

HAYNES BOONE

Other Transaction Authority (OTA) Agreements

OVERVIEW AND RECENT DEVELOPMENTS

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Agenda

- Recent Executive Actions Mandating Use of OTAs
- Background on and History of Other Transaction Authority
- Consortium OTAs
- Key Terms and Conditions
- DoD OTAs
 - Research, Prototype, Production
- NASA OTAs
- Protest of OTA Awards
- Performance Disputes Involving OTAs

Recent Executive Actions Mandating Use of OTAs

Executive Order 14265: Modernizing Defense Acquisitions and Spurring Innovation in the Defense Industrial Base (Apr. 9, 2025)

Sec. 3. Acquisition Process Reform. Within 60 days of the date of this order, the Secretary of Defense shall submit to the President **a plan to reform the Department of Defense's acquisition processes that, to the maximum extent possible, incorporates the following:**

(a) Utilization of existing authorities to expedite acquisitions throughout the Department of Defense, including a first **preference for commercial solutions** and a general **preference for Other Transactions Authority**, application of Rapid Capabilities Office policies, or any other authorities or pathways to promote streamlined acquisitions under the Adaptive Acquisition Framework. Starting upon issuance of this order, and during the formation of the plan, the Secretary of Defense shall **prioritize use of these authorities in all pending Department of Defense contracting actions and require their application**, where appropriate and consistent with applicable law, for all Department of Defense contracting actions pursued while the plan directed by this section is under consideration.

Executive Order 14265: Modernizing Defense Acquisitions and Spurring Innovation in the Defense Industrial Base (Apr. 9, 2025)

Sec. 5. Acquisition Workforce Reform. [D]evelop . . . a plan . . . to **reform**, right-size, and train the **acquisition workforce** that includes the following components:

(a) The restructuring of **performance evaluation metrics** for acquisition workforce members to include the ability to demonstrate and apply a **first consideration of commercial solutions, adaptive acquisition pathways** through the Adaptive Acquisition Framework, and iterative requirements based on the perspective of the end user.

(c) The establishment of **field training teams** . . . led by senior acquisition executives or managers with **expertise in innovative acquisition authorities and commercial solutions** [to] provide hands-on guidance, deliver templates and case studies . . . for innovative acquisition authorities, and [assist with] acquisition and sustainment tasks.

(d) The development and implementation of policies, procedures, and tools to incentivize acquisition officials to, in good faith, **utilize innovative acquisition authorities and take measured and calculated risks.**

Why Is Innovative Thinking and Risk-Taking Important?

From the **Strategic Institute for Innovation in Government Contracting** (LinkedIn Post 5/1/2025):

“The flexibility Other Transactions (OTs) offer has NOT been met with curiosity or a desire to explore and experiment with new and different approaches and arrangements to better deliver the fruits of R&D. Instead, leadership and ‘experts’ have been desperate to stuff these authorities into a box, turning them into a **process much like the traditional process** (but better, right?). OTs are NOT being used to liberate or energize thinking or to explore potential and opportunities, conversely, they have been made servile to the dominant mindset and attitudes within the bureaucracy.

The flexible authorities intended to encourage and enable new thinking and innovation, have been met with inflexible and outmoded thinking.

Since OTs were introduced three decades ago, most folks have only bothered to understand them from inside-the-box, from the context of the current system. Leadership has NOT incentivized entrusted teams to explore, learn, share and grow.

We believe that leadership can assemble and incentivize Special Acquisition Forces: Mission-oriented teams with the 'right stuff' to operate in different business environments with intelligence (i.e. win/win scenarios), heighten business acumen, and plain ol’ common sense.

OTs allow you to do the things, but YOU have to do the things!”

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Secretary of Defense Memo: Directing Modern Software Acquisition to Maximize Lethality (Apr. 9, 2025)

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000



It is a top priority for DoD to reform its acquisition processes in order to acquire, deliver, and iterate on our weapon and business systems — including software — at speed and scale for our Warfighter. To start, DoD must maximize the use of its existing authorities, contracting strategies, and processes for software acquisition. This will enable us to immediately shift to a construct designed to keep pace with commercial technology advancements, leverage the entire commercial ecosystem for defense systems, rapidly deliver scaled digital capabilities, and evolve our systems faster than adversaries can adapt on the battlefield.

