

Another Option in a Tightening Budget: A Primer on Department of Defense "Other Transactions" Agreements

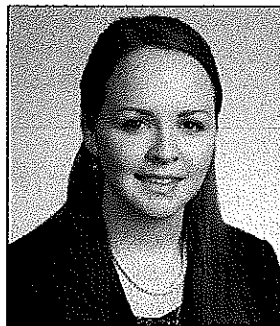
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The US Department of Defense (DoD) has a significant interest in incentivizing companies to conduct research and development (R&D) of new technologies for the protection of United States interests in an increasingly volatile environment. DoD is faced with heightened threats to national security, the realities of a shrinking defense budget, and the resulting cost cutting that defense contractors are implementing, including reductions in R&D. Despite the government's desire to access the commercial sector's cutting-edge technology, many commercial companies remain hesitant to enter the federal market because of what they perceive as rigid and significant compliance obligations and the potential adverse impacts on intellectual property rights for any R&D work performed with government funds. One approach that DoD has taken to overcome some of these challenges is its use of other transaction (OT) agreements.

Because the Federal Acquisition Regulation (FAR) and many procurement-related statutes do not apply to OT agreements, these agreements provide an opportunity for more flexible terms and conditions not easily achieved in traditional procurement contracts. This is especially appealing to commercial companies that are often discouraged by the numerous rules and regulations that contractors face when they work with or for the US government. Understanding what rules do and do not apply, however, requires a careful analysis of the type of agreement being used and the particular regulations that apply.

This article addresses the purpose and authority for

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OT agreements within DoD, highlights some of the unique attributes of these types of agreements, and discusses the potential advantages they offer both established and new entrants to the federal market.

The Origin of OT Agreements

An OT agreement is a unique vehicle that certain federal agencies can use to obtain or advance R&D

and/or prototypes. Only those agencies that have been provided OT authority may engage in "other transactions." Congress first granted OT authority to the National Aeronautics and Space Administration (NASA) in the late 1950s when it passed the National Aeronautics and Space Act of 1958 (Space Act).² Under the Space Act, NASA was authorized to:

enter into and perform such contracts, leases, or *other transactions* as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution.³

Nowhere in the statute or the implementing regulations is there a definition of "other transactions."

DoD first obtained OT authority in 1989 when Congress enacted legislation to provide the Defense Advanced Research Projects Agency (DARPA) with temporary authority to enter into cooperative agreements and "other transactions" for research work.⁴ Section 251 of the National Defense Authorization Act for Fiscal Year 1990 and Fiscal Year 1991 authorized DARPA to carry out "advanced research projects" and to "enter into cooperative agreements and *other transactions* with any person, any agency or instrumentality of the United States, any unit of State or local government, any educational institution, and any other entity."⁵ As with the Space Act, however, the National Defense Authorization Act contained no definition of "other transactions," other than specifying that OT agreements are

not contracts, grants, or cooperative agreements.⁶

These transactions now take the form of technology investment agreements (TIAs). DoD will use a TIA when it wants to encourage the development of new technologies for future defense needs with entities that might not otherwise work with the DoD.

TIAs therefore are designed to reduce barriers to commercial firms' participation in defense research, to give the [DoD] access to the broadest possible technology and industrial base; promote new relationships among performers in both the defense and commercial sectors of that technology and industrial base; and stimulate performers to develop, use, and disseminate improved practices.⁷

Congress authorized a second type of OT agreement for DARPA in 1993, under the notes to section 845 of the National Defense Authorization Act for Fiscal Year 1994.⁸ This second type of agreement was intended for prototype projects related to DoD's acquisition of weapons or weapon systems.⁹ In 1994, Congress extended the authority for both types of OT agreements beyond DARPA to the military services and other defense agencies for "carrying out basic, applied, and advanced research projects."¹⁰

Eventually, Congress extended this OT authority to a number of other executive agencies including the Federal Aviation Administration, Department of Transportation, Transportation Security Administration, Department of Homeland Security, Department of Health and Human Services, National Institutes of Health, and the Department of Energy.¹¹ This article, however, will focus solely on DoD's exercise of OT authority, including the requirements, advantages, and disadvantages of TIAs and OT prototype agreements.

Other Transaction Agreements Not Subject to Key Regulations

Important to the analysis of OT agreements is an understanding of what an OT agreement is *not*. An OT agreement is not a procurement contract, grant, or cooperative agreement.¹² One of the primary advantages of OT agreements is that they are not subject to the FAR¹³ or many procurement statutes that govern traditional federal procurements. This affords the government more leeway in negotiating with companies, thereby opening up potential opportunities for shared research between the government and the commercial sector. The determination of whether a particular statute applies, however, requires a careful analysis of the specific terms of each statute. Only a limited number of these issues have been resolved by the courts or administrative agencies, thereby increasing the need for appropriate legal counsel before executing one of these agreements.

Three key areas that present difficult challenges to commercial companies seeking to enter the federal market are: (1) competition requirements and bid protests,

(2) cost-based requirements, and (3) the allocation of intellectual property rights. As illustrated below, there are strong arguments that many of the procurement statutes that govern these three key areas do not apply to OT agreements. These types of arguments can be applied across many of the procurement statutes that impact federal procurement. Before executing an OT agreement, participants should conduct an analysis similar to that set forth below as to all the procurement-related requirements that may impact a particular agreement.

