

Other Transaction Authority: Evaluating Opportunities and Risks

Jon Baker, Crowell & Moring LLP

Michelle D. Coleman, Crowell & Moring LLP

Michelle Crawford, ATI

June 29, 2023



Speakers



Jonathan M. Baker
Crowell & Moring LLP



Michelle D. Coleman
Crowell & Moring LLP



Michelle Crawford
ATI

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Agenda

- Background and History
- Research Other Transactions
- DoD Prototype Other Transactions
- Other Transactions and Consortia
- Other Transactions Additional Considerations

Background & History



Other Transaction Authority

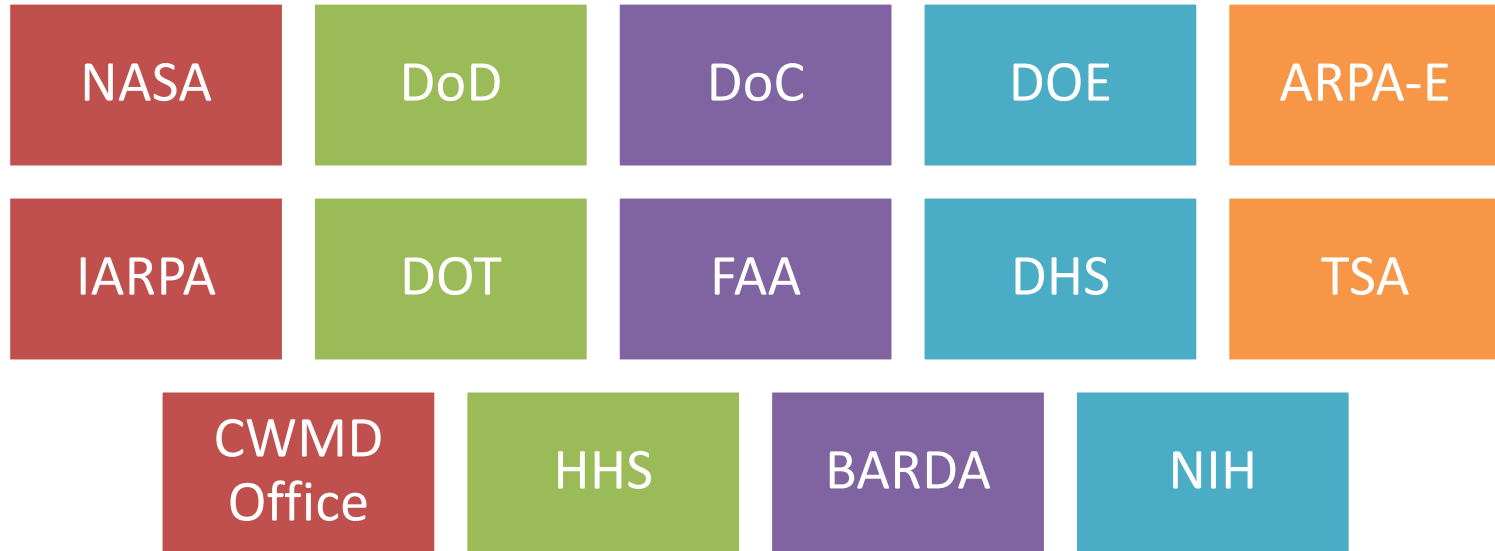
- Other Transaction authority has existed for decades
 - Late 1950s (NASA); early 1990s (DoD)
- Contracting tool which grants USG broad discretion
- Interest has increased exponentially in the past several years
 - Statutory changes
 - Expanded use of consortia

Other Transaction Authority

Features of Other Transactions

- Defined in the negative, i.e., not a procurement contract, grant, or cooperative agreement
- Exempt from many statutes and regulations that apply to procurement contracts, grants, and cooperative agreements

