Other Transaction Authority (OTA) 
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OTA – What is all the hype about?

- Other Transaction Authority (OTA) is a dynamic instrument for utilizing commercial and emerging technology.

- An Other Transaction (OT) award is an available Government agency tool to:

  1. Help adopt and incorporate business practices used outside the Government;

  2. Leverage and broaden the industrial base available to the Government;

  3. Encourage flexible, faster, less expensive product design and execution;

  4. Leverage commercial industry investment in technology development by fostering new relationships.
In December 2019, Under Secretary Lord described OTs as a method to:

“[A]llow innovation to bypass bureaucracy, reducing timelines and lowering costs to provide the best capabilities to our men and women in uniform.”
OTA – What is it *Not*?

1. OTs are *not* procurement contracts.

2. OTs are *not* subject to the Federal Acquisition Regulation (FAR), Defense Federal Acquisition Regulation Supplement (DFARS), and other applicable supplements.
   - Under the authority of 10 U.S.C. §§ 2371(a) and 2371b(a)(1), non-procurement contracts are exempt from the panoply of Federal procurement statutes. *See also Blade Strategies, LLC, B-416752, Sept. 24, 2018, 2018 CPD ¶ 327 at 1-2, “OTAs issued under this authority are not procurement contracts and do not fall under the provisions of the Federal Acquisition Regulation.”*

3. OTs are *not* subject to the Competition in Contracting Act (CICA) and Contracts Disputes Act (CDA).

4. OTs are *not* protest-proof.
   - GAO has exerted jurisdiction over some OTA protests, and there is an argument currently under review as to whether district courts have proper jurisdiction over OTs.
   - GAO is an arm of Congress and new decisions are published daily.

5. OTs are *not* subject to the Buy American Act.

6. OTs are not Cooperative Agreements, Grants, CRADAs, or subject to the DoD GARs.
When may OTA be Used?

The DoD OTA Guide describes 3 types of OTs:

1. Research OTs
2. Prototype* OTs
3. Production OTs

*In B-46061, the Government Accountability Office (GAO) did not impose a definition of "prototype," yet it agreed the Army's effort (a commercial program) could still constitute a prototype because: 1) the "prototype" project had not been previously deployed within the DoD, in part due to the DoD's stringent security requirements; and 2) neither the agency nor the protester could identify any DoD entity that had successfully implemented a similar automated migration program.

→ This essentially amounts to a "two-prong test" to correctly classify an effort as a "prototype" when otherwise commercially available.
When may OTA be Used?

1. **Research OTs**
   - Authorized by 10 U.S.C. 2371 for science and technology (S&T);
   - These OTs were intended to spur dual-use research and development (R&D), and encourage participation from non-traditional companies.
   - Often referred to as the “Original OT,” these OTs are authorized for basic, applied, and advanced research projects.

2. **Prototype OTs**
   - Authorized by 10 U.S.C. 2371(b) to acquire prototype capabilities and allow for those prototypes to transition into Production OTs.

3. **Production OTs**
   - Authorized by 10 U.S.C. 2371b(f) as noncompetitive, follow-on OTs to a Prototype OT agreement that was:
     - Competitively awarded; and
     - Successfully completed.
Who can award an OT?

Congressional legislation has grated OTA to several Federal departments:

1. Department of Defense (DoD);
2. Department of Energy (DoE);
3. Health and Human Services (HHS);
4. Department of Transportation (DoT); and
5. National Aeronautics and Space Administration (NASA).

Congress most recently amended the Section 845 authority in the Section 812 of the FY2015 NDAA. Whereas the original authority was limited to apply to “weapons or weapon systems proposed to be acquired or developed by the DoD,” Congress expanded the authority to include any prototype project “directly related 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 to improvement of platforms, systems, components, or materials in use by the Armed Forces.”
Who can receive an OT award?

