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Other Transaction Agreements-FAR Out!

NCMA
NATIONAL CONTRACT MANAGEMENT ASSOCIATION

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Department of Defense

OTHER TRANSACTIONS GUIDE

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For Acquisition and Sustainment

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https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf

Appendix C – OT Type Comparison Table

Research OT

APPLICABILITY:

- Basic, applied, and advanced research.

CONDITIONS FOR USE:

- No duplications of research to maximum extent practicable (generally non-issue).
- 50/50 Cost Share to the extent practicable.
- Competition to maximum extent practicable (see DoDGARS 37.400 for TIAs).
- Standard contract, grant, cooperative agreement not feasible/appropriate.

- Review DoDGARS Part 37-Technology Investment Agreements (TIA), Appendices A&B for applicability. *If TIA complies with Bayh-Dole Act, a Cooperative Agreement (CA) shall be used. If TIA patent provision varies from what is possible under Bayh-Dole Act, the TIA should be awarded as a Research OT.

Prototype OT

APPLICABILITY:

- Prototype Project.
- Directly relevant to enhancing mission effectiveness of military personnel, supporting platform, systems, components, or materials to be acquired by DoD, or improvements thereto.

CONDITIONS FOR USE

- All participants small or non-traditional; **or**
- At least one non-traditional defense contractor or non-profit research institution must participate to a significant extent in the prototype project; **or**
- At least 1/3 of total costs must be paid by parties to the OT other than the Government; **or**
- Senior procurement executive for the agency determines, in writing, that exceptional circumstances justify the use of an OT.
- Cost share not required (if non-traditional contractor participates); fee/profit negotiable.
- Competitive procedures to maximum extent practicable **Note:** "practicable" and "maximum extent practicable". If cost sharing aids in pushing the project forward it is practicable. If it proves an obstacle, it is not.

Production OT

- Follow-on contract or transaction may be awarded without the use of competitive procedures if:
  - Competitive procedures were used in the Prototype OT, and
  - The prototype project in the transaction was “successfully completed”
  - ADD ONE MORE: The potential for follow-on production must be included in the Solicitation (***Oracle America*** GAO Bid Protest Decision (May 31, 2018)

Appendix A - Glossary

Commercial Solutions Opening (CSO)

This guide describes the CSO pioneered by Defense Innovation Unit (DIU) and Army Contracting Command New Jersey (ACC-NJ) which leverages OT authority. At its core the CSO is a competitive solicitation process with three-phases focused on being '*fast, flexible, & collaborative*' for innovative prototype projects. Phase 1 is an evaluation of company solution briefs, typically five (5) page white papers or fifteen (15) slides. Companies are downselected based on solution briefs: relevancy, technical merit, business viability, and innovativeness. Companies invited to Phase 2 will pitch to the government additional details on project *rough order magnitude* (ROM), cost and schedule, as well as discuss data rights. Companies invited to Phase 3 will submit proposals to be reviewed and negotiated by the government. For additional information on the DIU CSO please visit their website (www.diux.mil).

Non-traditional Defense Contractor (NDC)

An entity that is not currently performing and has not performed for at least the one-year period preceding the solicitation of sources by DoD for the procurement or transaction, any contract or subcontract for the DoD that is subject to full CAS coverage. Full CAS coverage only applies to firms that receive a single CAS-covered contract award of $50 million or more; or received $50 million or more in net CAS-covered awards during its preceding cost accounting period.

The effect of this narrow definition is that a large number of entries will fall into the NDC category, including nearly all small business concerns, and even those firms that work exclusively with DoD. This is in part due to the exemptions to CAS coverage under 41 U.S.C. §1502 and FAR Part 30, which exempt commercial contracts, Firm Fixed Price contracts, Firm Fixed Price contracts based on adequate price competition, and any contract or subcontract with a small business concern, amongst other exemptions.

Prototype Project

The definition of a “prototype project” in the context of an OT is as follows: a prototype project addresses a proof of concept, model, reverse engineering to address obsolescence, pilot, **novel application of commercial technologies for defense purposes**, agile development activity, creation, design, development, demonstration of technical or operational utility, or combinations of the foregoing. A process, including a business process, may be the subject of a prototype project.