Federal Agencies with OT Authority



Federal Agencies with OT Authority Con'd

AGENCY	AUTHORIZING STATUTE
National Aeronautics and Space Administration (NASA)	51 U.S.C. § 20113(e)
Department of Defense (DoD)	10 U.S.C. § 4021; 10 USC § 4022
Department of Commerce(DoC) - National Oceanic and Atmospheric Administration (NOAA)	15 U.S.C. § 8531 (Section 301 of the Weather Research and Forecasting Innovation Act of 2017)
Department of Commerce(DoC) - National Institute of Standards and Technology (NIST)	Sec. 5301, FY2021 NDAA
Department of Energy (DOE), includes ARPA-E/EERE/IARPA	42 U.S.C. § 7256 7256(g) IAW; 10 USC § 4021 Section 845 of Public Law 103-160, as amended
Advanced Research Projects Agency-Energy (ARPA-E)	42 U.S.C. § 16538
Intelligence Advanced Research Projects Activity (IARPA)	Sec. 502, FY2021 IAA
Department of Transportation (DOT)	49 U.S.C. § 5312 (a-d); (49 U.S.C. § 5312 (e)
Federal Aviation Administration (FAA)	49 U.S.C. § 106(l)(6)
Department of Homeland Security (DHS), includes TSA / S&T Directorate	6 U.S.C. § 391(a)(1) IAW; 10 U.S.C. § 4021; 6 U.S.C. § 391(a)(2) IAW; 10 U.S.C. § 4021 Section 845 of Public Law 103-160, as amended
Transportation Security Administration	49 U.S.C. § 114(j)
Countering Weapons of Mass Destruction Office (Domestic Nuclear Detection Office)	6 U.S.C. § 596
Department of Health and Human Services (HHS) includes BARDA/ASPR/NIH	42 U.S.C. § 282
Biomedical Advanced Research and Development Authority (BARDA)	42 U.S.C. § 247d-7e
National Institutes of Health (NIH)	42 U.S.C. § 282(n); 42 U.S.C. § 284n(b)(1); 42 U.S.C. § 285b-3 Subject to 42 U.S.C. § 284(b)(2); 42 U.S.C. § 287a(e)(3)(C)
Agriculture Advanced Research and Development Authority (AGARDA)	Section 4021 of Title 10
Office of the National Cyber Director (Executive Office of the President)	6 U.S.C. § 1500

Other Transaction Authority within DoD

DoD Requirements, Guidance, and Resources

- 10 U.S.C. § 4021, Research Projects
 - DoD Grant and Agreement Regulations (DoDGARs)
 - Technology Investment Agreements (TIAs), 32 C.F.R. Part 37
- 10 U.S.C. § 4022, Prototype Projects
- DoD Other Transaction Guide
 - Latest update – November 2018