For a prototype project under OTA, one of the following conditions must be met:

A. There is at least one nontraditional defense contractor participating to a significant extent in the prototype project;

B. All significant participants in the transaction other than the Federal Government are small businesses or nontraditional defense contractors;

C. At least one third of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the Federal Government; or

D. 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.
Partnership Intermediary Agreement (PIA)


- A PIA is a contract, agreement, or Memorandum of Understanding (MOU) with a non-profit entity in order to engage academia and industry on behalf of the USG in order to accelerate tech transfer and licensing.
  - PIAs allow the government to pay for services to support tech transfers;
  - May function as an objective third party broker between the USG and industry to increase opportunities for commercialization of new capabilities.
  - May engage in proactive marketing of lab technologies to industry in order to enable tech transition/tech insertion.

- Only government labs have authority to enter into PIAs.

- General Applications of PIAs:
  - Used to facilitate tech transfer to the private sector.
  - Often utilized by government labs to increase the likelihood of success in conducting cooperative or joint activities with small business firms and institutions of high education to make technology-related assistance from a government lab.
Public-Private Partnerships

- Private-public bring together federal government, industry, and academic leaders.

- For example, the White House Office of Science and Technology, Department of Energy, and IBM.

- The High Performance Computing (HPC) Consortium encompasses computing capabilities from powerful and advanced computers worldwide. HPC seeks to empower researchers around the globe to accelerate understanding of the COVID-19 virus and the development of treatments and vaccines to help address infections. Consortium members manage a range of computing capabilities that span from small clusters to some of the very largest supercomputers in the world.

- HPC is currently inviting researchers to submit COVID-19 related research proposals to the consortium via its online portal (https://www.xsede.org/covid19-hpc-consortium).

- These opportunities do not look like traditional RFPs; for instance, HPC’s requesting submissions be no longer than 3 pages.
So How Does it Work?*

**Step 1:** Agency posts Request for Solution (“RFS”) or Request for White Papers (“RWP”).

**Step 2:** Agency evaluates solutions;
   a) Agency may elect to down-select solutions and invite vendors to demonstrate solutions.
   b) Agency evaluates down-selected set of solutions.

**Step 3:** Agency enters into Statement of Work (“SOW”) collaboration with selected vendors.

**Step 4:** Agency’s Program Attorney and vendors’ counsel negotiate data rights.

**Step 5:** Agency (or consortium, if applicable) awards OTA award.

**Step 6:** If the OTA award is a prototype, a follow-on production award may be directly awarded to the vendor if the RFS specifically stated a follow-on was anticipated, after satisfactory completion of the prototype.

*All OTA actions are tailored to the specific requirement, and there is no “one size fits all” process. Thus, while the above approach details a common format, it is no means a prescriptive methodology.*
RFS/RWP

Request for Solution (“RFS”) or Request for White Papers (“RWP”)

- May look similar to a procurement RFP;
  • However, procurement (FAR/DFARS) terminology and terms of art should not be used.

- May be much more open-ended than procurement RFPs since FAR Part 15 does not apply.

- Focuses on the problem, not a USG-prescribed solution.

- Should use laymen and industry terms – not Government jargon.

- Most state the issue and requests the solutions (typically less than 10 pages) generally discuss the proposed solution.

- Agreements Officer works with vendors to shape the Statement of Work (SOW) later.
Competition

- OTA Does not follow FAR Part 6 or Competition in Contracting Act (CICA)

- Standard
  - Competitive procedures should be used “to the maximum extent practicable”
  - Follow-on authority
    - § 2371b(f)) is contingent upon competitive procedures used for original prototype OTA

- Best Practice
  - Use common sense structure
  - Be consistent with industry practice
  - Fair, transparent, ethical
What happens after OTA prototyping?

Production OTs – innovative solutions can transition to production without further competition if:

1. The OT award was originally competitively awarded;
2. The participants in the original OT successfully completed the prototype project;
3. Advanced consideration was provided; and
4. Notice of the potential follow-on Production OT was provided when competed.
COVID-19: New Developments

- The COVID-19 pandemic has had significant impacts on OTs.

- More DoD acquisition officials are now authorized to award prototype OTs without needing higher approval within DoD or notifying Congress.

- Specifically, prototype OTs and follow-on production contracts or OTs >$100 million may now be approved by the Directors of the Defense Agencies or Field Activities, Commanding Officers of Combatant Commands with contracting authority, and the Director of the Defense Innovation Unit (DIU), rather than an agency’s senior procurement executive.

