



Other Transaction Agreements

Government Contractors Forum

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Agenda

- Overview of Other Transactions (OTs)
 - OT Authority
 - Key Stats
 - DoD OT Guidance/Policy
- OTs in Practice
 - CSO “Direct” OTs vs. Consortia
 - Terms & Conditions
 - IP
 - Cost/Pricing/Audit
 - Warranty
 - Disputes & Protests

Key Takeaways

- OTs are not new, but are seeing increased use
- OTs are widely perceived as the preferred way to entice non-traditional defense contractors into business with the Government
- OTs are widely perceived as the preferred way to deliver innovative technology from the lab to the warfighter faster
- Even though OTs are not FAR contracts, agencies may leverage FAR clauses and principles in OTs



OVERVIEW OF OTs

What is an OT?

- Best defined in the negative: OTs are *not* a FAR procurement contract, grant, or cooperative agreement
 - Generally, not subject to laws/regulations that apply only to these types of instruments
 - The Government has broad discretion to shape the terms and conditions of an OT
- Still a legally binding contract
 - Offer, Acceptance, Consideration, Authority, Legal Purpose, Meeting of the Minds

Inapplicable Laws/Regulations (Selected)

- CICA
 - *But* Prototype OTs must be competed “to the maximum extent practicable”
- Truthful Cost and Pricing Data Act
- CAS
- CDA
 - *But see* GSA OT sample terms...
- Buy American Act
- Bayh-Dole Act & Rights in Technical Data
 - *But see* DIU OT sample terms...

Applicable Laws/Regulations (Selected)

- Fiscal Law (incl. ADA)
- Tucker Act
- Procurement Integrity Act
- Trade Secrets Act
- Economic Espionage Act
- FOIA
 - *But note* statutory exception for prototype OTs
- Criminal Law (incl. false claims/false statements)
- Arms Export Control Act

OTs Require Authority

- First OT authority was NASA in 1958
 - NASA calls these “Space Act Agreements”
- Agencies with authority: NASA, NIH, DoD (and all services), FAA, DoT, TSA, DHS, DoE, HHS, Domestic Nuclear Detection Office, and ARPA-E



Use of OTs is Increasing

- Total OT Spend
 - FY15 ~ \$887 M
 - FY16 ~ \$1.6 B
 - FY17 ~ \$2.3 B
 - FY18 ~ \$3.5 B
- FY18 Spend by Agency
 - Army ~ \$2 B
 - Air Force ~ \$534 M
 - DARPA ~ \$355 M
 - TSA ~ \$215 M

What's Driving the Increase?

- FY 2018 NDAA “established a preference” for using OTs for prototypes
 - “Prototype” not defined in statute – broad interpretation
- FY 2016 NDAA
 - Broadens definition of “non-traditional defense contractor”
 - Authorized more flexible transition into production and sustainment following successful completion of a prototype project
- Shifting focus of R&D from Government funding to private spending
- Shifting center of innovation to the commercial sector – non-traditional contractors and startups
- Rapid technological change is eroding competitive (military) advantage
- OTs afford federal agencies with the flexibility to leverage innovation
- Belief that OTs encourage nontraditional defense contractors to work with DoD
- Belief that OTs shorten the DoD acquisition cycle

OTs Within DoD

- Three Types
 - Research (10 U.S.C. 2371)
 - Prototype (10 U.S.C. 2371b)
 - Production (10 U.S.C. 2371b(f))
- DoD's most recent OT guidance was published in November 2018
 - <https://aaf.dau.mil/ot-guide/>
- Part 37 of the DoD Grant and Agreement Regulations (DoDGARS) provides guidance for 2371 OT TIAs (Technology Investment Agreements)

DoD's Prototype OT Authority

DoD “may 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 [DoD], or to improvements of platforms, systems, components, or materials in use by the armed forces.”

-- 10 U.S.C. 2371b(a)(1)

What's a Prototype?

“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.”

--DoD OT Guide, Glossary

Who Can Receive an OT?

