Other Transactions 101

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The Present Situation in the Science and Technology Community

PAST	PRESENT
Innovation fueled by the Government	Innovation fueled by private sector
Commercial sector wanted to work with the Government	Cutting edge commercial firms with large R&D investments are reluctant to work with the Government
DoD was primary driver of technology innovation by making substantial investments in R&D in the defense industrial base	Focus and pace of S&T innovation in leading technology areas have shifted from Government to commercial sector
DoD powered a technology advantage on the battlefield with its investments in R&D	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

Tool Box

<table>
<tr><th colspan="3">Acquisition</th><th colspan="5">Non-Acquisition</th></tr>
<tr><th colspan="2">Procurement Contracts</th><th>Non-FAR Contracts</th><th>Grants</th><th colspan="2">Cooperative Agreements</th><th colspan="2">OTs</th></tr>
<tr><td colspan="2" rowspan="2">10 U.S.C. § 3201-3205
(formally 10 U.S.C. § 2304)

31 U.S.C. § 6303
↓
Federal Acquisition Regulation</td><td rowspan="3">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</td><td rowspan="3">10 U.S.C. § 4001
(formally 10 U.S.C. § 2358)

31 U.S.C. § 6304

2 CFR Part 200

DODGAR

Bayh-Dole Act</td><td rowspan="2">10 U.S.C. § 4001
(formally 10 U.S.C. § 2358)

31 U.S.C. § 6305</td><td colspan="2">Technology Investment Agreements (TIAs)</td><td rowspan="2">Other
10 U.S.C. § 4021
(formally 10 U.S.C. § 2371)</td></tr>
<tr><td>10 U.S.C. § 4001
(formally 10 U.S.C. § 2358)</td><td>10 U.S.C. § 4021 (a) & (b)
(formally 10 U.S.C. § 2371 (a) & (b))</td></tr>
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Cost/
Price Based</td><td>PART 12
Commercial Items

Price Based</td><td>Traditional

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Bayh-Dole Act

Lore</td><td>Flexible

Recoupment Authority
10 U.S.C. § 4021 (d)
(formally 10 U.S.C. § 2371 (d))

USD(R&E) Letter

DODGAR

Bayh-Dole Act</td><td>Multi-Party

Recoupment Authority
10 U.S.C. § 4021 (d)
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USD(R&E) Letter

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OT Guide

Exception to Bayh-Dole</td><td>New/Unique Arrangements

Bailments
Lease Arrangements

Loan-to-Own

Exception to Bayh-Dole</td></tr>
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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 Authorities

- DoD has statutory authority to award Other Transactions (OT) (as do many other agencies)
  - OTs for Research (aka Technology Investment Agreements (TIAs)) – 10 U.S.C. 4021 (formally 10 U.S.C. 2371)
  - OTs for Prototypes – 10 U.S.C. 4022 (formally 10 U.S.C. 2371b)
  - OTs for Production – 10 U.S.C. 4022(f) (formally 10 U.S.C. 2371b(f))
- Awards using either statute are largely exempt from the Federal acquisition statutes and regulations and allow for negotiation of all agreement terms and conditions

Unique Aspects of OT Authority

- Advance payments are allowed
- Recovery of Government funds are permitted
- Materials submitted under a solicitation for an OT are exempt from the Freedom of Information Act for five years from the date on which the information is received by DoD
- Flexible methods of competition
  - Competition in Contracting Act does not apply
- Flexible contract terms can be negotiated
  - Not bound by most procurement laws and regulations (FAR)
  - No Termination for Default or Termination for Convenience
- Option for a wide variety of flexible relationships, including partnerships, consortia or teaming arrangements
- Intellectual property terms are open to negotiation
  - The Bayh-Dole Act (patents) and 10 U.S.C. 3771-3775 (formally 10 U.S.C. 2320) (Rights in technical data) does not apply
- Flexibility in payment methods, including milestones

10 U.S.C. 4021 (formally 10 U.S.C. 2371)

- Statutory Authority
  - 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 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 research under the OT should not duplicate research done on other programs
  - 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)
  - Information submitted during the award process (competitive or noncompetitive) is exempt from FOIA for 5 years from receipt

Permanent Codification of OT for Prototypes Statutory Authority

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

⇩

10 U.S.C. § 4022

(Formally 10 U.S.C. § 2371b)

Other Transactions for Prototypes – 10 U.S.C. § 4022
(formally 10 U.S.C. § 2371b)

- Under certain circumstances, DoD may use the authority of 10 U.S.C. § 4021 (formally 10 U.S.C. 2371) to carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the DoD, or improvements of platforms, systems, components, or materials in use by the armed forces.