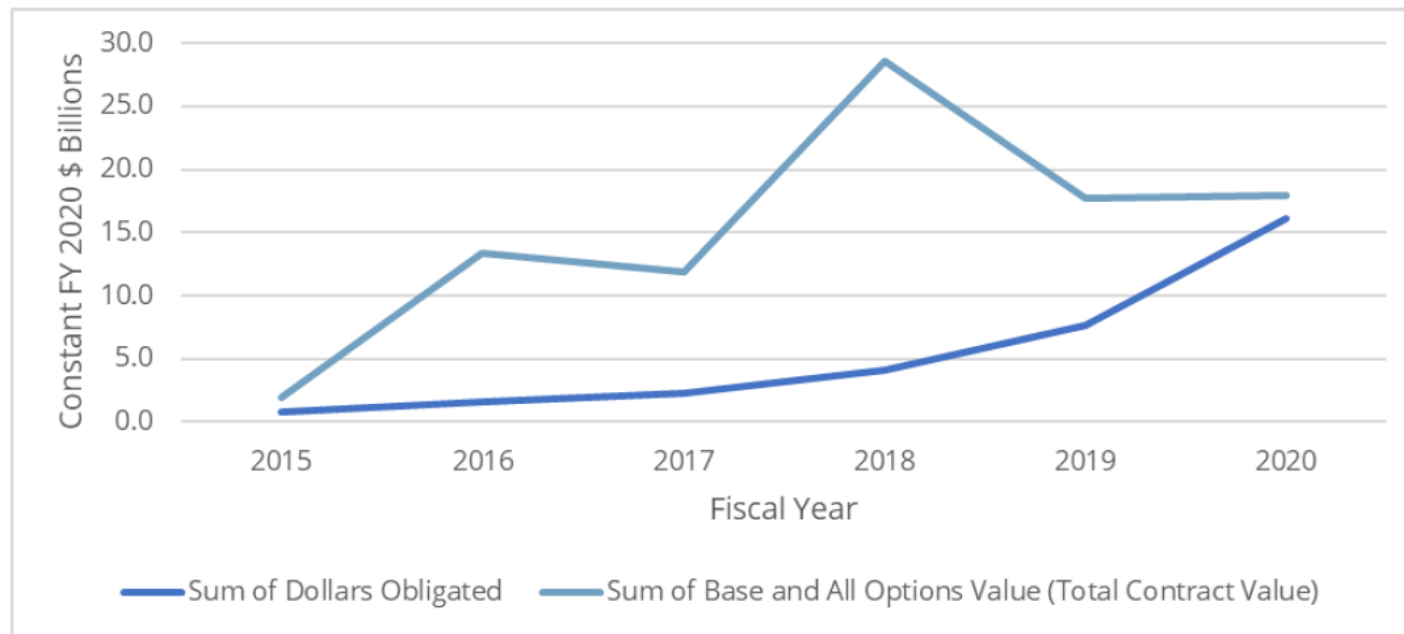
OT Expenditures Are on the Rise

Funding Agency	2019 ↕	2020 ↕	2021 ↕	2022 ↕	2023 (YTD) ↕	TOTAL (FY 2019–2023) ▼
Total	\$7.82 B	\$17.94 B	\$15.51 B	\$11.05 B	\$5.45 B	\$57,762,990,510
‣ DOD – Department of Defense	\$7.57 B	\$16.43 B	\$14.69 B	\$10.92 B	\$5.35 B	\$54,962,288,766
‣ HHS – Department of Health and Human Services	\$61.35 M	\$1.30 B	\$501.89 M	\$108.51 M	\$90.50 M	\$2,058,447,310
‣ DHS – Department of Homeland Security	\$183.14 M	\$217.35 M	\$309.07 M	\$25.34 M	\$5.95 M	\$740,840,684
‣ DOI – Department of the Interior	\$614.50 K	\$599.76 K	\$16.43 K	–	–	\$1,230,690
‣ None Reported	–	–	–	–	\$500.00 K	\$500,000
‣ DOC – Department of Commerce	–	–	–	–	\$32.50 K	\$32,500
‣ NASA – National Aeronautics and Space Administration	–	–	–	–	–	\$0
‣ DOT – Department of Transportation	–	–	–\$167.76 K	–\$181.68 K	–	\$–349,440

Source: Bloomberg Government Contract Intelligence Tool

OT Expenditures Are on the Rise

Figure 2-1: Defense OTA Obligations, 2015–2020

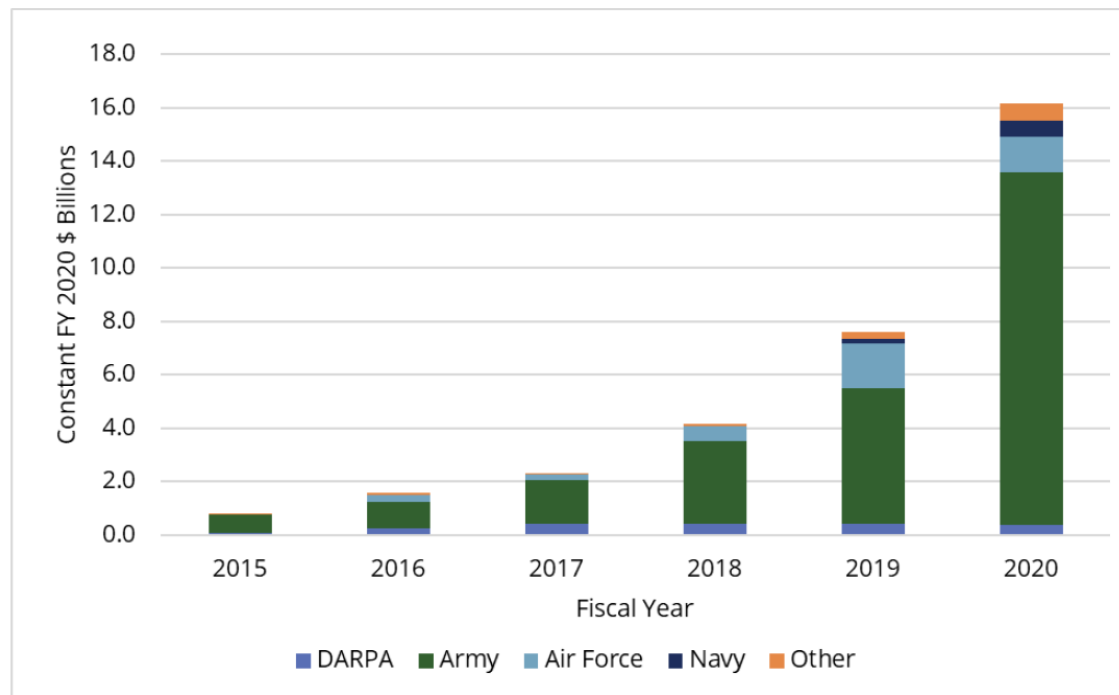


Source: FPDS; CSIS analysis.

Source: *Trends in Dept. of Defense Other Transaction Authority Usage*, R. McCormick & G. Sanders, May 2022, Report of the CSIS Defense-Industrial Initiatives Group, <https://www.csis.org/analysis/trends-department-defense-other-transaction-authority-usage>