- Similarly, agreements valued at >$500 million typically require Secretary Lord’s (or her fellow Under Secretary’s) approval and 30-days advance notice to Congress. However, pursuant to the COVID-19 response, these agreements may now may be approved by an agency’s senior procurement executive, with notice to Congress “as soon as practicable” after award.
Under Secretary of Defense for Acquisition & Sustainment Ellen Lord delegated approval authority for Other Transaction Agreements ("OTs") related to the coronavirus response, consistent with Section 13006 of the CARES Act. Secretary Lord’s 5 APR 2020 Memorandum designated approval authorities for OT prototype projects and follow-on production contracts and agreements as follows:

1. >$100 million to <$500 million, the Directors of Defense Agencies/Field Activities with contracting authority, as well as the Director of the Defense Innovation Unit (DIU). This authority was otherwise vested in the Senior Procurement Executives ("SPE") of the Military Departments, the Director of the Defense Advanced Research Projects Agency ("DARPA"), and the Director of the Missile Defense Agency ("MDA").

2. >$500 million, to the SPEs of the Military Departments, and the Directors of DARPA and the MDA. This authority was otherwise restricted to the Under Secretaries for Acquisition & Sustainment and Research & Engineering. Approval authority for OT prototype actions between $100 million and $500 million may now be further delegated by the SPE or Director.
COVID-19: New Developments (con’t)

While the aforementioned delegations are only effective until the COVID-19 national emergency declaration is rescinded, they allow for expedited approvals for prototype projects related to the virus and encourage companies to foster urgently needed innovative solution.

Relevant up-to-date opportunities are listed at:
https://aida.mitre.org/covid/
Common Misconceptions

1. “OTA is new.” This in inaccurate; OTs were pioneered by NASA in 1958 (think Space Race) but has ties going back as far as 1926 in the Air Corps Act.

2. “OTs allow me to buy things, faster.” Partially inaccurate; OTA must be used within the constraints of the law (e.g. proper prototypes, proper follow-on procedures, etc.). The OT award process will not always be faster than the traditional procurement processes and sometimes can be as long or longer. An OT award is only as good as the team implementing it (and the planning that went into it).

3. “OTA was created to bypass the FAR.” Inaccurate. The idea was to create an attractive way for companies to do business with DOD while retaining the characteristics of innovative commercial companies; gaining for DOD access to cutting edge technology, taking advantage of economies of scale without burdening the companies with government regulatory overhead which would make them noncompetitive in the commercial (non-defense) sector.

4. “OT awards cannot be protested.” Inaccurate. GAO exerted jurisdiction in B-416061 Matter of Oracle America, Inc. “We will review, however, a timely protest that an agency is improperly using its other transaction authority. 4 C.F.R. § 21.5(m).” The U.S. Court of Federal Claims has also exerted jurisdiction over OTs, and the Department of Justice (DoJ) argued in a May 30, 2019 brief that district courts have jurisdiction over OTs.
OTA Lessons Learned

1. Determine which rights are needed (or minimum acceptable rights) prior to OTA white paper (“Request for Solutions” or “RFS”) process;

2. Utilizing and including FAR data rights clauses is common practice across the various DoN entities, though the specific verbiage (and not the actual FAR citation) should be included in the OT award;

3. Ensure language indicating a follow-on production award is specifically listed in the RFS (derived from sustained May 31, 2018 GAO Oracle decision, B-416061);

4. Ensure the right people are in the room (or the “virtual” room). Members that have actual hands-on OT experience is preferable;

5. Ensure USG program attorneys and vendor attorneys have one another’s contacts – data rights are typically hashed out at this level;

6. If OT award(s) is/are in a “bake-off” situation, though the Competition in Contracting Act (CICA) does not apply, the Procurement Integrity Act (PIA) does apply; the bake-off remains active competition and data and results should be treated as such to maintain the integrity of the award;
OTA Lessons Learned (Cont’d)

7. Ensure OT contract does not go beyond the bounds of the original competed RFS; we are still bound by fair competition and scope issues;

8. Develop an assessment tool for evaluating the OT progress (whether it be “sprints” or “milestones”) upfront and include with RFS so evaluation methodology is clear;