The Competition in Contracting Act. The Competition in Contracting Act of 1984 (CICA),¹⁴ revised the FAR to increase competition for the award of procurement contracts and to allow for protests of those awards. The Government Accountability Office (GAO) derives its authority to review awards and solicitations of contracts from CICA.¹⁵ One of the most attractive features of the GAO as a protest forum is the automatic stay provision that usually results from a timely protest.¹⁶ By contrast, one of the more useful characteristics of an OT agreement is that the award of these agreements generally is not subject to GAO review.

In reviewing whether it had jurisdiction to review the award of an "other transaction" or a Space Act agreement, the GAO noted that in its grant of authority to NASA, Congress plainly distinguished between contracts and "other transactions."¹⁷ The GAO found that "other transactions" were not procurement contracts and concluded that NASA's "issuance of these Space Act agreements pursuant to its 'other transactions authority' is not tantamount to the award of contracts for the procurement of goods and services."¹⁸ GAO has made similar findings as to a DARPA technology investment agreement.¹⁹ Thus, once it identifies a potential contractor, it appears that the government can execute an OT agreement without fear of a GAO protest.²⁰

Cost Accounting Standards/Cost Principles/Truth in Negotiations Act. Because OT agreements are not procurement contracts, neither the cost principles in FAR Part 31,²¹ nor the Cost Accounting Standards²² are required in OT agreements. The implementing regulations for TIAs explicitly recognize that if a for-profit entity executing a cost reimbursable TIA has "existing systems for identifying allowable costs under those [FAR Part 31 cost] principles," then the government may require the entity executing the TIA to apply those standards to the agreement.²³ But, the regulations allow the government to grant an exception "[i]f there are programmatic or business reasons to do otherwise."²⁴ If the entity receiving the TIA has no existing cost systems in place, the regulations specify minimal requirements that the agency should impose on the awardee/recipient such as limiting costs to those that a "reasonable and prudent person would incur in carrying out the research project" and those that are "consistent with the purposes stated in the governing Congressional authorizations and appropriations."²⁵ Similar statements appear in DoD's



Other Transactions (OT) Guide For Prototype Projects (OT Prototype Guide), which provides as follows:

'Other Transactions' for Prototype Projects are instruments that are generally not subject to the federal laws and regulations governing procurement contracts. As such, they are not required to comply with the Federal Acquisition Regulation (FAR), its supplements, or laws that are limited in applicability to procurement contracts, such as the Truth in Negotiations Act and Cost Accounting Standards (CAS).²⁶

Similarly, the Truth in Negotiations Act (TINA) requires contractors to submit cost or pricing data and certify their accuracy, completeness, and currency for the award of a procurement contract over a specified threshold, currently at \$700,000.²⁷ For purposes of TINA, a procurement is defined as "the process of acquiring property or services²⁸ that does not encompass a TIA or OT prototype agreement."²⁹ That being said, and as discussed in more detail below, the government will still include some requirements for tracking and auditing costs within any OT agreement and the recipients of those agreements must be prepared to address whatever standards are negotiated.

Intellectual Property Rights—Bayh-Dole Act and Data Rights Provisions. Prior to 1980, the government generally retained title to any inventions created under federal research grants and contracts. In 1980, Congress passed the Bayh-Dole Act, which created a uniform patent policy for inventions resulting from federally sponsored research and development agreements.³⁰ The Act was initially applicable to small businesses, universities, and other nonprofit organizations and gave them the right to retain title to and profit from their inventions if they met certain requirements.³¹ The government retained a nonexclusive, nontransferable, irrevocable, paid-up (royalty-free) license to use the invention. On February 18, 1983, President Ronald Reagan issued a presidential memorandum that extended the patent policy of Bayh-Dole to any invention made in the performance of federally funded research and development contracts, grants, and cooperative agreements to the extent permitted by law.³² On April 10, 1987, President Reagan issued Executive Order 12591, which directed federal agencies to extend the Bayh-Dole policies to "all businesses."³³

As discussed in more detail below, the government retains flexibility in OT agreements to negotiate rights in inventions that may deviate from the requirements of Bayh-Dole.³⁴ In addition, because OT agreements are not contracts, the data rights provisions that appear in Part 27 of the FAR and Part 227 of the DFARs also do not apply.³⁵ This flexibility is reflected in the regulations implementing TIAs³⁶ and in the OT Prototype Guide.³⁷

Other Statutes and Requirements. The three areas noted above are just a subset of the analysis that participants need to undertake when presented with one of these OT opportunities. For example, one issue that remains unresolved is the application of socioeconomic policies to these types of agreements. In the area of equal

opportunity, Title VI of the Civil Rights Act, applicable to any federal program,³⁸ would apply. In contrast, on its face, Executive Order 11246,³⁹ requires federal "contractors" and "subcontractors" to comply with various affirmative action and equal employment opportunity obligations, depending on the amount of federal contracts or subcontracts they enter into each year. Despite the executive order's references to contractors and subcontractors,

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the Office of Federal Contract Compliance Programs (OFCCP) has taken very aggressive positions as to the applicability of the executive order to entities that have claimed that they are not government subcontractors.⁴⁰

Thus, although these agreements offer added flexibility, with such flexibility comes some uncertainty. Consequently, participants in these agreements should seek legal advice to fully understand the risks and rewards of participating in such an agreement.

