boston, Massachusetts. DIUx's mission is to be a "bridge between those in the U.S. military executing on some of our nation's toughest security challenges and companies operating at the cutting edge of technology."²¹ Hoping to entice the best science and technology talent, DIUx's Defense Innovation Advisory Board boasts high-profile names like Amazon.com founder Jeff Bezos and popular science advocate Neil deGrasse Tyson.²²

OTA Agreements: Untapped Potential for Innovation, Science, and Technology

As the science and technology marketplace continues to shift toward innovation fueled by private industry, the government must fight to attract cutting-edge research, development, and technology. OTA removes the rigidity associated with traditional methods of government procurement, and allows for increased participation by small businesses, new technology start-ups, nontraditional contractors, and Silicon Valley firms. As contracting professionals gain a greater understanding of the strengths and risks of OTA, they will be better equipped to use this special tool for acquiring innovative research, development, science, and technology; and will play an integral role in ensuring American technological superiority for years to come. **CM**

ENDNOTES

1. See <https://www.aas.org/page/historical-rd-data>.
2. *Ibid.*
3. FAR 1.104.
4. FAR 4.601 defines *contract action* and states, in part, "Contract action does not include grants, cooperative agreements, other transactions, real property leases, requisitions from Federal stock, training authorizations, or other non-FAR based transactions."
5. 10 U.S.C. 2371.
6. See also "National Defense Authorization Act for Fiscal Year 1994."
7. 10 U.S.C. 2371b(a)(1).
8. See Christoph Mlinarchik, "Sticks and Stones: How Words and Terms of Art Can Hurt the Contracting Profession," *Contract Management Magazine* (January 2016).
9. See 10 U.S.C. 2302(9).
10. See *Exploration Partners LLC*, B-298804 (December 19, 2006).
11. *Ibid.*
12. *Ibid.*
13. See "Use of 'Other Transaction' Agreements Limited and Mostly for Research and Development Activities," GAO-16-209 (January 2016).
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. See <https://www.sbir.gov/about>.
18. See 15 U.S.C. 638.
19. Alex Martinez (chief executive officer, ByteCubed LLC), personal communication (August 2016).
20. *Ibid.*
21. See <https://www.diu.xmil>.
22. See <https://www.washingtonpost.com/news/checkpoint/wp/2016/07/26/increasingly-eclectic-pentagon-innovation-board-adds-neil-degrasse-tyson-jeff-bezos/> and <http://www.defensenews.com/story/defense/policy-budget/policy/2016/07/26/carter-defense-innovation-advisory-new-board-members/87570876/>.



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Events Calendar



December 11 • Washington, DC

December 11, 2016

Washington Marriott Wardman Park
Washington, DC





December 12-13, 2016

Washington Marriott Wardman Park
Washington, DC





March 30-31, 2017

Hyatt Regency
Dulles, VA





July 23-26, 2017

Navy Pier
Chicago, IL



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