To meet this challenge, I am directing all DoD Components to adopt the Software Acquisition Pathway (SWP) as the preferred pathway for all software development components of business and weapon system programs in the Department.

The Department must also align contracting strategies and maximize the use of existing authorities. Effective immediately, for efforts that meet the threshold requirements enabling the application of authorities provided at title 10, U.S.C., § 3458 or title 10, U.S.C., § 4022. I am directing the use of Commercial Solutions Openings and Other Transactions as the default solicitation and award approaches for acquiring capabilities under the SWP. This applies to any software pathway program in the planning phase prior to execution. Department Components are prohibited from implementing further guidance on this point that would set out restrictive measures, guidelines, frameworks, directives, or policies other than required by statute.

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Background on and History of Other Transaction Authority

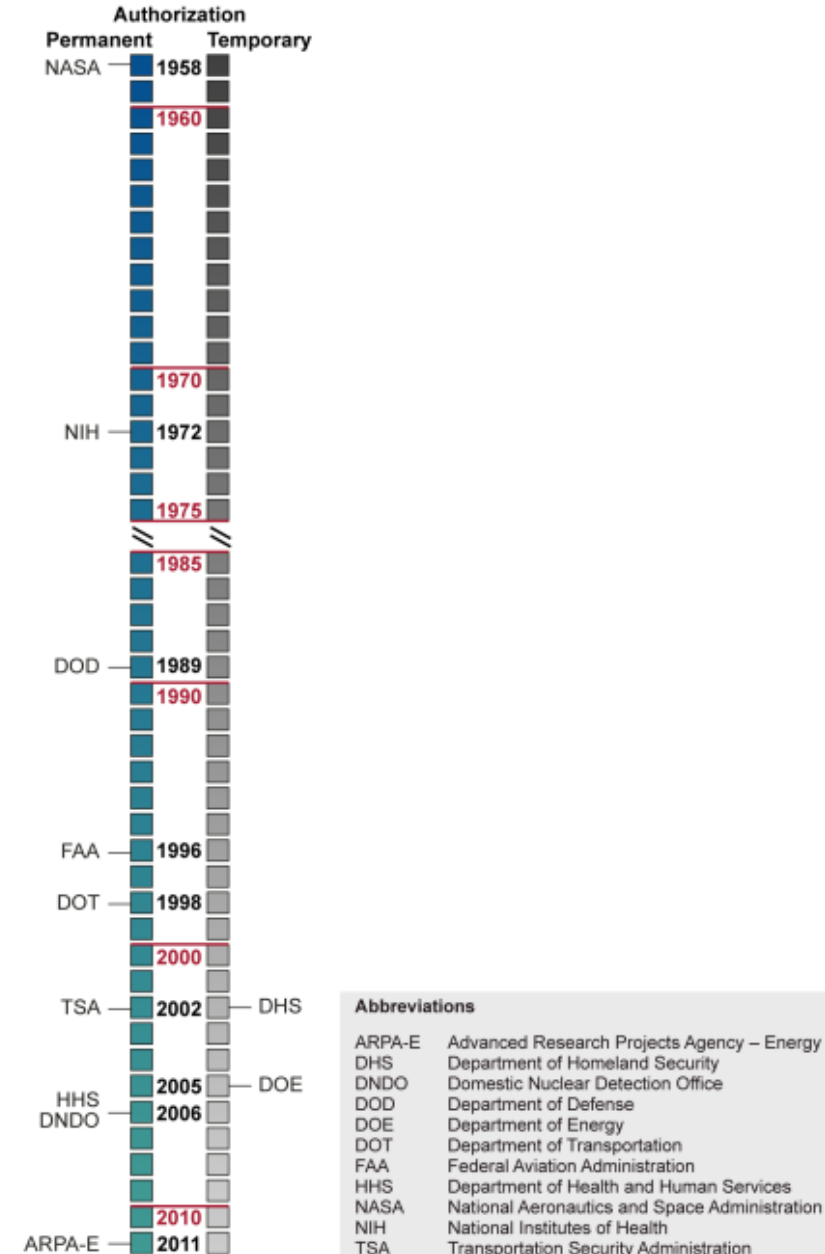
What are “Other Transaction” Agreements?