Purpose, Authority, and Requirements for Prototype Projects

Purpose. DoD uses prototype projects—not surprisingly—to develop physical or virtual models used to evaluate the technical or manufacturing feasibility or military utility of a particular technology or process, concept, end item, or system.⁴¹ The quantity that the government can develop should be limited to the number the government needs to establish technical or manufacturing feasibility or to evaluate military utility.⁴² In addition, the government's use of "Low Rate Initial Production" is not authorized under prototype authority.⁴³

The purpose of a prototype project is to allow the DoD to tap into the research and development of "nontraditional defense contractors" or, on a cost-sharing basis, of traditional contractors, to pursue commercial solutions directly relevant to weapons or weapons systems.⁴⁴ A nontraditional defense contractor is a business unit that has not, for a period of at least one year prior to the date of the agreement, entered into or performed on (1) any procurement contract subject to the cost accounting standards under 41

IP rights



U.S.C. § 422, or (2) any other procurement contract in excess of \$500,000.⁴⁵ Nontraditional defense contractors can be at the prime level, team members, subcontractors, lower-tier vendors, or intracompany business units, so long as the contractor makes a "significant contribution" to the project.⁴⁶ DoD also can justify a prototype project on exceptional circumstances when no nontraditional defense contractors are participating.⁴⁷

Authority. DoD may exercise OT prototype authority only if (1) there is at least one nontraditional defense contractor participating to a significant extent in the prototype project, (2) parties to the transaction other than the federal government pay for at least one-third of the total cost of the prototype project, or (3) the senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of an OT agreement.⁴⁸ The expected cost of a prototype project should generally be between \$20 million and \$100 million absent certain conditions.⁴⁹

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for its direct benefit but the agreements are not procurement contracts subject to the FAR.⁵⁰ Prototype projects could include prototypes of weapon systems, subsystems, components, or technology.⁵¹ Research, development, test, and evaluation (RDT&E) appropriations will generally be appropriate for OT prototype projects.⁵²

Patent Rights. The *OT Prototype Guide* clarifies that the requirements of the Bayh-Dole Act do not apply to prototype projects. Though the agreements officer is encouraged to seek intellectual property rights consistent with the Bayh-Dole Act for patents, and 10 U.S.C. §§ 2320, 2321 for technical data, the agreements officer has the authority to "negotiate rights of a different scope

when necessary to accomplish program objectives and foster Government interests."⁵³

In determining what represents a reasonable arrangement under the circumstances, the agreements officer will consider the government's needs for patents and patent rights to use the developed technology, or any other intellectual property rights needed if the agreement provides for trade secret protection instead of patent protection.⁵⁴ Pursuant to the *OT Prototype Guide*, the agreements officer should address the following issues in the intellectual property provisions of the agreement:

- First, the agreements officer should consider defining the "subject invention" to include those inventions conceived or first actually reduced to practice under the agreement.⁵⁵
- Second, the agreements officer should consider allowing the participant to retain ownership of the subject invention while reserving for the government a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.⁵⁶
- Third, the agreement also should address the government's rights in background inventions that are incorporated into the prototype design.⁵⁷
- Fourth, the agreements officer should consider negotiating government march-in rights to encourage further commercialization of the technology. While the march-in rights outlined in the Bayh-Dole Act may be modified to best meet the needs of the program, the *OT Prototype Guide* counsels that the agreements officer should remove march-in rights entirely only in rare circumstances.⁵⁸
- Fifth, the agreements officer may consider changing the timing of submissions of the disclosures, elections of title, and patent applications.⁵⁹
- Sixth, the agreement may allow subject inventions to remain trade secrets so long as the government's interest in the continued use of the technology is protected. As part of his evaluation, the *OT Prototype Guide* directs the agreements officer to consider whether (1) allowing the technology to remain a trade secret creates an unacceptable risk of a third party patenting the same technology, (2) the government has retained the right to utilize this technology with third parties, and (3) there are available means to mitigate the risks of a third party patenting the same technology outside of requiring patent protection.⁶⁰
- And finally, the agreements officer should consider whether it is appropriate to include clauses that address authorization and consent, indemnity and notice, and assistance.⁶¹

Because the *OT Prototype Guide* is guidance rather than a regulatory or statutory requirement, DoD retains flexibility to negotiate appropriate IP provisions that reflect the unique needs of a particular transaction.

Data Rights. Regarding allocation of data rights, the *OT Prototype Guide* requires prototype agreements to address explicitly the government's rights to use, modify, reproduce, release, and disclose the relevant technical data and computer software. The government is encouraged to obtain rights in all technical data and computer software developed under the agreement, regardless of whether it is delivered, as well as rights in all delivered technical data and computer software, regardless of whether or not it was developed under the agreement.⁶² But the government retains the flexibility to negotiate broader or narrower rights.

