Other Transactions Basics

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Other Transactions and Grants
## Market Changes in the Science and Technology Community

<table>
<thead>
<tr>
<th>PAST</th>
<th>PRESENT</th>
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<tbody>
<tr>
<td>Innovation fueled by Government</td>
<td>Innovation fueled by commercial market</td>
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<tr>
<td>Commercial sector wanted to work with the Government</td>
<td>Cutting edge commercial firms with large R&amp;D investments are reluctant to work with the Government</td>
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<td>DoD was primary driver of technology innovation by making substantial investments in R&amp;D in the defense industrial base</td>
<td>The focus and pace of S&amp;T innovation and its environment in leading technology areas shifted from Government to commercial sector</td>
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<td>DoD powered a technology advantage on the battlefield with its investments in R&amp;D</td>
<td>DoD needs to work with commercial sector to maintain a technology advantage on the battlefield</td>
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Changes Supporting Alternative Approaches

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

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

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

“Start-ups are the leading edge of commercial innovation, and right now, DoD researchers don’t have enough promising ways to transition technologies that they came up with to application.”

Secretary Ash Carter, Defense Media Activity, April 23, 2015.
Impediments to Commercial Firm Participation

- The traditional procurement process is too slow
- Traditional procurement contracts are based on regulation rather than negotiation
- The Government’s cost-based pricing system is cumbersome and expensive
  - Requires unique accounting and auditing systems
  - Legacy of actual or perceived oversight excesses
- The Government’s standard approach to intellectual property can be overreaching and inflexible
Other Transactions Authorities

- DoD has statutory authority to award Other Transactions (OT) (as do many other agencies)
  - OTs, including Technology Investment Agreements (TIAs) – 10 U.S.C. 2371
  - OTs for Prototypes – 10 U.S.C. 2371b
Unique Aspects Common to Both Authorities

- 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 5 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/DFARS)
  - No Termination for Default or Termination for Convenience
- There is the 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. 2320 (Rights in technical data) does not apply
- There is flexibility in payment methods, including milestones
Perceptions of OTs by the Procurement Community

Advocates:
- Attractive to performers looking for flexibility in their agreement terms
- Attracts companies that would normally avoid DoD business
- Invokes commercial practices, such as negotiable terms and conditions.
- Removes rigidity of traditional Government procurement
- Promotes trust and a spirit of cooperation with industry
Perceptions of OTs by the Procurement Community

Contrarians:
- Terms of agreement may foster too many unknowns, thereby creating more risk for the Government
- In removing the rigidity of traditional Government procurement, the safeguards are also removed
- They can be more time-consuming than traditional R&D contracts, especially for inexperienced contracting personnel
- Greater participation on the part of the Government program manager is required
Technology Investment Agreements (TIAs)
10 U.S.C. 2371

• Formerly known as Other Transactions for Research
• The Secretary of Defense and the Secretary of each military department may enter into transactions (other than contracts, cooperative agreements, and grants) in carrying out basic, applied and advanced research projects
• The SecDef shall ensure that:
  – To the maximum extent practicable, no transaction for research duplicates research conducted under existing programs
  – To the extent the SecDef deems practicable, the funds provided by the Government does not exceed the total amount provided by the other parties to the transaction (cost sharing)
• FY18 NDAA including new DoD education and guidance requirements
• Guidance on TIAs has been implemented in Part 37 of the DoD Grants and Agreements Regulation (DoDGARs)
Under certain circumstances, DoD may use the authority of 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.

Authority can be exercised by the Director of DARPA, and the Secretaries of the military departments or delegated by the Secretary of Defense:
- Currently the authority has been delegated to Missile Defense Agency (MDA); Washington Headquarters Service (WHS); Defense Information Systems Agency (DISA); United States Transportation Command (TRANSCOM); United States Special Operations Command (SOCOM); United States Cyber Command (CYBERCOM); and Defense Microelectronics Activity (DMEA)

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

Public Law 103-160, Section 845

10 U.S.C. § 2371b
Unique 2371b Requirements

• Use competitive procedures to the maximum extent practicable.
• Under the OTs for Prototype authority, agencies do not have 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. 2373 in the execution of S&T and prototype programs
• The statute provides for Comptroller General’s access to information and review for agreements in excess of $5,000,000
• Procurement Integrity Act applies.
OT for Prototype Approval Levels

FY19 NDAA

- < $100M = CO approval
- $100M-$500M (prototype project and any follow-on production contract or transaction) = SPE approval*
- > $500M (prototype project and any follow-on production contract or transaction) = USD(A&S) or USD(R&E) approval
  with 30 days advance notice to the congressional defense committees

*Approval at SPE Level:
- DARPA – Director of DARPA – statutory
- MDA – Director of MDA – statutory
- Military Departments – SPEs – statutory
- Other Defense Agencies – look to specific delegation

**SPE and OSD approvals are not delegable.**
Who can participate?

- At least one non-traditional defense contractor or nonprofit research institution participating to significant extent; OR

- All significant participants in the transaction are small businesses or non-traditional defense contractors (including SBIR participants); OR

- At least 1/3 of the total cost of the prototype project is paid by sources other than the Federal Government; OR

- The agency SPE determines exceptional circumstances justify the use of the authority.
What is “significant participation”?  