- Must meet one of the following:
 1. At least one non-traditional defense contractor or non-profit research institution participating to a significant extent
 - Ex.: key technology, novel approach to existing technology
 - “totality of circumstances” test
 2. All significant participants are small businesses or non-traditional defense contractors
 3. At least 1/3 of the total cost paid by other than the USG
 4. “Exceptional circumstances” (authority of the agency senior procurement executive)

What's a Non-Traditional Defense Contractor?

- An entity that, for one year, has not performed any contract or subcontract subject to full CAS-coverage
 - \$50M+
- CAS-covered contracts do not include:
 - Contracts with small businesses
 - Commercial item contracts
 - FFP contracts awarded without submission of cost/pricing data

Awarding a Prototype OT

- Competition is not required, but shall be used “to the maximum extent practicable”
 - If the prototype OT was not awarded through competition, then the follow-on production OT authority of 2371b(f) is not available
- DoD’s OT Guide now **requires** that the prototype OT provide that a follow-on production OT is possible
 - This is in response to the *Oracle* protest

Transition to Production

- 10 U.S.C. 2371b(f) provides authority to award a production OT on a non-competitive basis to the recipient of a prototype OT
 - The prototype OT must have been awarded through competition
 - The prototype OT must contemplated the follow-on production OT
 - The prototype OT must have been successfully completed

Successful Completion

- Met the key technical goals of a prototype project
- Satisfied success metrics incorporated into the prototype OT
- Accomplished a particularly favorable or unexpected result that justifies the transition to production
- Can occur prior to conclusion of the prototype project – portions of the prototype OT can be transitioned



OTs IN PRACTICE

CSO “Direct” OTs vs. Consortia

- Consortia Management Firm (CMF) model
 - CMF Enters master OTA with DoD
 - Member entities join the consortia
 - DoD issues Requests for Project Proposals (RPPs)
 - Members submit white paper responses
 - Project agreements awarded
 - Ts & Cs of base consortia OTA apply

CSO “Direct” OTs vs. Consortia

- Commercial Solutions Opening (CSO) model
 - Created by DIUx
 - 6/26/18 DoD Class Deviation authorizes DoD-wide pilot program
 - Problem Statements/Areas of Interest posted
 - Vendors respond with short papers/decks (solution briefs)
 - Submissions evaluated; successful invited to “pitch” session
 - If successful, Request for Prototype Proposals issued with model Ts/Cs
 - Parties work collaboratively to negotiate
 - Scope
 - Terms
 - Payment Milestones
 - Agreements Officer executes

Important Terms – Intellectual Property

- The Bayh-Dole Act and the Rights in Technical Data statute do not apply
- The prior version of the DoD OT Guide suggested that OTs follow Bayh-Dole for inventions/patents and the DFARS clauses for rights in technical data and computer software
- The current DoD OT Guide “encourages” negotiation of IP terms based on consideration of the relative investments and risks borne by the parties
 - The Army’s December 2018 IP policy adopts a similar theme of flexibility on IP – and applies to FAR/DFARS contracts *and OTs*

DIU Model Terms - “Four Buckets” of IP

Data Categories:

- **Category A** is Data developed and paid for totally by non-governmental funds, whether pre-existing or concurrently developed proprietary data, trade secret data, or data related to COMPANY products. The COMPANY retains all rights to Category A Data.
- **Category B** is any Data developed under this Agreement, using Government funds, which cannot be disclosed without compromising the Category A data.
- **Category C** is any COMPANY developed Data, excluding Category A and B data, developed during the performance of work under this Agreement.
- **Category D** is third party proprietary data used in performance of work under this Agreement, including but not limited to, technical data, software, trade secrets and mask works.