DoD OT Expenditures by Agency

Figure 2-6: Defense OTA Obligations by Customer, 2015–2020

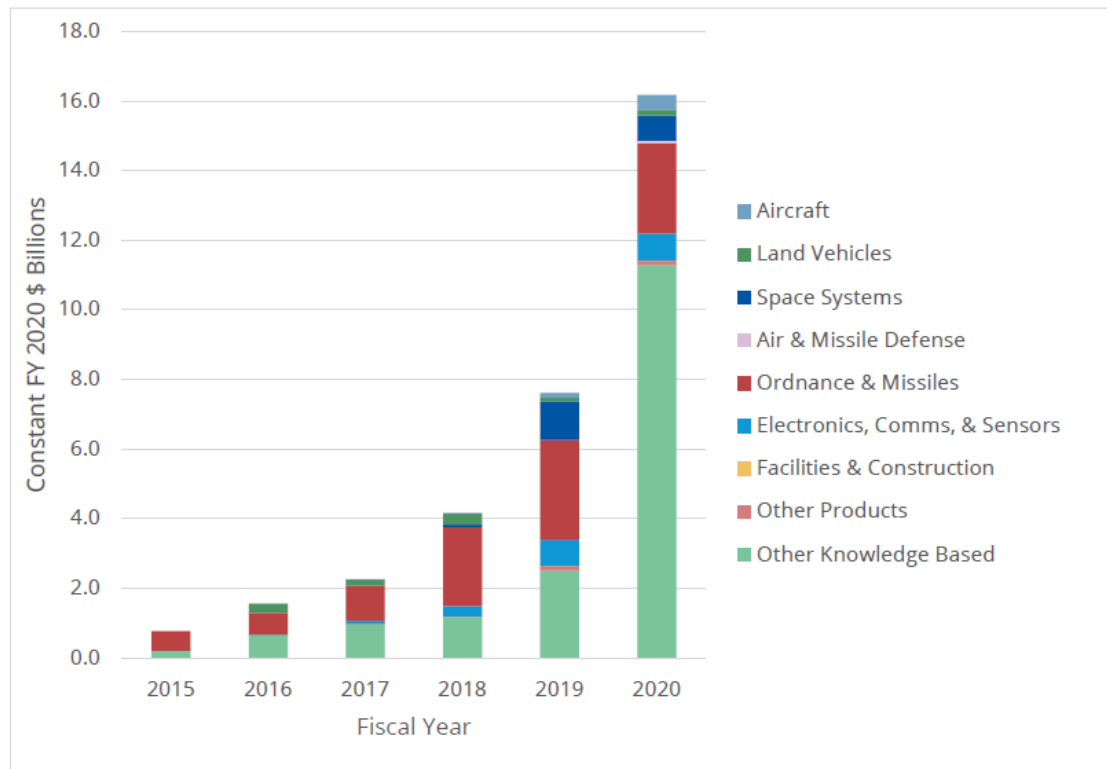


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DoD OT Expenditures by Platform

Figure 2-5: Defense OTA Obligations by Platform Portfolio, 2015–2020



Source: *Trends in Dept. of Defense Other Transaction Authority Usage*, R. McCormick & G. Sanders, May 2022, Report of the CSIS Defense-Industrial Initiatives Group, <https://www.csis.org/analysis/trends-department-defense-other-transaction-authority-usage>

Research Other Transactions



DoD Research OTs

- SECDEF is authorized to award Research OTs through DARPA or any other DoD element
- Prohibition on advance payments does not apply to DoD Research OTs
- Cost sharing: To the extent practicable, USG funding of Research OT must not exceed amount provided by other parties to the OT
- Research OT must not duplicate other research being conducted under existing DoD programs

10 U.S.C. § 4021

DoD Technology Investment Agreements

- DoDGARS: “TIAs are assistance instruments used to stimulate or support research”
 - May be a kind of cooperative agreement, OR
 - May be a type of assistance transaction other than a grant or cooperative agreement
- Purpose of TIAs is to foster civil-military integration
- DoD Policy
 - TIAs should not duplicate other DoD research, to the maximum extent practicable
 - Awards to consortia are encouraged
 - Use competition when required by statute and, in all other cases, to the maximum extent practicable
 - Agreements officer must have specific authority to award or administer TIAs
 - ***Must seek 50% cost share, to the maximum extent practicable***
- Rules on nonprocurement suspension & debarment (2 CFR § 1125), drug-free workplace (32 CFR § 26), and lobbying restrictions (32 CFR § 28), as well as portions of other DoDGARS parts apply

DoD Prototype Other Transactions



What is a Prototype Project?

- NDAA FY 2023 clarified types of projects that are authorized for prototype OTs

(a) Authority.--(1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of [section 4021](#) of this title, carry out prototype projects that are directly relevant to enhancing the mission effectiveness of ~~military personnel and the supporting personnel of the Department of Defense or improving~~ platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, Dec. 23, 2022, § 843.

What is a Prototype Project

- NDAA FY 2023 further defined “prototype project.” Includes a project that addresses:
 - A proof of concept, model, or process, including a business process;
 - Reverse engineering to address obsolescence;
 - A pilot or novel application of commercial technologies for defense purposes;
 - Agile development activity;
 - The creation, design, development, or demonstration of operational utility; or
 - Any combination of the above.

James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, Dec. 23, 2022, § 843.