If the participant is required to deliver software or technical data, the agreement should address the delivery medium, and for computer software, whether that includes both executable and source code.⁶³ The agreement also should account for certain emergency or special circumstances in which the government may need additional rights, such as the need to disclose technical data or computer software for emergency repair or overhaul.⁶⁴ In addition, the agreement should address commercial technical data and software incorporated into the prototype. The government generally does not require rights that are as extensive for commercial technical data and software.⁶⁵

Cost-Sharing Requirements and Evaluation. One of the benefits of allowing a "nontraditional defense contractor" to make a "significant contribution" to the prototype project is that the government will not require cost sharing. However, unless a nontraditional defense contractor is participating to a significant extent in the prototype project, at least one-third of the total cost of the prototype project must be borne by parties to the transaction other than the US government.⁶⁶ Cost sharing generally consists of labor, materials, equipment, and/or facilities costs (including allocable indirect costs).⁶⁷

In a cost-sharing situation, the costs that the awardee contributes cannot include costs that the awardee incurred before the date on which the agreement becomes effective.⁶⁸ Costs that the awardee incurs after the beginning of negotiations but prior to the effective date of the agreement may satisfy the cost-sharing obligations if (1) the awardee or subordinate element incurred the costs in anticipation of entering into the agreement, and (2) it was appropriate for the awardee or subordinate element to incur the costs before the agreement became effective to ensure the successful implementation of the agreement. The agreements officer must make this determination in writing.⁶⁹

Awardees that have cost-based procurement contracts may treat their cost share as a direct effort or as R&D. R&D is acceptable as cost sharing, even though it may be reimbursed by the government through other awards.⁷⁰ However, in determining the amount of cost sharing, the agreement should not count, as part of the awardee's cost share, the cost of government-funded research, prior R&D, or indirect costs that are not allocable to the OT.⁷¹

Any part of the cost share that includes an amount

for a fully depreciated asset should be limited to a reasonable usage charge based on: (1) the original cost of the asset; (2) total estimated remaining useful life at the time of negotiations; (3) the effect of any increased maintenance charges or decreased efficiency due to age; and (4) the amount of depreciation previously charged to procurement contracts and subcontracts.⁷²

Payment Structure, Method, and Fee/Profit Allowances. So long as the OT prototype agreement clearly identifies the basis and procedures for payment, there is no explicit methodology that the awardee must use.⁷³ The following factors should be considered when drafting agreement payment clauses: (1) whether the payments are based on amounts generated from the awardee's financial or cost records; (2) whether the payment amounts are subject to adjustment during the period of performance; (3) what the basis and process are for adjustment, if adjustment is allowed; (4) what the conditions and procedures are for final payment and closeout; and (5) whether an interim or final audit of costs is needed.⁷⁴

There is also no one proscribed uniform clause or set of procedures for "payable milestones." Rather, payable milestone procedures vary, depending on the inherent nature of the agreement.⁷⁵ Basing payment on fixed payable milestones is the preferred payment method.⁷⁶ However, adjustable payable milestones may be used where the agreement provides for payment adjustments based on amounts generated from the awardee's financial or cost records. In these situations, the agreement must address the procedures for adjusting the payable milestones.⁷⁷

The *OT Prototype Guide* discourages the government from making advance payments to the OT awardee. If advance payments are authorized, the payments must be placed in an interest bearing account maintained by the OT awardee (unless certain exceptions apply), with interest to be remitted annually to the agreements officer.⁷⁸ Generally the government's payments or financing should be representative of its cost share as the work progresses, rather than front-loading government contributions.⁷⁹

When the agreement provides for interim reimbursement based on amounts generated from the awardee's financial or cost records, any indirect rates used for the purpose of that interim reimbursement should be no higher than the awardee's provisionally approved indirect rates, when such rates are available.⁸⁰

In general, profit or fee is permitted for awardees of OT agreements for prototype projects except for projects that are cost-shared.⁸¹

Audit and Financial Reporting Requirements. Auditing requirements apply only when an agreement (1) uses amounts generated from the awardee's financial or cost records as the basis for payments (e.g., interim or actual cost reimbursement, including payable milestones that provide for adjustment based on amounts generated from the awardee's financial or cost records); or (2) requires at least one-third of the total costs to be provided by non-federal parties pursuant to statute.⁸² Generally,

audits of agreements will be performed only when the agreements officer determines it is necessary to verify awardee compliance with the terms of the agreement.⁸³

The agreements officer should coordinate with the auditor regarding the nature of the audit. The agreements officer may request a traditional audit, wherein the auditor determines the scope of the review. The agreements officer may also request a review of specific cost elements. Though the auditor also determines the scope of these reviews, the reviews are limited to those cost elements specified by the agreements officer.⁸⁴

A prototype project agreement for all government funding or statutorily required cost share should include a provision allowing "direct and full access" to sufficient records for auditors, generally for a period of three years after final payment.⁸⁵ Additionally, when the prototype project agreement uses amounts generated from the awardee's financial or cost records as the basis for payment, the agreement should require that (1) adequate records be maintained to account for federal funds received and cost sharing, if any;⁸⁶ and (2) require financial reporting that provides appropriate transparency for expenditures of government funds and expenditures of private sector funds. These projects must also provide appropriate audit access.⁸⁷

The awardee is responsible for managing and monitoring each prototype project and all participants, and the solicitation and resulting agreement should identify the frequency and type of performance reports "necessary to support effective management."⁸⁸ Effective performance reporting should address cost, schedule, and technical progress. It should also compare the work accomplished to the work planned and the actual cost and explains any variances.⁸⁹

Foreign Access and Domestic Manufacturing Requirements. Export restrictions prohibit prototype project awardees from disclosing or licensing certain technology to foreign firms.⁹⁰ The *OT Guide* directs DoD to consider restricting awardees from licensing technology developed under the agreement to domestic or foreign firms under circumstances that would hinder potential domestic manufacture or use of the technology.⁹¹