- *Other Transaction Authority Agreements (OTAs)*, or simply *Other Transactions (OTs)*, are contractual agreements **other than procurement contracts, grants, or cooperative agreements**
- OTAs are exempt from the procurement laws and regulations and agencies have significant flexibility in crafting contract provisions and competitive processes
- The agreements are generally not subject to cost allowability principles or standard intellectual property provisions, among other standard government contract requirements
- Not all agencies have authority to issue OTAs

History of OTs

- NASA was the first agency to receive Other Transaction Authority, pursuant to the National Aeronautics and Space Act of 1958
- Eleven other agencies received permanent or temporary authority since then, most recently Advanced Research Projects Agency–Health (ARPA-H) in 2020. See 42 USCA § 290c(g)(1)(D).
- Only DoD and DHS have authority for prototype OTs
- A 2016 GAO study found OT use had been limited and mostly for research and development

Figure 1: Agencies with Permanent or Temporary Other Transaction Authority and Year Granted



Sources: GAO analysis of U.S. code, public laws, and agency information. | GAO-16-209

Recent Increased Use of OTs

- Use of Other Transactions has increased significantly over the last ten years, especially at DoD
- The increase affected Consortium OTAs as well as individual awards
- Partly driven by OTs for COVID response, both at DoD Medical CBRN Defense Consortium (MCDC), and Advanced Research Projects Agency for Health (ARPA-H). Thus, there was a particular spike in 2020

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



Source: FPDS; CSIS analysis.

OTA type	2019	2020	2021	Total 2019-2021
Prototype	5,205.5	12,623.8	6,444.1	24,273.4
Research ^a	12.6	12.3	9.7	34.6
Production	0.4 ^b	8.5	21.0	29.9
Total	5,218.5	12,644.6	6,474.8	24,337.9

DOD = Department of Defense

OTA = other transaction agreement

Source: GAO analysis of DOD, Federal Procurement Data System (FPDS), and industry data. | GAO-22-105357

Note: Obligation amounts were adjusted for inflation using the Fiscal Year 2021 Gross Domestic Product Price Index.

^aAll research OTA obligations are from one Navy OTA for shipbuilding research.

^bFiscal year 2019 obligations reported for production OTAs are from June 29, 2019 through September 30, 2019, because DOD did not begin collecting this data in FPDS until June 29, 2019.

Which federal agencies can use OTAs?

- **Agencies with Statutory Other Transaction Authority**
 - National Aeronautics and Space Administration (NASA)
 - Department of Defense (DoD)
 - Department of Energy (DOE)
 - Department of Health and Human Services (HHS)
 - Department of Homeland Security (DHS)
 - Department of Transportation (DOT)
 - Federal Aviation Administration (FAA)
 - Transportation Security Administration (TSA)
 - Domestic Nuclear Detection Office (DNDO)
 - Advanced Research Projects Agency–Energy (ARPA-E)
 - National Institutes of Health (NIH)
 - Advanced Research Projects Agency–Health (ARPA-H)

Other Transaction Authority: Applicability of Procurement Laws and Regulations

Laws and Regulations That <u>Do Not</u> Apply	Laws and Regulations That <u>Do</u> Apply
<ul style="list-style-type: none">• Federal Acquisition Regulation (FAR)• Defense Federal Acquisition Regulation Supplement (DFARS) and other agency supplements• Competition in Contracting Act (CICA)• Contract Disputes Act (CDA)• Bayh-Dole Act and Technical Data Statutes• Truthful Cost or Pricing Data Act (aka TINA)• Cost Accounting Standards (CAS)• Buy American Act (BAA) / Trade Agreements Act (TAA)• OMB Uniform Guidance (2 C.F.R. Part 200)	<ul style="list-style-type: none">• False Claims Act (FCA)• Bribery and Gratuities Statute• Tucker Act• Anti-Deficiency Act (ADA)• Freedom of Information Act (FOIA)• Trade Secrets Act (TSA)• Patent and Copyright Cases (28 U.S.C. 1498)• Comptroller General Access to Records• International Trafficking in Arms Regulations (ITAR) and Export Administration Regulations (EAR)

Might Apply/Selectively Apply: Anti-Kickback Act, Procurement Integrity Act

Consortium OTAs

What is a “consortium”?