DoD Prototype Eligibility

- DoD may not use this prototype authority unless:
 - At least one nontraditional defense contractor or nonprofit research institution participating to a significant extent;
 - All non-federal significant participants in the transaction are small businesses or nontraditional defense contractors;
 - At least 1/3 of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government; or
 - Sr. Procurement Executive determines that exceptional circumstances justify use of OT that provides for innovative business arrangements that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

10 U.S.C. § 4022(d)(1)

DoD Prototype OT Authority

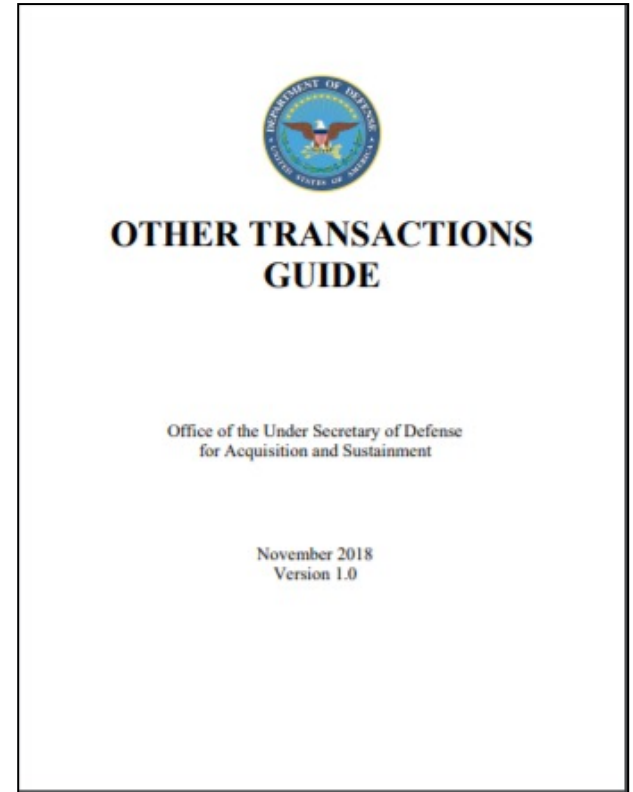
“At least one nontraditional defense contractor or nonprofit research institution participating to a significant extent”

- Statutory definition of “nontraditional defense contractor”:
 - “an entity that is not currently performing and has not performed, for at least the **one-year period** preceding the solicitation of sources by the [DoD] for the procurement or transaction, any contract or subcontract by the [DoD] for the procurement or transaction, any contract or subcontract for the [DoD] that is subject to **full** coverage under the cost accounting standards prescribed pursuant to [41 U.S.C. § 1502] and the regulations implementing such section” (10 U.S.C. § 3014)
 - Earlier version of statute also required nontraditional defense contractor to not have any contract in excess of \$500,000 to carry out federal prototype projects or to perform federal basic, applied, or advanced research projects

DoD Prototype OT Authority

2018 DoD Other Transactions Guide

- Rescinds and replaces January 2017 Other Transactions Guide for Prototype Projects
- Adopts statutory definition of “nontraditional defense contractor”
- Per 2017 Guide, nontraditional defense contractor can be:
 - At the prime level,
 - Team members,
 - Subawardees,
 - “Intra-company” business units (provided the business unit makes a significant contribution to the prototype project)



DoD Prototype OT Authority

“Participating to a Significant Extent”

- “Significant extent” is not defined by the authorizing statute
- Per 2018 DoD Other Transactions Guide:
 - Agreements Officers should make determination by assessing the totality of the circumstances for each proposed prototype project
 - Considerations include whether the nontraditional defense contractor will:
 - supply new key technology, product, or process;
 - supply a novel application or approach to an existing technology;
 - provide a material increase in the performance, efficiency, quality, or versatility of a key technology, product, or process;
 - accomplish a significant amount of the effort; and
 - cause a material reduction in cost or schedule

DoD Prototype OT Authority

“At least 1/3 of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government”

- Can be cash or in-kind contributions
- Can be from any non-federal source
- Prior versions of statute required cost share to be provided by
 - OT participant
 - Parties to the transaction other than the Federal Government

DoD Prototype OT Approvals

Approvals Required

- \leq \$100 million
 - No higher-level approvals required
- \$100 million - \$500 million (including all options), requires:
 - Written determination from Senior Procurement Executive that (1) OTA statutory requirements will be met and (2) use of authority “is essential to promoting the success of the prototype project”
- $>$ \$500 million (including all options), requires:
 - Written determination from Under Secretary of Defense for Research & Engineering or Under Secretary of Defense for Acquisition and Sustainment that (1) OTA statutory requirements will be met and (2) use of authority “is essential to meet critical national security objectives”; and
 - Senate and House armed services and appropriations committees are notified at least 30 days before authority is executed

Follow-on Production Contracts and Transactions

- Prototype “transaction” may provide for award of a follow-on production contract or transaction to the OT participants
 - Transaction includes individual prototype subprojects awarded under the transaction to a consortium
 - May be awarded without competition if,
 - Competitive procedures used to select OTA participants, and
 - Participants successfully completed the prototype project
- Under prior version of statute, any follow-on production had to be priced and scoped as part of competitive OTA award process