TIA Agreements

Purpose. The ultimate goal for using TIAs, like other assistance instruments used in defense research programs, is to foster the best technologies for future defense needs by stimulating or supporting research. TIAs differ from other assistance instruments in that TIAs address the goal by fostering civil-military integration.⁹² TIAs therefore are designed to (1) reduce barriers to commercial firms' participation in defense research, to give DoD access to the broadest possible technology and industrial base; and (2) promote new relationships among performers in both the defense and commercial sectors of that technology and industrial base; and (3) stimulate performers to develop, use, and disseminate

improved practices.⁹³ A TIA may be either a kind of cooperative agreement or an "other transaction."⁹⁴ This article addresses the OT type of TIAs.⁹⁵

TIAs require a greater level of involvement of the government program official in the execution of the research than the typical oversight of a research grant or procurement contract. Program officials participate in periodic reviews of research progress and are involved with the recipients in the resulting revisions of plans for future efforts.⁹⁶

Authority. An agency may award or administer a TIA if it has a delegation of authority under 10 U.S.C. § 2371. The agency must be able to support or simulate research, recover funds from recipients and reuse the funds if necessary, and exempt certain information from the Freedom of Information Act (FOIA).⁹⁷

Patent Rights. When using a TIA, the DoD has the option of utilizing patent rights provisions that are less restrictive than the Bayh-Dole Act.⁹⁸ DoD regulations suggest that the government should try to obtain, when an invention is conceived or first actually reduced to practice under a TIA, a nonexclusive, nontransferable, irrevocable, paid-up license to practice the invention, or to have it practiced, for or on behalf of the United States throughout the world. The license is for governmental purposes, and does not include the right to practice the invention for commercial purposes.⁹⁹

DoD components should negotiate a reasonable arrangement "considering the circumstances," which include past investments, contributions under the current TIA, and potential commercial markets.¹⁰⁰ With regard to past investments, the DoD component should evaluate whether the government or recipient has contributed more to the prior research and development that provides the foundation for the planned effort. Under the regulations, if the predominant past contributor has been the government, then the TIA's patent rights provision should be at or close to the standard Bayh-Dole provision. If the recipient has been the more predominant contributor, then a less restrictive patent provision may be appropriate.¹⁰¹

DoD regulations provide the following guidance as to the scope of the intellectual property terms and conditions in the TIA:

- obtaining a nonexclusive license at the time of award is valuable if the government later requires access to inventions to enable development of defense-unique products or processes that the commercial marketplace is not addressing;¹⁰²
- permitting flexible timing as to when the recipient must (1) notify the government of an invention, from the time the inventor discloses it within the for-profit firm, (2) inform the government whether it intends to take title to the invention, and (3) commercialize the invention, before the government license rights in the invention become effective;¹⁰³
- including the Bayh-Dole march-in rights clause or an equivalent clause, concerning actions that the government may take to obtain the right to use

subject inventions if the recipient fails to take effective steps to achieve practical application of the subject inventions within a reasonable time.¹⁰⁴

Data Rights. DoD regulations state that the DoD component typically should seek an irrevocable, worldwide license for it to use, modify, reproduce, release, or disclose for governmental purposes the data that are generated under TIAs (including any data, such as computer software, in which a recipient may obtain a copyright).¹⁰⁵ However, DoD may negotiate licenses of different scope "when necessary to accomplish program objectives or to protect the Government's interests."¹⁰⁶ This provision gives awardees an opportunity to develop specially negotiated rates. Awardees may see aggressive positions from some contracting officers as to background IP that the awardee brings to the contract because the regulations guide DoD components to consider the rights in background data that are necessary to fully utilize technology that is expected to result from the TIA. This is especially true in the event the recipient does not commercialize the technology or chooses to protect any invention as a trade secret rather than by a patent.¹⁰⁷

Cost Sharing Requirements and Evaluation. Per 10 U.S.C. § 2371, to the maximum extent practicable, all non-federal parties must provide at least half of the costs of the project from non-federal resources unless there is specific authority to use other federal resources.¹⁰⁸ The DoD component must determine that the recipient's cost-sharing contributions meet the criteria for cost sharing and determine values for them. In doing so, it must (1) ensure that there are affirmative statements from any third parties identified as sources of cash contributions; and (2) determine that the recipient's cost-sharing contribution, as a percentage of the total budget, is reasonable.¹⁰⁹

When evaluating cost sharing, the DoD component may accept any cash or in-kind contributions that (1) demonstrate the recipient's commitment to the success of the research project; (2) are necessary and reasonable for accomplishment of the research project's objectives; (3) are verifiable from the recipient's records; and (4) are not included as cost-sharing contributions for any other federal award.¹¹⁰ The DoD component will rarely accept cost-sharing contributions of real property,¹¹¹ cannot accept prior research as cost sharing,¹¹² and usually will not accept intellectual property as cost sharing.¹¹³

Payment Structure, Method, and Fee/Profit Allowances. Two different payment structures may be utilized under a TIA. First, a TIA's payment structure may be expenditure-based, where the amount of interim payments or the total amount ultimately paid to the recipient is based on the amount expended.¹¹⁴ If a recipient completes the project specified at the time of award before expending all federal funding and recipient cost sharing, the federal government may recover its share of the unexpended funds. This method *must* be used if (1) there is a non-waivable statutory requirement for a specific amount or percentage of cost sharing; or (2) the TIA otherwise

requires a specific or percentage of cost sharing.¹¹⁵

Second, a TIA payment structure may be fixed-support, where the amount of assistance established at the time of the award is not meant to be adjusted later as long as the research project is carried to completion.¹¹⁶ This method *may* be used if (1) the agreement is to support or stimulate research with well-defined, observable, and verifiable outcomes; (2) the amount of resources required to achieve the outcome can be reasonably estimated; and (3) the TIA does not require a specific amount or percentage of recipient cost spending.¹¹⁷