What’s a Prototype?

- There is no established definition in the statute
- Recent DoD Policy includes the following indicia:
  - Proof of concept
  - Model or pilot
  - Reverse engineering to address obsolescence
  - Novel application of commercial technologies for defense purposes
  - Agile development activity
  - Creation, design, development, and/or demonstration of technical or operational utility
  - Combinations of the above

Basic Statutory Requirements

- 10 U.S.C. 4022 (formally 10 U.S.C. 2371b) **extends** the authority of 10 U.S.C. 4021 (formally 10 U.S.C. 2371) to allow for prototype projects
  - Most of the authorities given under 10 U.S.C. 4021 apply to OTs for Prototypes as well
    - Use of competitive procedures to the maximum extent practicable
    - Allowance for recovery and retention of Government funds
    - Allowance for the use of advance payments
    - 5 year FOIA exemption for information submitted during the award process, including proposals, business plans, and technical information
  - OTs for Prototypes are exempt from some requirements under 10 U.S.C. 4021
    - Allows use of OT authority without having to justify why procurement contract, grant, or cooperative agreement is not feasible or appropriate
      - In fact, the FY18 NDAA (P.L. 115-91, Section 867) requires the SecDef to establish a preference for the use of OTs and experimental authority under 10 U.S.C. 4004 (formally 10 U.S.C. 2373) in the execution of S&T and prototype programs
    - There is no requirement for cost share except in certain circumstances
- 10 U.S.C. 4022 also has some additional statutory requirements
  - Comptroller General's access to information and review thresholds
    - Applicable when total agreement amount is in excess of $5,000,000
  - The Procurement Integrity Act (41 U.S.C. 2102-07) will apply
  - There are statutory approval thresholds
  - There are unique participation requirements

Approval Levels

- Approval levels will be determined on the value of each OT for Prototype **transaction**, including:
  - All options with established prices and
  - Any cost-shared amount required to be provided by the performing team
- Approval levels will not be based on the total value of all OTs that might be executed for a specific prototype project or program or for follow-on production
- Regardless of value, a separate approval is required for each phase – prototype or production

OT for Prototype Approval Levels (Per OT transaction)

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

* **The determinations at these levels are nondelegable. Additionally, OTs over $500M must give 30 days advance notice to the congressional defense committees**

Who can participate?

10 U.S.C. § 4022

(formally 10 U.S.C. § 2371b)

4 options

At least one non-traditional defense contractor or non-profit research institution 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?

- The definition of “non-traditional defense contractor” is in 10 U.S.C. § 3014 (formally 10 U.S.C. § 2302(9))
  - An entity that is not currently performing or has not performed in 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 CAS coverage

Follow-on Activities

- The FY16 NDAA changed the follow-on production section of 10 U.S.C. 4022 (formally 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 a consortium OT
  - Competitive procedures were used for the selection of the participants in the OT transaction
  - The 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 SecDef may establish
  - You are not required to recompete
  - It is not considered a sole source award

Notice Requirements

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

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

Top 5 OT Issues

- Agencies think speed to award is the goal of OTs
- Agencies think they'll be able to fully utilize the advantages of OTs without changing their internal processes
- Agencies are not using the authority for the appropriate reasons
- Agencies are choosing the award vehicle before fully determining the program goals and objectives
- Agencies believe that using an IDIQ consortia is the only/best/preferred way to use the OT authority

Issue #1 – Agencies think speed is the goal of OTs

- While faster speed to award can be a definite side effect of using the OT authorities, speed in and of itself is not the main purpose behind the authorities.
- OTs were created as an alternative way for the private sector to work with the Government, especially that part of the private sector that viewed the Government as too difficult or bureaucratic.
- This could be entities that had never worked with the Government before or more traditional contractors who were looking for more streamlined ways of doing business with the Government or interacting with the rest of industry.
- For most organizations, the first few OTs they try may not be that fast
  - OTs require everyone on the Government team to embrace a different mindset that will likely be very unfamiliar and somewhat uncomfortable.
  - Contracting officers (COs) will have to learn how to craft agreement terms and conditions (something they are not taught) and how to fully negotiate the agreement terms (something they don’t generally do).
  - Government attorneys will have to stop relying on a FAR/DFARS compliance model and begin to work with COs as a team in crafting and negotiating agreement language.
  - Agency leadership and decision makers will have to begin to view OTs as a different way of doing business and not force OTs to utilize the same processes and procedures as FAR-based contracts