Successfully Completed

A transaction for a prototype project is complete upon the written determination of the appropriate approving official for the matter in question that efforts conducted under a Prototype OT: (1) met the key technical goals of a project; (2) satisfied success metrics incorporated into the Prototype; or (3) accomplished a particularly favorable or unexpected result that justifies the transition to production. Furthermore, successful completion can occur prior to the conclusion of a prototype project to allow the Government to transition any aspect of the prototype project determined to provide utility into production while other aspects of the prototype project have yet to be completed. Any prototype agreement must be successfully completed.

Appendix D – Common OT Myths and Facts

Myth 1: There is only one type of OT available to DoD

FALSE: There are two different OT statutory authorities that can result in three different types of OTs. The first is for basic, applied, and advanced research projects at 10 U.S.C. §2371. The second is for prototype projects at 10 U.S.C. §2371b. There are differences between the two authorities and agencies should consider which makes the most sense for their problem set. The OT for Prototype authority is much more commonly known; however, this does not mean it is appropriate for all circumstances. Consider the following when determining which authority is appropriate:

- 1. Does the technology have a dual-use application (application in both the commercial and government sectors)? Are we entering this program to push the state-of-the-art in a particular technology area? Do we need to create items to test out the approach to determine how far we have pushed the technology but keeping the test items was incidental to the overall effort? If yes, then this program could result in an OT under 10 U.S.C. §2371.

- 2. Is the application of the technology for primarily military uses? Is the ultimate goal of the program to create a prototype asset that will be delivered to the Government? Is the main desire to acquire a reasonable number of prototypes to test in the field before making the decision to purchase in quantity? If yes, then this program could result in an OT under 10 U.S.C §2371b.

- 3. Once a prototype agreement is awarded and it satisfies the requirements of 10 U.S.C. §2371b (f), it can be followed by an award for the production phase of the program without re-competition. The follow-on agreement for the production phase can take many forms, including a new OT for Production agreement.

Myth 2: The OT authorities are new and are rarely used

- **FALSE:** The underlying concept of OTs have been around for more than 60 years. Beginning with the NASA Space Act in 1958, OTs have been a tool available to the Federal R&D community. DoD was given the authority for Research OTs in FY89 and Prototype OTs in FY94. More than seven civilian agencies, in addition to NASA, have the authority to do either one or both types of OTs. While the use of these authorities have ebbed and flowed in these organizations as a whole over the years, largely tied to the swings of acquisition reform, they have been continuously used since FY89.

Myth 3: Since an OT is termed an "agreement", it is not a contract

- **FALSE:** When most people in the Government hear the term "contract," they automatically think "Federal Acquisition Regulation (FAR)-based procurement contract" awarded under the traditional acquisition process and subject to all of the federal acquisition statutes and regulations. OT agreements are not procurement contracts, but they are legally valid contracts. They have all six legal elements for a contract (offer, acceptance, consideration, authority, legal purpose, and meeting of the minds) and will be signed by someone who has the authority to bind the federal government (i.e. an Agreements Officer). The terms and conditions can be enforced by and against either party. The organizations within DoD routinely using OTs have called them agreements to ensure that there would be no confusion between these arrangements and FAR based procurement contracts.

Myth 4: Since Competition in Contracting Act (CICA) does not apply to OTs, competition and fairness are not a consideration

- **FALSE:** Both OT statutory authorities require the use of competitive practices to the maximum extent practicable. Agencies are not required to complete the formal competition structure laid out in CICA (i.e. three tiers of competition: full and open, limited and sole source with justification and approval) nor follow the competition rules in the FAR. The OT statutes and guidance allow the agency to determine what the competition will look like and how it will be structured. Competition is a good thing. It helps keep prices low, quality high, and gives the Government leverage in negotiations.

- If an agency wishes to award a follow-on from a Prototype OT into either a Production OT or a procurement contract **without re-competing**, the solicitation documents and the original OT award ***must*** have been competitive and provide for the award of either type of follow-on award.

Myth 5: OTs cannot be protested

- **FALSE:** While bid protests are rare for OTs, agencies should be mindful of the possibility. Agency-level protests are possible if the agency choses to include language in its solicitation describing the procedures. While not required, agencies may want to include such language to encourage any issues to be handled internally and quickly. GAO has limited jurisdiction to review OT decisions and protests to GAO regarding OT awards are rare. Protests to the U.S. Court of Federal Claims are also possible but are a rare occurrence.