The regulations permit two payment methods under a TIA. First, the TIA may have a reimbursement payment method, where the recipient requests reimbursement for costs incurred during a certain time period.¹¹⁸ The TIA must allow recipients to submit requests for payment at least monthly.¹¹⁹ Second, the TIA may have

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an advance payment method, where the recipient receives payment based upon projections of the recipient's cash needs. This payment method should only be used in exceptional circumstances when certain conditions are met.¹²⁰ The TIA must allow recipients to submit requests for payment at least monthly.¹²¹

These payments may be made according to a schedule that is based on predetermined measures of technical progress or other payable milestones. Fixed-support TIAs *must* use this payment method.¹²² Recipients submit a report or other evidence of accomplishment to the program official at the completion of each predetermined activity. The agreement administrator may approve payment to the recipient after receiving validation from the program manager that the milestone was successfully reached.¹²³

TIAs may *not* be used if a participant is to receive a fee or profit. This requirement applies to any subawards for substantive program performance but not to reasonable payments made to suppliers of goods.¹²⁴

Pre-award costs, as long as they are otherwise allowable costs, may be charged to an expenditure-based TIA but only with the specific approval of the agreements officer. All pre-award costs are incurred at the recipient's

risk (i.e., no DoD component is obligated to reimburse the costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover the costs).¹²⁵

Audit and Financial Reporting Requirements. A provision for audits must be included in expenditure-based TIAs.¹²⁶ For-profit participants that are audited by the Defense Contract Audit Agency (DCAA) or another federal auditor may not be subject to additional audits.¹²⁷ Otherwise, an independent auditor (i.e., the DCAA or an independent public accountant) will likely conduct periodic audits if the participant expends \$500,000 or more per year in TIAs and other federal assistance awards. Award-specific audits also may be conducted.¹²⁸ DoD regulations suggest that an audit be performed during the first year of the award; the frequency thereafter may vary depending on the amount that the participant is expending annually under the award.¹²⁹ Participants must flow down any audit requirements to sub recipients.¹³⁰

Participants must also keep records related to the TIA for three years after submission of the final financial status report for an expenditure-based TIA or final programmatic status report for a fixed-support TIA except (1) if the records relate to an audit, claim, or dispute that begins but does not reach its conclusion within the three-year period (records must be kept until the matter is resolved and final action taken); or (2) records for any real property or equipment acquired with project funds under the TIA (records must be kept for three years after final disposition).¹³¹

The TIA must include one of two requirements: either (1) the requirements in 32 C.F.R. §§ 32.51, 32.52 for status reports on programmatic performance and, if it is an expenditure-based award, on financial performance; or (2) alternative requirements that, at a minimum, include at least annual reports addressing program and, if it is an expenditure-based award, business status.¹³² Under 32 CFR § 32.51, performance reports are not required more frequently than quarterly or less frequently than annually.

A provision requiring the recipient to prepare annual, updated technical plans for the future conduct of the research effort may also be included in the TIA.¹³³ In addition, a TIA may require a final performance report that addresses all major accomplishments under the TIA. Although this report is optional, if it is not performed the regulation specifies that "there must be an alternative that satisfies the requirement in DoD Instruction 3200.14."¹³⁴

Foreign Access and Domestic Manufacturing Requirements. All transfers of technology developed under the TIA must be consistent with US export laws, regulations and policies, the DoD Industrial Security Regulation in DoD 5220.22-R, and the Department of Commerce Export Regulation.¹³⁵

All transfers of exclusive rights to use or sell technology developed under the TIA in the United States must

require that products embodying the technology or produced through the use of the technology will be manufactured substantially in the United States. The government may waive this requirement upon a showing by the recipient that (1) reasonable but unsuccessful efforts have been made to transfer the technology under similar terms to those likely to manufacture substantially in the United States; or (2) under the circumstances domestic manufacture is not commercially feasible.¹³⁶

There also may be a domestic manufacture condition for transfers of nonexclusive rights to use or sell the technology developed under the TIA in the United States.¹³⁷ If the government provides the recipient the exclusive right to use or sell the technology in the United States, the recipient must, unless the government grants a waiver, require that products embodying the technology or produced through the use of the technology be manufactured substantially in the United States.¹³⁸

Conclusion

OTAs are unique vehicles that afford DoD significant leeway in negotiations with participants. As government agencies face increasing demands and are asked to do more with less, these OT agreements offer an opportunity for technology sharing and advancement between both traditional and nontraditional contractors and the DoD. An OT agreement serves as a useful mechanism for encouraging participation by the commercial sector. However, this very flexibility means that it is incumbent upon companies seeking to rely on these agreements to understand their rights, as well as the limitations imposed by these agreements. ☐

Endnotes

1. Stephanie Barclay is a member of the Idaho Bar. She is currently not admitted in the District of Columbia but is supervised by principals of the firm.

2. National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, 72 Stat. 426 (1958) (codified at 51 U.S.C. § 10101 et. seq.).

3. 42 U.S.C. § 2473(c)(5) (emphasis added).

4. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 252, 103 Stat. 1403 (1989).

5. *Id.* § 251, 103 Stat. 1403 (emphasis added).