DIU Model Terms - “Four Buckets” of IP

Allocation of Principal Rights:

- 1. The parties agree that in consideration for the Government’s funding, and in lieu of any Government rights to Category A, B or D data (except as contained in paragraph 4 below), the COMPANY intends to reduce to practical application materials and processes developed under this Agreement.*
 - 2. No deliveries to the Government of Category A and B data are contemplated or required under this Agreement. The Government reserves the right to negotiate certain rights in Category A and B data with the owner of the data.*
 - 3. The Government shall have immediate and irrevocable Government Purpose Rights to all Category C Data.*
 - 4. The COMPANY shall deliver third-party computer software, Category D data, as required for the performance or operation of other computer software required to be delivered in the performance of this Agreement, with such rights as it is able to negotiate with the software vendor.*
- Note: GSA OT sample terms has a “Commercial Supplier Agreements – Unenforceable Clauses” provision that copies GSAR 552.232-78 verbatim

DIU Model Terms – IP

Prior Technology:

In the event it is necessary for the COMPANY to furnish the Government with Data which existed prior to, or was produced outside of this Agreement, and such Data embodies trade secrets or comprises commercial or financial information which is privileged or confidential, and such Data is so identified with a suitable notice or legend, the Data will be maintained in confidence and disclosed and used by the Government and such Government Contractors or contract employees that the Government may hire on a temporary or periodic basis only for the purpose of carrying out the Government's responsibilities under this Agreement. **Data protection will include proprietary markings and handling, and the signing of nondisclosure agreements by such Government Contractors or contract employees.** The COMPANY shall not be obligated to provide Data that existed prior to, or was developed outside of this Agreement to the Government. Upon completion of activities under this Agreement, such Data will be disposed of as requested by the COMPANY.

Important Terms – Cost/Pricing/Audit

- OTs are not subject to the Truthful Cost or Pricing Data Act or CAS
- The Government must determine price reasonableness – exhaust all possible avenues of information before requesting data from the offeror
- GAO has an audit right under 10 U.S.C. 2371b(c)
 - Prototype projects \$5M+

Important Terms – Cost/Pricing/Audit

- Because the definition of “nontraditional defense contractor” ties back to CAS coverage, OT participants may not have adequate cost accounting systems for a cost-type OT
- Consider the capabilities of the offeror’s accounting systems before using a cost-type or cost sharing OT
- Avoid audit provisions on fixed-price OTs

Important Terms – Warranty, Compliance

- GSA Model CSO OT terms:
 - *“Warranty. Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.”*
 - Compare Commercial terms: “THESE WARRANTIES ARE THE CUSTOMER'S EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.”
 - *“Other Compliances. Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.”*

Disputes

- Generally, CDA does not apply...
- But some agreements cite the CDA
 - GSA Model CSO OT terms: *“This contract is subject to 41 USC chapter 71, Contract Disputes”*
 - And others include “Continued Performance/Duty to Proceed”
- Others establish escalation/ADR framework, reserving rights to “pursue any right or remedy provided by law”
 - What does that mean?

Protesting OTs: *Oracle America, Inc.*, B-416061

- Does the GAO have jurisdiction to hear a protest over an OT?
 - GAO caselaw holds that an OT is not a procurement contract
 - So the GAO generally will not entertain a protest of an OT solicitation or award
 - But the GAO will entertain protests about whether an agency is improperly using its other transaction authorities

Protesting OTs: *Oracle America, Inc.*, B-416061

- Was the P-OT proper?
 - 10 U.S.C. 2371b(f) prescribes conditions for a P-OT awarded without competition...*inter alia*:
 - “A transaction . . . may provide for the award of a follow-on production contract or transaction”
 - The CSO and AoI are not sufficient – they’re not the “transaction”
 - DoD OT Guide now requires language about follow-on production OTs in prototype OTs
 - “[T]he participants in the transaction successfully completed the prototype project provided for in the transaction”
 - “[T]he plain meaning of the phrase ‘completed the prototype project provided for in the transaction’ is the entire prototype project described in the transaction, i.e., the instrument itself”
 - This part of the decision has apparently been overruled by legislation (FY19 NDAA – successful completion of prototype subproject is now sufficient and military department makes determination) and policy (DoD OT Guide)



Questions?

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