- *Consortia* are groups of organizations focused on a specific technology area or areas that provide the government with a ready pool of stakeholders to innovate in that technology area. A consortium can be its own legal entity or not
- “From fiscal years 2019 through 2021, DOD obligated over \$24 billion on OTA awards to consortia for prototyping efforts, which included developing COVID-19 vaccines. These obligations represented nearly two-thirds of all DOD’s prototype OTA dollars obligated [over that timeframe].”
- “In addition, of the 28 consortia that received OTA awards in this 3-year period, most were established since 2014 and managed by one of four organizations.”
- Prominent CMOs include Advanced Technology International (ATI), Consortium Management Group, Inc. (CMG), National Security Technology Accelerator (NSTXL), and System of Systems Consortium, Inc. (SOSSEC)

<https://www.gao.gov/assets/gao-22-105357.pdf>

Consortium OTA Terminology

Consortium Management Organization (CMO)

- Organization that runs one or more consortia, typically a nonprofit organization (though it can be a for-profit company or an academic institution)
- When a consortium is not a legal entity, the CMO serves as the legal entity
- CMOs can provide acquisition support and administrative services, e.g., market research, releasing RFPs to consortium members on behalf of the government and recruiting consortium members

Consortium Members

- Organizations (including traditional defense contractors, nontraditional contractors, academic institutions, and nonprofit organizations) that participate in a consortium
- Members typically sign a “consortium membership agreement” (sometimes referred to as articles of collaboration) and pay dues in exchange for access to RFPs and sometimes benefits such as training and teaming opportunities

<https://www.gao.gov/assets/gao-22-105357.pdf>

Consortium OTA Terminology (Cont.)

Base Award

- DoD umbrella agreement awarded to CMO that provides terms and conditions that generally apply to all projects awarded
- Serves as starting point for CMO to negotiate umbrella terms with consortium member awardees on DoD's behalf
- Consortia or CMOs may receive multiple base OTAs with different technical focus (e.g. one for armaments for ordnance work, and another for naval energy work)

Project Award

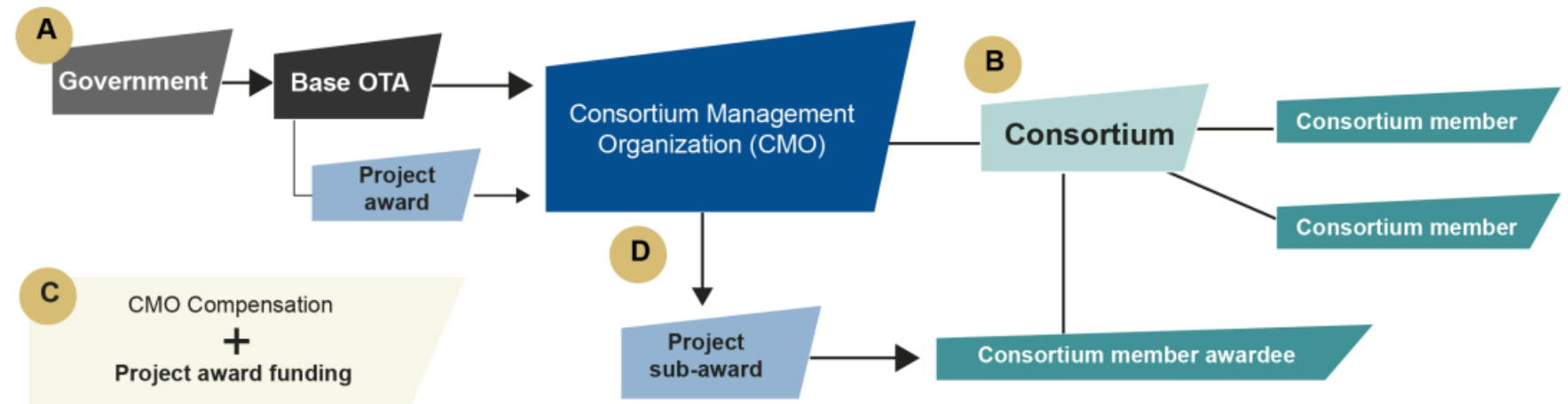
- Award that covers specific research, prototype, or in some cases, production efforts
- DOD selects the consortium member awardee and typically awards the project to the CMO, which, in turn, issues a project sub-award to the consortium member
- Sometimes DOD will award the project directly to the consortium member rather than via the CMO
- Project award includes terms and conditions, including statement of work, specific to the project

<https://www.gao.gov/assets/gao-22-105357.pdf>

Consortium OT Award Process

Consortium-based OTAs vary in the relationship between the CMO, consortium, and consortium members as well as how projects are awarded, but this figure depicts a typical process

Figure 1: Notional DOD Consortium-Based OTA Model



A. The government awards a base OTA, which provides terms and conditions that generally apply to all projects awarded and serves as a starting point for negotiations between the government, CMO, and consortium member awardees. In this notional model, the base OTA and projects are awarded to a consortium via the CMO. The project award includes the terms and conditions specific to the project.