10 U.S.C. § 4022(f)

OT Competitive Procedures

- “To the maximum extent practicable, competitive procedures shall be used when entering [prototype OTs].” 10 U.S.C. § 4022(b)(2).
- Common competition approaches:
 - Broad Agency Announcements
 - Commercial Solutions Openings
 - Request for Solutions
 - Request for White Papers

Follow-on Production Contracts and Transactions

Successful Completion of Prototype Project

- Per 2018 DoD Other Transactions Guide:
 - “Successful completion” requires that the effort:
 - Met key technical goals;
 - Satisfied success metrics incorporated into the OT; or
 - Accomplished a particularly favorable or unexpected result that justifies the transition to production.
 - “Successful completion” can occur prior to conclusion of prototype project. This allows USG to transition some aspects of prototype project to production while others continue to be worked.
 - Prototype OTs “shall contain a provision that sets forth the conditions under which that prototype agreement must be successfully completed”

Follow-on Production Contracts and Transactions

Recent Clarification – NDAA FY 2023

- Some DoD agencies had interpreted authorizing statute as also requiring OT solicitations to contemplate potential award of sole-source follow-on production contracts/OTs.
- Congress recently rejected that interpretation:

(2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements ~~of section 2304 of this title of chapter 221 of this title and even if explicit notification was not listed within the request for proposal for the transaction~~, if--

(A) competitive procedures were used for the selection of parties for participation in the transaction; and

(B) the participants in the transaction successfully completed the prototype project provided for in the transaction.

James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, Dec. 23, 2022, § 843.

Negotiation of OTs

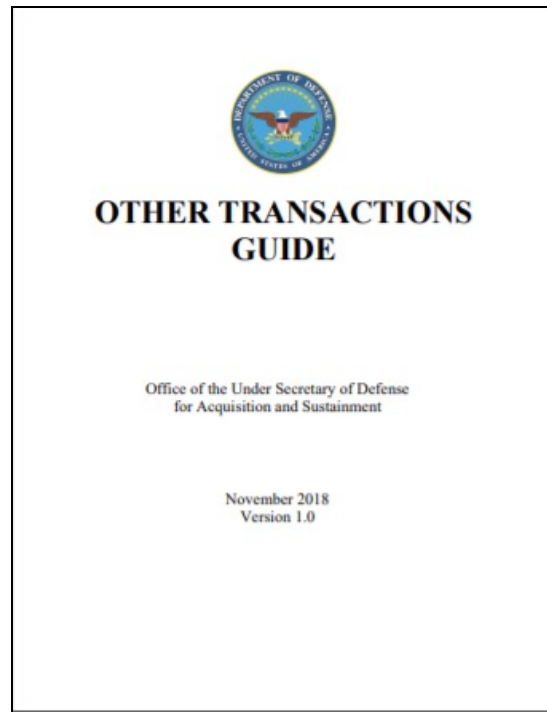
Successful Completion of Prototype Project

- Because FAR & DFARS do not apply, terms may be flexible
- USG often attempts to incorporate FAR & DFARS provisions
- IP terms, for example, are commonly negotiated

IP Guidance

2018 DoD Other Transaction Guide

- Encourages use of “a tailored IP scheme”
- Tailored IP terms may include, *inter alia*:
 - Royalty provisions
 - Limited licenses (scope, duration, manner)
 - Options
 - Conditions
 - Right-of-first refusal
 - Exclusivity terms
- Encourages use negotiation of rights that differ from statutory requirements for patents (Bayh-Dole Act) or technical data)
- Negotiated IP terms “should facilitate all parties’ business plans and project goals, including any likely production and follow-on support”
- Recognizes “reduced need for rights in IP” when project calls for reliance on commercial marketplace to produce, maintain, modify, or upgrade technology



Other Transactions & Consortia



How OTs are Awarded

- Can be awarded directly by Agency to contractor via:
 - Commercial Solutions Opening
 - Broad Agency Announcement
 - Small Business Innovation Research program
 - Other
- Can be awarded to Consortia
- How does the Gov't fund OTs?
 - Depends
 - Research OTs generally restricted to Research, Development, Test, and Evaluation
 - No specific fund type for prototype OTs
 - Can use RDT&E, O&M, etc.
 - OT does not expand or restrict available appropriations
 - Can use a combination of funding types depending on the effort
- OT may provide for incremental funding and applicable clauses limiting Gov't obligation may be included

Use of Consortia

Many project agreements issued to companies under OTs held by a consortium.