GAO's *Oracle America, Inc.* Case

- DIUx CSO under 2371b for TRANSCOM for Cloud Based Solution to Local Server Options.
- Protest of Follow-On Sole Source Production (P-OTA) Contract.
- Key Take-Aways:
  - GAO Has Jurisdiction to Review Proper Use of OTA Authority
  - OTA Agreement Must Provide for Follow-On P-OTA Award
  - Prototype Project Must be Successfully Completed (as Modified)
  - Decision to Go the OTA Route – Still Safe (***Rocketplane Kisler*** GAO Jan. 2008)

Myth 6: None of the federal statutes or regulations apply to OTs

- **FALSE:** OT authorities are authorized by law with clear statutory guidelines. Generally, the statutes and regulations applicable to acquisition and assistance do not apply to OTs. Since OTs are defined in the negative – they are NOT procurement contracts, grants, or cooperative agreements – any statute, regulation, or policy that applies solely to these types of contractual arrangements will not apply to OTs. However, statutes and regulations applicable to acquisition and assistance are only a subset of all federal statutes or regulations. Laws and regulations that are unrelated to the acquisition or assistance process will still apply to OTs. These can include, but are not limited to, appropriations, security, export control, socio-economic, and criminal laws.

Myth 7: OTs can only be awarded through a consortium

- **FALSE:** There are many teaming arrangements permitted, to include award to a single company, joint venture, partnership, consortium (through its members or authorized agent), or a prime contractor with subcontract relationships. The possibilities are endless for OTs (and for FAR-based contracts). Each construct has its advantages and issues, and each situation may dictate a different approach. Ideally, the Government should allow the performers to determine the best way to organize their teams. Artificially forcing performers into a particular team structure often has adverse effects on efficiency and performance.

Myth 8: The OT authorities can only use RDT&E appropriations

- **FALSE:** While the majority of OT efforts are focused on RDT&E activities, the statute does not prohibit the use of other fiscal appropriations. It is important to consider the nature of the intended effort and whether the appropriation being used is appropriate for the activity of the project. This determination ultimately rests with the funding agency comptroller, but leveraging OTs does not automatically preclude use of non-RDT&E appropriations.

Myth 9: Anyone in DoD can award an OT

- **FALSE:** The USD(A&S) has designated the Directors of the Defense Agencies, the Directors of Field Activities with contracting authority, the Commanding Officers of Combantant Commands (CCMDs) with contracting authority and the Director of the Defense Innovation Unit as having the authority to carry out Prototype OTs and follow-on Production OTs as permitted by §2371b. This designation does not apply to the military departments, the Defense Advanced Research Projects Agency (DARPA), and the Missile Defense Agency (MDA), which have their own authorities prescribed in statute.

Myth 10: OTs will always be faster to award than other contractual instruments

- **FALSE:** The OT award process will not always be faster than the traditional procurement processes and sometimes can be as long or longer. For example, some agencies will award an OT but conduct the source selection process as if it were subject to FAR Part 15. Likewise, if the OT award must go through the same approval chain as a procurement contract, it could take as long. Also, because all of the terms and conditions in an OT are negotiable, drafting the agreement and negotiating it between the Government and the performer can take a long time. The OT award process can be faster if the Government team embraces the flexibility of the authority, is prepared, and the process remains as streamlined as possible.

IP Rights and DoD – Categories and Statutes/Regulations

- Inventions Conceived or First Actually Reduced to Practice – Bayh-Dole Act, 35 C.F.R. Part 401; FAR 27.3, DFARS 227.3
- Trade Secrets in the form of Technical Data and Computer Software – 10 U.S.C. 2320 (TD); DFARS 227.71 (TD); DFARS 227.72 (CS and CSD).
- Framework for Traditional DoD Contracts – Contractor Retains Ownership (Title) and DoD Gets a License Depending on Type and Level of Funding.

Patent Rights under Non-OTAs – Key Concepts

- Contractor's Right to Title to Subject Inventions (Alternative: Nonexclusive; nontransferable license).
- Exception: Declaration of Exceptional Circumstances.

Restrictions on Patent Rights

- Contractors Risk Forfeiture for Failure to Perfect Title. If Disclosures are Not Met, Penalty is Harsh – Not Rights. Safe Harbor of 60 Days Eliminated by Recent Amendments.
- Government Gets Broad License to Practice Subject Invention (Government Purpose).
- Prohibits Exclusive License Where Products Embodying Inventions are Manufactured Substantially Outside the United States.
- Nonprofits Require Government Approval to Assign Rights in U.S., Must Favor Small Businesses, and Must Share Licensing Royalties with Inventors (with balance going to Research or Education.
- Government Gets "March-In Rights" – Never Exercised.
- Government May Modify or Revoke Contractor License (where Contractor does not elect title) Where a Third Party Applies for an Exclusive License.