B. Organizations join a consortium by signing a consortium membership agreement, and in some cases by paying membership dues. Once an organization is a consortium member, it is eligible to receive project awards.

C. The government obligates funding for both CMO compensation and the project awards. The funding can be obligated on the base OTA or project award, depending on the model. CMO compensation is used to pay the CMO for administrative and acquisition support that it provides to the government.

D. In this notional model, the CMO issues a project sub-award on behalf of the government to a consortium member, making it a consortium member awardee. A project sub-award executes the project.

OTA = other transaction agreement

Source: GAO analysis of Department of Defense information. | GAO-22-105357

DoD OTAs

DoD OTAs: Three Types

Congress authorized DoD to use OTs in 1989 for research projects and granted DARPA authority to use OTs for prototype projects in 1994. Today, DoD is authorized to issue three types of OTAs:

Research OTAs
10 U.S.C. § 4021(a)

**Basic, Applied, and
Advanced Research**

Intended to spur dual-use R&D, taking advantage of economies of scale without burdening companies with government regulatory overhead

Prototype OTAs
10 U.S.C. § 4022

Prototype Project

Designed to carry out prototype projects directly relevant to enhancing mission effectiveness of military personnel and supporting platforms, systems, components, or materials to be acquired or developed by DOD or improvement of platforms, systems, components, or materials used by the armed forces

Production OTAs
10 U.S.C. § 4022(f)(1)

**Follow-On to
Prototype OTA**

Prototype OTA may provide for the award of a follow-on production OTA to the participants of the OTA transaction

Prototype and Production OTAs – Requirements for Issuance

Prototype OTAs, and follow-on production OTAs, require that one of four conditions be met:

- (A) **NDC Participation.** There is at least one *nontraditional defense contractor* (NDC) or nonprofit research institution *participating to a significant extent* in the prototype project
- (B) **Small Businesses.** All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. 638)) or nontraditional defense contractors
- (C) **Cost Share.** At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government **OR**
- (D) **SPE-Approved Exception.** The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures 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)

Prototype and Production OTAs – Requirements for Issuance (Cont.)

Non-Traditional Defense Contractor (NDC)

- *Non-traditional defense contractor* is 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 Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards.”
- “Entity” reasonably should mirror CAS definitions and focus on the “business unit” or “segment”
- “Entity” could conceptually be interpreted to include the entire legal entity, which is arguably the common definition of the term. That term still would not encompass multiple legal entities with common ownership, but would instead focus on the business itself and not parents, affiliates, or subsidiaries.
- As a result, major defense contractors can have related legal entities that qualify as NDCs so long as the distinct legal entity is not currently, and has not for a period of one year preceding the solicitation, performed on contracts subject to full CAS coverage.

Prototype and Production OTAs – Requirements for Issuance (Cont.)

Significant Extent

- *Significant extent* is not defined, and there have been no decisions from the Court of Federal Claims, Government Accountability Office, or other courts or agencies addressing this issue. Given lack of definition in regulations or any DoD guidance, DoD has discretion to determine what level of participation satisfies the statutory requirement. DoD's OTA Guide makes that point expressly. Given the interest in using OTAs for many projects, we suspect DoD will more often than not choose to exercise its discretion broadly and construe participation as significant in cases that are borderline.

Production OTAs

A *follow-on production OTA* may be awarded to the participants in the transaction without the use of competitive procedures if:

- (i) Competitive procedures were used for the selection of the participants in the prototype OTA, and
- (ii) The participants in the transaction successfully completed the prototype project.

10 U.S.C. § 4022(f)(2)

A follow-on production OTA also may be awarded when the DOD determines that an individual prototype or prototype subproject part of a consortium is successfully completed by the participants. 10 U.S.C. § 4022(f)(3).