6. 10 U.S.C. § 2371(a).

7. Opportunities at DARPA, Other Transactions, DARPA, <http://tinyurl.com/9wzkr1s>.

8. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845, 107 Stat. 1721 (1993) (codified at 10 U.S.C. § 2371 note).

9. DARPA, *supra* n. 6.

10. See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1301(b), 108 Stat. 3243, 3285 (1994) (codified at 10 U.S.C. § 2371(a)).

11. See L. ELAINE HALCHIN, CONGR. RESEARCH SERV., RL34760, OTHER TRANSACTION (OT) AUTHORITY 5-6 (2010).

12. 10 U.S.C. § 2371(a) (other transactions are neither contracts, cooperative agreements nor grants); 31 U.S.C. § 6303 (principle purpose of procurement contract is to "acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government"); see also *Rick's Mushroom Serv., Inc. v. United States*, 76 Fed. Cl. 250, 258 (Fed. Cl.

2007) (finding that agreement was not a procurement contract where it did not contemplate the transfer of goods or services directly to the government, there was no evidence of a buyer-seller relationship, and no direct benefit accrued to the government), *aff'd*, 521 F.3d 1338 (Fed. Cir. 2008).

13. The FAR defines "acquisition" as the "acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease. . . ." FAR § 2.101 (emphasis added). If an agency is relying on the "other transaction" authority found in 10 U.S.C. § 2371, then it is using an instrument other than a "contract." See 10 U.S.C. § 2371 ("The Secretary of Defense and the Secretary of each military department may enter into transactions (other than contracts, cooperative agreements, and grants) under the authority of this subsection in carrying out basic, applied, and advanced research projects.") (emphasis added).

14. 10 U.S.C. § 2304 *et seq.*; 41 U.S.C. § 251 *et seq.*

15. 31 U.S.C. §§ 3551(1), 3552. The GAO decided bid protests for many decades prior to the enactment of CICA pursuant to a broad interpretation of its mandate as an investigatory body. See Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 6 Wts. L. Rev. 1225, 1229 (2007). CICA granted the GAO "explicit statutory authority" to perform this function. *Id.* at 1230.

16. 31 C.F.R. § 33.104(c).

17. See *Exploration Partners, LLC*, B-298804, Dec. 19, 2006, 2006 CPD ¶ 201 (Comp. Gen. Dec. 19, 2006).

18. *Id.*; see also 10 U.S.C. § 2371(a) (DoD's grant of "other transaction" authority distinguishes that authority from the authority provided DOD to enter into contracts).

19. See *Energy Conversion Devices, Inc.*, B-260514, 95-2 CPD ¶ 121 (Comp. Gen. June 16, 1995). In *Energy Conversion*, the GAO noted that although it will not review protests of the award, or solicitation for the award, of cooperative agreements or other non-procurement instruments because they do not involve the

award of a contract, the GAO will review a protest alleging that the agency improperly used a non-procurement agreement when a contract was required.

20. There may, however, be jurisdiction for protests at the Court of Federal Claims under the Tucker Act, which limits the court's jurisdiction to protests "in connection with a procurement." The Court of Federal Claims has taken a broad view of what constitutes a procurement. See *360Training.com, Inc. v. United States*, 104 Fed. Cl. 575, 577(2012) (rejecting argument that the definition of "procurement" under the Tucker Act was limited by the definition of "procurement contract" in the Federal Grant and Cooperative Agreement Act).

21. See 31 C.F.R. § 31.000 (cost principles apply to the "pricing of contracts, subcontracts, and modifications to contracts and subcontracts whenever cost analysis is performed") (emphasis added).

22. See 48 C.F.R. Chapter 9900 ("scope of chapter describes policies and procedures for applying the Cost Accounting Standards (CAS) to negotiated contracts and subcontracts") (emphasis added).

23. 32 C.F.R. § 37.625(a).

24. *Id.*

25. *Id.* § 37.625(b).

26. OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS, "OTHER TRANSACTIONS" (OT) GUIDE FOR PROTOTYPE PROJECTS § C1.4 (January 2001) [hereinafter OT PROTOTYPE GUIDE].

27. 10 U.S.C. § 2306a(a).

28. 41 U.S.C. § 111.

29. See *Exploration Partners, LLC*, B-298804, Dec. 19, 2006, 2006 CPD ¶ 201; see also FAR § 35.003(a) ("Contracts shall be used only when the principal purpose is the acquisition of supplies and services for the direct benefit of the Federal Government").