OSD Sponsored	Air Force Sponsored	Army Sponsored	Navy Sponsored
<ul style="list-style-type: none">• Cornerstone Consortium• Countering Weapons of Mass Destruction Consortium• Defense Electronics Consortium• DoD Ordnance Technology Consortium• Medical CBRN Defense Consortium• National Spectrum Consortium• University Consortium for Applied Hypersonics• Vertical Lift Consortium	<ul style="list-style-type: none">• AFLCMC Consortium Initiative• AFRL OTAFI• AFRL Open System Acquisition Initiative• AFLCMC Propulsion Directorate Consortium Initiative• Space Enterprise Consortium• Supply Chain Consortium Initiative	<ul style="list-style-type: none">• Aviation & Missile Technology Consortium• Cyberspace Operations Broad Responsive Agreement• Consortium for Command, Control, and Communications in Cyberspace• Consortium for Energy, Environment, and Demilitarization• Defense Automotive Technologies Consortium• Engineer, Research, and Development Center• Medical Technologies Enterprise Consortium• National Advanced Mobility Consortium• Sensors, Communications, and Electronics Consortium• Training and Readiness Accelerator Consortium	<ul style="list-style-type: none">• Information Warfare Research Project• Marine Sustainment Technology and Innovation Consortium• Naval Aviation Systems Consortium• Naval Surface Technology and Innovation Consortium• Strategic & Spectrum Missions Advanced Resilient Trusted Systems• Undersea Technology Innovation Consortium

Use of Consortia

- Relatively low barriers of entry to consortia
- Nontraditional and traditional defense contractors may be eligible for membership
- Consortia are often managed by a “consortium management firm”
- Example: System of Systems Consortium (SOSSEC)
 - Complete membership application
 - Pay annual membership fee (SOSSEC = \$500)
- Normally required to execute a consortium membership agreement



Opportunities Through Consortia

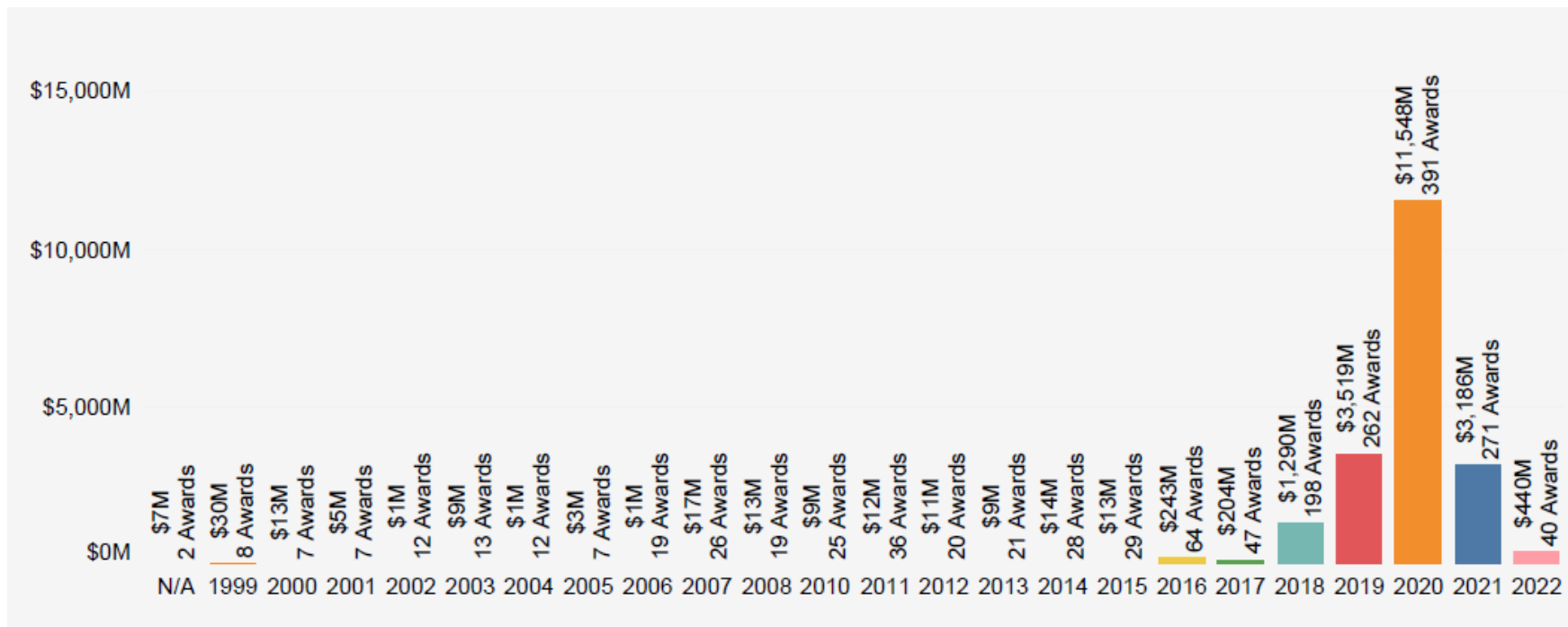
Table 2-2: Top 20 Vendors, Overall OTA Obligations, 2015–2020