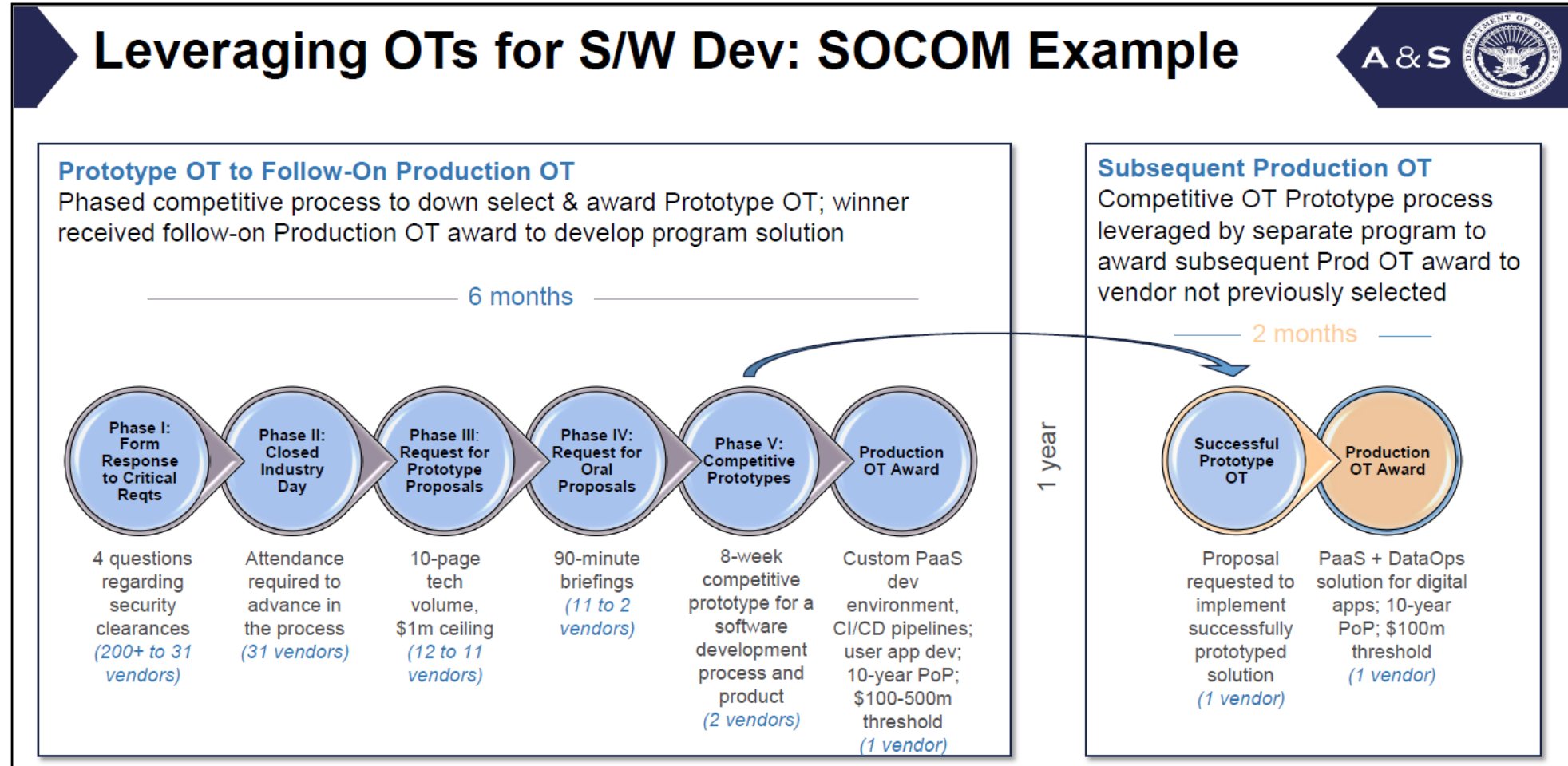
Prototype solicitation should, but does not have to, advise offerors of the intent to award follow-on production.

Sample Award Process for Follow-On OTs

DoD can issue serial OTs covering development to production.

This figure depicts one example.

Source:
<https://www.dau.edu/sites/default/files/2025-03/LTA%20Software%20Acquisition%20Take%204%20Brady.pdf>



Protest of OTA Awards

Protest of OTA Awards—Where to Protest?