Contractor's Preservation of Title

Small Businesses and Non-Profits (FAR 52.227-11 and Clause 401.14)

Disclosure – 2 Months

Election of Title – 2 Years (Unless …)

Domestic Patent Application – 1 Year

(Nonprovisional 10 months after Provisional with right to extension)

Large For Profit Businesses (DFARS 252.227-7038)

Disclosure – 2/6 Months

Election of Title – 8 Months

Presumption in Favor or Extensions

Agency Right to Examine Records to Determine Subject Invention

Penalty of up to $50K for Failure to Abide by Clause

Data Rights Under Non-OTAs – Key Concepts

- Delivery Limited to That Which Satisfies Agency's Needs – and for Commercial Items – Customarily Provided to the Public.
- Now a Statutory Period of 6 Years after acceptance or termination for Deferred Ordering (since 2016) but DFARS Clause 252.227-7027 (still limits it to 3 years).

- Licensing Regime for Non-Commercial Items:
  - Unlimited Rights
  - Limited Rights (technical data) and Restricted Rights (computer software)
  - Government Purpose Rights (Mixed Funding)
  - Specially Negotiated Rights
  - Special Treatment under SBIR Contracts (5 years of limited rights, but when is the start date?)
- Separate Rules for Commercial Computer Software and Technical Data Pertaining to Commercial Items.

- No or limited protections for:
  - Form, Fit and Function Data
  - Data Necessary for Operation, Maintenance, Installation and Training
  - Data Necessary for Emergency Repair or Overhaul
  - Necessary for Review by a Covered Government Support Contractor
  - Interface Data Necessary for Segregation or Reintegration of Item or Processes (not yet implemented)

Patent Rights under 2371 – Research Projects

- The Technology Investment Agreement 32 CFR 37.105. (NOT THE ONLY VEHICLE).
- Suggest Clause 401.14 but Allows for Negotiation.
- Alternative to Government Purpose Rights: Springing Government license rights following commercialization.
- Flexible Approaches for deadlines for disclosure and election of title.
- Protection from Disclosure While Patent Application is Being Filed.
- March-in Rights may be contingent on Level of Funding.
- Retains Domestic Mfg. Preference with Stinger – Refund if Violation + Applicable to Nonexclusive Licenses.

Data Rights under 2371 – Research Projects

- The TIA regs anticipate that no data will be delivered in most cases.
- For data delivered, the regs prescribe “Government purpose” rights – i.e., cannot be used for “commercial purposes”.
- The agency is given broad authority to negotiate a license to accomplish program objectives and protect the government’s interests.

Patent Rights Under 2371b - Prototypes

- No Regulations; DoD's New OTA Guide Says Virtually Nothing.
- The DPAP Guide (now rescinded) instructs DoD to begin with Bayh-Dole regulations.
  - Preaches flexibility to address both commercialization and protection of Government's interest
  - Raises trade secret protection as viable alternative to patent protection

Patent Rights under 2371b -- Prototypes

- DARPA OTA SBIR Prototype Agreement.
  - Exists despite SBIR Statute which limits Phase I and II to “funding agreements”
  - Contains an actual template following Bayh-Dole Clause 401.14 and FAR 52.227-11 without references to terms of art and procedural protections
- Consortium Agreements.
- DIU Agreements.

Data Rights under 2371b -- Prototypes

- As with inventions there are no regulations addressing data.
- The DPAP OTA Prototype Guide recommends to the DFARS clauses for data rights and adopts definitions of key terms from the DFARS and FAR. No special recognition for small businesses.
- Although acknowledging flexibility, it warns that follow-on production contracts are likely and will be governed by the DFARS, so the terms should be consistent in the OTA. The Guide suggests that all data developed at government expense be delivered and the agency should consider delivery of source code.

Data Rights Under 7371b -- Prototypes

- The Guide floats the idea of springing broader rights to spur commercialization, the Government's needs are unclear, or if the contractor is no longer performing.
- Consortium Agreements.
- DIU Agreements.
- Compare Phase III SBIR Agreements with OTA Agreements with Small Businesses.