Issue #2 – Agencies think they'll be able to fully utilize the advantages of OTs without changing their internal processes

- Agencies that usually do traditional FAR-based contracts are working in a very standardized, compliance-driven model
  - They are used to following the specific solicitation and award procedures laid out in the FAR for their various scenarios and awarding contracts that follow a common model with predetermined terms and conditions
  - They are used to following fairly standard templates and checklists
  - Everyone in the acquisition chain is familiar with the same model
- The whole purpose behind OTs is flexibility and adapting your process and agreement to fit the circumstances that are facing you at that moment
  - There are no checklists and most of the existing templates are fairly top-level with a lot left to the organization to determine as it plans and negotiates
  - The only official guidance is fairly general and intended to give philosophical guidance rather than step-by-step instructions
- Many agencies want to do OTs but want to keep their existing FAR-based processes then wonder why it isn't more simplified or faster
  - When it comes to speed, it's not the award vehicle that's the issue, it's the award process
  - Unless the organization can separate itself from its legacy processes and embrace the flexibility the OT authorities afford it, the organization will never fully benefit from using the OT authorities.

Issue #3 – Agencies are not using the authorities for the appropriate reasons

- At its heart, the OT authority is an R&D authority
  - The language of 10 U.S.C. 4021 (formally 10 U.S.C. 2371) focuses on basic, applied, and advanced research
  - The language of 10 U.S.C. 4022 (formally 10 U.S.C. 2371b) focuses on expanding that prototype programs
  - The authorities were not intended to provide an full alternative acquisition approach that was appropriate to handle all of the various types of acquisitions the FAR was written
    - The FAR was written to buy supplies and most of its language is geared toward the specific issues involved in acquiring goods and services for the direct benefit of the Government.
    - The FAR has never been well suited for acquiring R&D solutions, which present very different types of issues.
- The OT authorities were created to cater to the unique R&D issues and situations that arise in R&D programs
- Just because an organization needs to acquire something quickly, doesn't mean that OTs are the answer
  - Buying quantities of existing items to be used for their standard purpose or hiring support contractors for general internal support will rarely be suitable for OT awards
  - DoD has a host of alternative authorities that may be better suited to fulfilling non-R&D type actions
    - One example, 10 U.S.C. 4004 (formally 10 U.S.C. 2373) allows for acquisitions for non-R&D purposes (see next slide). Awards under 4004 would not be OTs but would be a different and distinct type of award vehicle
- DoD must be careful to use the OT authorities for the reasons Congress mandated or risk losing the authorities altogether

Issue #4 – Agencies are choosing the award vehicle before determining the program or project's goals and objectives

- Many organizations are deciding to utilize OTs before fully fleshing out the ultimate program goal and result it wishes to achieve with the award
  - OTs are chosen because of their perceived "coolness" or because the organization is pushing their use
  - This choice is made often before discussion of the program perimeters and downstream goals
  - Speed is often the primary factor in the decision
  - Organizations then often find themselves having to do a tremendous amount of work or explanation to justify the use of the OT authority for their particular situation because it doesn't really fit
- Instead, organizations need to go into any program or project with the same initial step – What am I trying to achieve at the end of this program and what do I expect the outcome to be?
  - Only then can the organization take a good, hard look at what type of acquisition approach would be best suited for this situation
  - OTs may be right but which type of OT and why?
  - Is there another acquisition tool that would be better suited for what needs to be done to get to the desired outcome? Some solutions may offer easier and smooth paths to the desired end state which can make the acquisition much easier for the organization to implement and defend.
  - Is the FAR a viable option here? The FAR is the best choice for many situations and has much more flexibility than most Government employees realize

Issue #5: Agencies believe that using an IDIQ-like consortia is the only/best/preferred way to use the OT authority