- No conclusive answer.
- Three possibilities:
 1. GAO (Competition in Contracting Act & bid protest regulations)
 2. Court of Federal Claims (Tucker Act)
 3. District Court (Administrative Procedure Act)

Protest of OTA Awards—GAO

- GAO generally lacks jurisdiction over OTA protests. See 4 C.F.R. § 21.5(m)
 - E.g., GAO won't hear a protest that an agency had properly used OTA but conducted an unreasonable evaluation. See *MD Helicopters, Inc.*, B-417379, Apr. 4, 2019, 2019 CPD ¶ 120.
- **Limited Exception:** A **timely** protest alleging that the agency improperly used OTA.
 - “whether the agency’s use of its discretionary authority was proper, *i.e.*, knowing and authorized”
 - Violation of OTA statute or regulation.

Protest of OTA Awards—COFC

- COFC recently declared itself the “de facto forum for bid protests involving [OTAs under 10 USC §§ 4021–22].” *Raytheon Co. v. United States*, 175 Fed. Cl. 281, 284 (2025).
- But in *Telesto v. United States*, Case No. 1:24-cv-01784, a different judge at COFC (in dictum) found no jurisdiction over a protest at the prototype phase: a “jurisdictional blackout”
- When COFC and GAO lack jurisdiction, only option is to challenge award of OTA as final agency action under the APA. If COFC lacks jurisdiction, COFC can transfer case to the appropriate District Court.

Protest of OTA Awards—Factors

- What is “the federal agency’s immediate endgame”?
- Is the Government:
 1. creating commercial market that gov can later procure COTS (*SpaceX*) **OR**
 2. “seeking to acquire a specific product or service and directing or otherwise facilitating its generation and production ” (*MD Helicopters, Kinometrics, Hydraulics Int’l, and IRTC*)
- Has the Government formally committed to purchasing an end product from a successful prototype developer?

Protest of OTA Awards—Protest Grounds

- Potentially viable protest grounds include:
 - OTA includes work not properly within scope of OTA authority.
 - Agency violation of internal guidance that (1) agency relies on to justify the use of OTA or (2) that is incorporated into the solicitation.
 - Violation of statute.
 - *See Oracle Am., Inc.*, B-416061, May 31, 2018, 2019 CPD 180 (“Thus, because the plain and unambiguous meaning of the statute provides that the Army only has the authority to award a follow-on P–OTA if it was provided for in the prototype OTA, and because the prototype OTA here included no provision for a follow-on P–OTA, we conclude that the Army lacked the statutory authority to award the P–OTA and sustain the protest on this basis.”).
 - Disparate treatment, improper evaluation, inadequately reasoned decision or agency conclusions otherwise not supported by the record.

Performance Disputes Involving OTAs

Performance Dispute Case: *CLogic LLC v. United States*, 170 Fed. Cl. 450 (2024)

- Air Force OT with CLogic to upgrade mine-resistant vehicle equipment and manage subcontractor (Navistar) installation on total of 142 vehicles, in funded phases
- CLogic procured all the upgraded equipment up front in the first phase
- AF cancelled the program and eventually procured the equipment upgrades directly from subcontractor Navistar
- CLogic had provided all the equipment to Navistar and demanded Navistar return the equipment that had not been installed. Navistar refused, saying the Air Force had directed them to retain it as it all belonged to the Air Force.
- CLogic brought a Tucker Act takings claim at the COFC, asserting that the AF “took its property, the upgrade equipment, for public use without paying just compensation”
- USG moved to dismiss for failure to state a claim, arguing any wrongdoing was by Navistar
- HELD: Motion denied; “complaint plausibly alleges that the Air Force, acting through its contractor, took CLogic's property for public use without paying just (or any) compensation”

Performance Dispute Jurisdiction, Generally

- Other Transaction disputes should be cognizable as Tucker Act breach of contract actions at the Court of Federal Claims
- Only potential wrinkle is *Rick's Mushroom Serv, Inc. v. United States*, 521 F.3d 1338 (Fed. Cir. 2008). In that case, the Federal Circuit held that the Court of Federal Claims lacked jurisdiction over the plaintiff's contract claim because the cooperative agreement at issue did not provide a right to recover money damages
- In view of *Rick's Mushroom*, it is prudent to include language in OTs making clear, for the avoidance of doubt, that money damages are available for a breach and that jurisdiction is proper at the Court of Federal Claims under 28 U.S.C. 1491(a)(1)

Questions?

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