30. Bayh-Dole Act, Pub. Law. No. 96-517, 94 Stat. 3019 (1980).

31. See generally 37 C.F.R. Part 401.

32. See MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: GOVERNMENT PATENT POLICY, PUB. PAPERS

- 248 (Feb. 18, 1983).
33. Exec. Order No. 12591, 52 Fed. Reg. 13414 (Apr. 10, 1987).
34. 32 C.F.R. § 37.860.
35. See 10 U.S.C. § 2320 (addressing technical data rights that the government should seek from *contractors* and *subcontractors*) (emphasis added); 10 U.S.C. 2371(a) (noting that OT agreements are not contracts).
36. 32 U.S.C. § 37.860.
37. OT PROTOTYPE GUIDE at § C2.3.1.1.
38. 42 U.S.C. §§ 2000d.
39. Exec. Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (stating that executive order applies to "every Government Contract").
40. See OFCCP v. Fla. Hosp. of Orlando (DOL OALJ No. 2009-OFCCP-00002, 10/18/10). OFCCP v. UPMC Braddock, (DOL ARB No. 08-048, 5/29/09). In *Florida Hospital and Braddock*, the Department of Labor extended OFCCP's jurisdiction over these hospitals by taking an expansive view of what constitutes a federal subcontractor.
41. *Id.* § C1.6.
42. *Id.*
43. *Id.*
44. *Id.* § C1.1.2.
45. *Id.* § DL1.12.
46. *Id.* § C1.5.1.
47. *Id.* § C1.7.1.
48. 10 U.S.C. § 2371 note.
49. *Id.*
50. OT PROTOTYPE GUIDE § C1.6.
51. *Id.* § C1.6.
52. *Id.*
53. *Id.* § C2.3.1.4.
54. *Id.* § C2.3.1.1.
55. *Id.* § C2.3.2.2.1.
56. *Id.* § C2.3.2.2.2.
57. *Id.*
58. *Id.* § C2.3.2.2.3.
59. *Id.* § C2.3.2.2.4.
60. *Id.* § C2.3.2.2.5.
61. *Id.* § C2.3.2.2.6.
62. *Id.* § C2.3.3.3.2.
63. *Id.* § C2.3.3.3.3.
64. *Id.* § C2.3.3.3.5.
65. *Id.* § C2.3.3.3.6.
66. *Id.* § C2.16.1.
67. *Id.* § C2.16.3.
68. *Id.* § C2.16.2.
69. *Id.*
70. *Id.* § C2.16.3.1.
71. *Id.* § C2.16.3.2. 72. *Id.*
73. *Id.* § C2.17.1.2.
74. *Id.* § C2.17.1.2.1-5.
75. *Id.* § C2.17.2.
76. *Id.* § C2.17.2.1.
77. *Id.* § C2.17.2.2.
78. *Id.* § C2.17.3.1-2.
79. *Id.* § C2.16.5.
80. *Id.* § C2.17.3.2.
81. *Id.* § C2.17.1.1.
82. *Id.* § C2.14.
83. *Id.* § C2.14.2.
84. *Id.* § C2.14.4.
85. *Id.* § C2.14.5.1.
86. *Id.* § C2.13.2.
87. *Id.* § C2.16.6.
88. *Id.* § C2.22.1.
89. *Id.*
90. *Id.* § C2.3.1.8.
91. *Id.*
92. 32 C.F.R. § 37.115.
93. *Id.*
94. *Id.* § 37.110.
95. This article does not address cooperative agreements or cooperative research and development agreements (CRADAs). These vehicles do not fall within the OT authority. Cooperative agreements are authorized under 10 U.S.C. § 2358. Although cooperative agreements allow for some flexibility as compared to procurement contracts, they are not as flexible as OT agreements. For example, patent rights provisions in a cooperative agreement *must comply* with the Bayh-Dole Act, which allows participants to retain title to innovations developed under federally funded research programs, but gives the government a nonexclusive license to practice the patent throughout the world. Similarly, a CRADA is an agreement between a federal laboratory and a nonfederal party to perform collaborative research and development. See 15 U.S.C. § 3710a. A CRADA grants the government a government purpose license and the nonfederal party a nonexclusive, paid-up, royalty-free license for internal use of any patents that result from the CRADA research. *Id.* The government also grants the nonfederal party an option to negotiate either an exclusive or nonexclusive commercial license within a field of use, subject to government-purpose rights. *Id.*
96. *Id.* § 37.220(b).
97. *Id.* § 37.120.
98. *Id.* § 37.860(a)(1).
99. *Id.* § 37.860(b).
100. *Id.* § 37.860(d)(1).
101. *Id.*
102. *Id.* § 37.860(d)(2).
103. *Id.* § 37.860(d)(3).
104. *Id.* § 37.865.
105. *Id.* § 37.845(a).
106. *Id.* § 37.845(b).
107. *Id.* § 37.845(c).
108. *Id.* § 37.215(b).
109. *Id.* § 37.525.
110. *Id.* § 37.530.
111. *Id.* § 37.535.
112. *Id.* § 37.545.
113. *Id.* § 37.550.
114. *Id.* § 37.300(a).
115. *Id.* § 37.310; see also *id.* § 37.305.
116. 32 C.F.R. § 37.300(b).
117. *Id.* § 37.305; see also *id.* § 37.560.
118. 32 C.F.R. § 37.805(a); see also *id.* § 34.12.
119. 32 C.F.R. § 37.810(a).
120. *Id.* § 37.805(b); see also *id.* § 34.12.
121. 32 C.F.R. § 37.810(a).
122. *Id.* § 37.805(c).
123. *Id.* § 37.810(b).
124. *Id.* § 37.230.
125. *Id.* § 37.830.
126. *Id.* § 37.640.
127. *Id.* § 37.645(a).
128. *Id.* § 37.645(b).
129. *Id.* § 37.655 ("[I]t is not unreasonable to require an updated audit every two to three years to reverify that the participant's systems are reliable.").
130. *Id.* § 37.670.
131. *Id.* § 37.910.
132. *Id.* § 37.880.
133. *Id.* § 37.885.
134. *Id.* § 37.890.
135. *Id.* § 37.875(b)(1).
136. *Id.* § 37.875(b)(2).
137. *Id.* § 37.875(c).
138. *Id.* § 37.875.