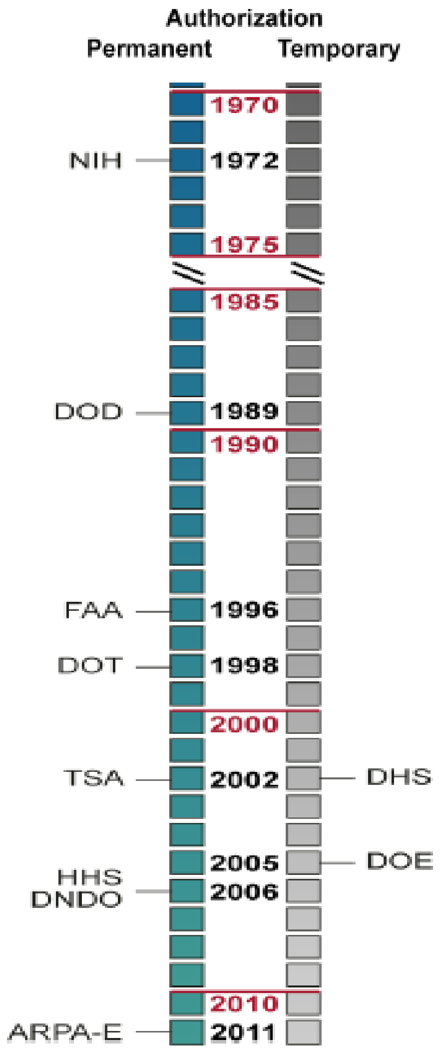
- In using OTs over the past 30 years, DoD has had many very successful agreements with groups of contractors who've chosen to work together to create state-of the art technologies. These groups of contractors were often called teams or consortia
  - Most of these groups came together of their own volition and self-governed
  - Many remained in existence to further the technology development in an industry sector long after the Government was no longer providing funding
- In recent years, agencies have created consortia that function like task order contracts with a contractor manager acting much like an agent for the Government and passing money through to the actual performers
  - This type of arrangement is relatively new
  - It has proliferated because many organizations didn't know how to embrace the flexibility of the OT authorities themselves and a task order arrangement was a familiar model from the contracting world
- The popularity of these "OT consortia" have created some misconceptions
  - One is that an organization must use one of these vehicles to use OTs – many organizations are doing singular OT awards and are doing them just as quickly and efficiently as the OT consortia
  - Another is that the consortia business model and OTs are interdependent – the consortia business model is a model that could utilize many different types of award vehicles and OTs can be awarded through many mechanisms, including new and unique approaches
  - Finally, there is a misconception that the "OT Consortia" are a cheaper, more efficient way to do OTs – in fact, the consortia fees can be quite high and the time to award can be significantly long

Conclusion

- The OT authorities provide significant options to the traditional process
- It is not the appropriate option in all circumstances
- The primary goal of OTs is to encourage and engage non-traditional performers in working on defense programs, NOT to award agreements quickly
- Speed can be a side-effect of the OT flexibility but it will depend on negotiation issues and internal processes

Reference

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

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
  - P.L. 85-804 and indemnification
  - 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)
- Uniform Commercial Code (UCC) does not apply

10 U.S.C. § 4021 Essentials (previously 10 U.S.C. § 2371)

- Applicable to basic, applied, and advanced research projects
- Defines Other Transactions as an agreement that is not a procurement contract, grant, or cooperative agreement
- Must be delegated by the USD(A&S)
- Cost share is required but share ratio is discretionary and flexible
- Advance payments and recovery of funds are allowable

No Follow-on to Production

10 U.S.C. § 4022 Essentials (previously 10 U.S.C. § 2371b)

Statutory Scope

- Prototype Project
- Directly relevant to enhancing effectiveness or improvement of military personnel, platforms, systems, components, materials
- Proposed to be acquired or developed by DoD

Military Approval Thresholds

- Determined by OT Transaction
- Under $100M – SPE (delegable)
- $100M - $500M – SPE (nondelegable)
- Over $500M – USD(A&S) or (R&E) (nondelegable) and 30 day notice to Congressional defense committees

Agreement Requirements

- At least one non-traditional defense contractor participating to a significant extent OR
- All significant participants are non-traditional or small business OR
- At least 1/3 of the cost of program comes from a non-Federal source OR
- Agency SPE waiver

Noncompetitive Follow On Production is permissible under certain conditions

10 U.S.C. § 4022 (f) Essentials (previously 10 U.S.C. § 2371b (f))

Allows for follow-on production without recompetition for prototype projects begun under 10 U.S.C. 2371b

Prototype Phase had to be competitively awarded to avoid recompetition at the production decision

Follow-on must be awarded to the same participants as in the prototype agreement

Prototype phase must be successfully completed

Follow-on production can be awarded as an OT, procurement contract, or other vehicle the SecDef establishes

10 U.S.C. § 4004 Essentials (previously 10 U.S.C. § 2373)

Procurement for experimental or test purposes	Appropriate acquisitions	Acquisition approach
• Ordnance • Signal • Chemical Activity • Transportation • Energy • Medical • Space-flight • Telecommunciations • Aeronautical	•Supplies •Parts •Accessories •Designs •Intended for experimentation/technical evaluation/assessment of operational utility, safety or residual operational	• 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