- 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. § 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

  - The current definition was enacted in the FY16 NDAA and is significantly broader than the previous definition
Follow-on Activities

- The FY16 NDAA changed the follow-on production section of 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
Best Practices

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

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

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

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

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

• Fairness and transparency is paramount to success
Best Practices

• There are no templates or checklists, so use good business judgment

• With purposely little guidance, OT practice is ever evolving

• The new follow-on production language is still in its infancy
  – Expect some failures
  – Best practices are yet to come
  – It may not be appropriate or wise to do a follow-on in every situation

• With the renewed popularity of OTs, expect some oversight to follow, both internal and external
  – Don’t be afraid of it – just make sure the decisions made are thoughtful and documented
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.
# The Toolbox

## Acquisition

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<th>Procurement Contracts</th>
<th>Non-FAR Contracts</th>
<th>Grants</th>
<th>Cooperative Agreements</th>
<th>OTs</th>
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<tbody>
<tr>
<td>Federal Acquisition Regulation</td>
<td>10 U.S.C. § 2371b</td>
<td></td>
<td>10 U.S.C. § 2371 (a) &amp; (d)</td>
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<tr>
<td>PART 15</td>
<td>NASA Space Act</td>
<td>Traditional</td>
<td>Flexible</td>
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<tr>
<td>PART 12 Commercial Items</td>
<td>Unique authority at 9 civilian agencies</td>
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<tr>
<td>Cost/Price Based</td>
<td>2 CFR Part 200</td>
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<td>Recoupment Authority</td>
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<td>Price Based</td>
<td>DODGAR</td>
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<td>10 U.S.C. § 2371(d)</td>
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<td>Bayh-Dole Act</td>
<td>Exception to Bayh-Dole Act</td>
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## Non-Acquisition

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*Note: 10 U.S.C. § 2358 and 31 U.S.C. § 6305 are referenced for non-FAR contracts and grants, respectively.*

**Exception to Bayh-Dole Act**

**Multi-Party Commercial Firm Consortia**

**Recoupment Authority**

**ASD(R&E) Letter**

**New/Unique Arrangements**

**Bailments**

**Lease**

**Arrangement**

**Loan-to-Own**
Other Transactions Solicitation Methods

• OTs can be awarded through several solicitation approaches
  – Broad Agency Announcements (BAAs)
    • Typically allows for the award of procurement contracts, grants, cooperative agreements, or both types of OTs
    • The solicitation process is governed by FAR Part 35
  – Research Announcements (RAs)
    • Limited to research efforts and a determination is made at the outset that only grants, cooperative agreements, or TIAs will be awarded
    • Solicitation process is governed by the document itself and can include unique terms and conditions
  – Program Solicitations (PAs)
    • This solicitation can be named whatever you choose (i.e. Commercial Solutions Opening, Program Announcement)
    • A determination is made at the outset that only OTs for Prototypes will be awarded
    • Solicitation process is governed by the document itself and can include unique terms and conditions
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 flow downs to subcontractors
Acquisition Authorities and OTs

- Some laws still do apply
  - Criminal Laws (false claims/statements)
  - Laws of general applicability (Civil Rights Act)
  - Laws that would apply to anyone doing business in the U.S. (e.g. environmental laws, import/export control)
- No supporting regime of commercial law as in the private sector
Legislative History of OTs

- Cooperative Agreements and Other Transactions when standard contracts or grants not feasible or appropriate.

- DARPA-specific OT authority for prototype development up to the point of production.
- Temporary authority, 3-year sunset provision.

- Authority expanded to military services and Secretary of Defense-designated officials.
- Temporary authority extended, 3-year sunset provision.

- Temporary authority extended, 2-year sunset provision.

- Comptroller General Review added.
Legislative History of OTs

- Adds concept of nontraditional defense contractor.
- Requires cost-share of 1/3 if not a nontraditional defense contractor.
- Temporary authority extended, 3-year sunset provision.

- Allows for follow-on production contracts only for a specific number of units at a specific target price.

- Expanded definition of weapons system.
- Pilot program to allow for follow-on contracting for the production of commercial items.
- Temporary authority extended, 4-year sunset provision.

- Adds dollar-value threshold review levels.
- Procurement Integrity Act now applicable to OTs.
Legislative History of OTs

- Expands scope of pilot program (clarification).
- Temporary authority extended, 5-year sunset provision.

- Includes all options in dollar-value threshold review levels.

FY2013 – Pub. L. 112-239, Sec. 863.
- Temporary authority extended, 5-year sunset provision.

- “Enhancing the mission effectiveness of military personnel...” replaces “weapons or weapons systems used by the Armed Forces.”
- Small businesses eligible to receive OT for prototype without cost-share requirement.
Legislative History of OTs

- Section 845 repealed.
- Permanent authority codified at 10 U.S.C. § 2371b.
- Non-traditional defense contractor redefined by 10 U.S.C. § 2302(9).

FY2018 – Pub. L. 115-91
- Sec 864
  - Increased the approval thresholds to $100M at agency level and $500M at OSD level
  - Included language to clarify that approval levels applied to OT to be awarded and would not include other DoD assets that might be used during the program
  - Included express authority to allow for the award of OTs for Prototypes in the Small Business Innovative Research Program (SBIR)
  - Broadened the follow-on production language to include individual subawards under an OT consortium
- Sec 216
  - Amended 10 U.S.C. 2371b (d)(2)(A) to allow for award if a nonprofit research institution were participating to a significant extent in the project
Legislative History of OTs

  - Section 211

- Updated approval thresholds to include consideration of the dollar amounts of both the prototype transaction and any follow-on production contract or transaction
- Removed reference to USD(AT&L) in highest level approval and substituted (USD(A&S) or USD(R&E))
- Clarified application of follow-on production authority for projects carried out through consortia arrangements