9. Allow time (and build-in the timeline) for ample negotiation after white paper submission and discussions with vendors;

10. Since non-traditional vendors will likely engage in OT competition, the USG coordinate with Acquisition Integrity Office (AIO) to ensure vendor is not placed on debarment list or probationary lists; the vendor’s information may not readily be available on SAM.gov if it does not have a DUNS or CAGE code;

11. If a consortium is being used to award the OT, it is highly beneficial to float a draft “Performer’s Agreement” to the selected vendor prior to award to expedite the review process; and

12. Ensure follow-on production OT award does not initiate until prototype is completely finished. In the Oracle decision, GAO found that the prototype project was not "successfully completed," as required by § 2371b(f)(2)(B) in order to award a P-OTA without competition.
OTA’s Cousin: Prize Challenges

10 U.S.C. 2374a authorizes Prize Challenges – cash awards for innovative ideas and technology.

- 10 U.S.C. 2374a, Section (d) states this authority may be carried out in conjunction with or in addition to the exercise of any other authority to acquire, support, or stimulate basic, advanced and applied research, technology development, or prototype projects (e.g., Other Transaction Authority under 10 U.S.C. 2371b).

- Thus, agencies have authority to award a follow-on or production OT following a prize challenge.

- Ample opportunities may be located at Challenge.gov and FedBizOpps (FBO)
  - Dozens of challenges are currently open on Challenge.gov.
Prize Challenges (Cont’d)

- NAVWAR published its first prize challenge in September 2019, which resulted in two winners (1st place: $100k, 2nd place: $50k). It’s second prize challenge is currently underway and active (closes June 30, 2020):

  **Challenge Name:** Artificial Intelligence Applications to Autonomous Cybersecurity (AI ATAC) II

  **Tagline:** NAVWAR is seeking Network Detection of Adversarial Campaigns using Artificial Intelligence and Machine Learning.

  **Rules:**
  - The submission package must include the following three items:
    1. White paper *
    2. Corresponding technology *. Note this must include
    3. The license(s) to operate the technology on a 10 Gb/s bandwidth network through 31 DEC 2020 on multiple VMs simultaneously.
  - User’s guide. Note this must include
  - The recommended base configuration of the technology;
  - A description of the resources required to run the technology to support an up to 1,500 node network, if delivered as software or a VM;
  - A representative sample of output data with field descriptions.

  **Prize:**
  - $500,000 cash prize for first place

OTA Takeaways

OTA will never be the principal means by which the DoD buys things or services, nor should it be.

- OTs provide significant options to the traditional process;
  - However, OTA should be viewed as a tool in the USG’s toolbox, along with procurement contracts, grants, and cooperative agreements.

- Primary goal is to leverage the commercial sector’s innovation and attract the best;
  - Speed is a “side-affect”—not the goal.

Industry: Vendors (especially those new to the Federal space) should be on the lookout for streamlined OTA procedures to pursue research development and prototype opportunities – including prize challenges – in the Federal marketplace.

Military and/or Federal employees: OTs must be well-planned for, follow the appropriate statutory authorities, and structured correctly. The right team is crucial. Also, OTA is not always faster than FAR-based procurements; the proper planning and statutory adherence are crucial.
References

- Secretary Lord’s Memorandum, “Delegation of Authority for Use of Other Transactions for Prototype Projects Under Title 10, United States Code, Section 2371b,” April 5, 2020
- “Protesting Other Transactions,” Nash and Cibinic Report, July 2019
- B-417379, *MD Helicopters, Inc.*, April 4, 2019
- The definition of “non-traditional defense contractor” is in 10 U.S.C. § 2302(9)
  - The definition of “Nontraditional Defense Contractors” is provided within 10 U.S.C. §2302(9) to mean a business 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 DoD that is subject to full coverage under the cost accounting standards described in 41 U.S.C. § 1502 and its implementing regulations.
- Title 10 United States Code (U.S.C.) Sections 2371, 2371b, 2373, and 2374a
- B-416061, *Matter of Oracle America, Inc.*, May 31, 2018
- November 2018 DoD OTA Guide
Questions?