Vendor Rank	Global Vendor Name	Vendor Type	Total Obligations (2015–2020) Billions
1	Analytic Services	Consortium	16.34
2	Consortium Management Group	Consortium	1.69
3	Advanced Technology International	Consortium	1.68
4	Lockheed Martin	Big Five Defense	0.86
5	System of Systems Consortium (SOSSEC)	Consortium	0.79
Top 5 Total			21.36
6	National Center for Manufacturing Sciences	Consortium	0.78
7	Microsoft	Big Five IT	0.66
8	Raytheon	Big Five Defense	0.58
9	Northrop Grumman	Big Five Defense	0.55
10	United Launch Alliance L.L.C.	Big Five Defense (Joint Venture)	0.50
11	Boeing	Big Five Defense	0.42
12	Medical Technology Enterprise Consortium	Consortium	0.35
13	Defense Energy Center of Excellence	Consortium	0.35
14	Aerodyne Rocketdyne Holdings	Large Defense	0.35
15	Defense Automotive Technologies Consortium	Consortium	0.24
16	National Security Technology Accelerator	Consortium	0.23
17	Blue Origin	Large Nontraditional	0.22
18	ICON PLC	Large Nontraditional	0.21
19	VMWare	Large Nontraditional	0.19
20	Consortium For Energy, Environment, and Demilitarization	Consortium	0.18
Top 20 Total			27.17
Overall DOD total			34.07

10 of the top 20 DoD OT vendors from 2015–2020 are consortia or consortium management firms

Source: Trends in Dept. of Defense Other Transaction Authority Usage, R. McCormick & G. Sanders, May 2022, Report of the CSIS Defense-Industrial Initiatives Group, <https://www.csis.org/analysis/trends-department-defense-other-transaction-authority-usage>

OTA Awards Through Consortia



Source: Bloomberg Government Consortia Other Transaction Agreement Dashboard

Opportunities Through Consortia

- Consortium members notified of government funding opportunities
- Consortia hold competitions (i.e., requests for white papers) among consortium members
- USG reviews white papers and select those for potential project agreements
- Consortium member submits proposal; USG reviews and approves
- Consortia then issue project agreements to selected member(s), flowing down certain contract terms from the OT

Other Transactions: Additional Considerations



Can Someone Challenge My OT Award?

Bid Protests

- Agencies may have internal dispute procedure
- GAO lacks jurisdiction to hear challenges to OT awards
 - Exception: protests alleging that agency is improperly using OT to procure good or services or if the OT is in connection with a procurement (*Kinemetrics, Inc.*, 155 Fed. Cl. 777 (2021))
- Whether federal courts have jurisdiction is fact dependent:
 - *Space Exploration Technologies v. U.S.* (2019): Court of Federal Claims (COFC) declined jurisdiction over protest challenging award of OT, where offerors were eligible to compete in follow-on procurement, even if not awarded the OT
 - *MD Helicopters v. U.S.* (2020): District Court of Arizona declined jurisdiction
 - *Hydraulics Inc. v. U.S.* (2022): COFC held it had jurisdiction over protest challenging award of OT where the OT solicitation contemplated potential award of a follow-on production contract. Thus, OT was “in connection with” a procurement and COFC had jurisdiction under the Tucker Act.

How are Terminations Handled?

Depends on the Other Transaction

- Typically tailored
 - Can provide more or less robust procedures
- Typically allows the Gov't the right to terminate for any reason and at any time
- When terminated, contractor and subcontractors must cease work
- For termination for default/cause, Gov't may:
 - Withhold payments
 - Disallow costs or fee/profit
 - Terminate in whole or part
 - Other legal remedies (reprocurement?)

How are Terminations Handled? Cont'd

Depends on the Other Transaction

- Gov't agrees to negotiate in good faith a reasonable adjustment of all outstanding issues and failure to agree is a “dispute”
 - May take into account credits for the Gov'ts cost share
 - May allow recovery for non-cancellable items if reasonable
 - May not allow costs incurred after Notice of Termination, unless expressly authorized
- Gov't typically retains the right to report termination for cause/default

What Happens if My Company Loses Nontraditional Defense Contractor Status?

- Question often arises in context of M&A
- OT statutes are silent
- OT awards sometimes include notice requirements
- Can you team with another nontraditional defense contractor that will participate to a significant extent?

Why Use DoD Prototype OT Authority

- Generally, a faster procurement cycle
- Not subject to FAR
- Flexibility in IP and other provisions
- But...there are some rules that apply to OTAs:
 - Old Prototype OTA Guide – Includes extensive list of inapplicable statutes
 - New Prototype OTA Guide more circumspect about applicability of various procurement statutes
 - Procurement Integrity Act expressly applies
 - OTA may include FAR/DFARS-like provisions
 - Recommend careful consideration before ignoring certain compliance statutes
 - False Claims Act still applicable

How Do I Encourage Gov't Use of an OT?

- Responses to RFIs for upcoming opportunities
- Industry Day discussions
- Submit White Paper
- Lobbying efforts
- Through these instruments:
 - Demonstrate eligibility
 - Remind the Gov't of:
 - The speed and flexibility of negotiating OTs
 - Protest barrier
 - Follow-on production or OT award without competition (subject to requirements)

Thank you



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