THE POWER OF OTHER TRANSACTION AUTHORITY (OTA): OPPORTUNITIES AND CHALLENGES FOR GOVERNMENT CONTRACTORS

September 27, 2018
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OTAS

- What is an OTA?
- Why Are They So Popular?
- What Are the Advantages for Contractors?
- What Are the Disadvantages for the Government?
- How Are They Used?
- Consortiums
- DIUx (Defense Innovation Unit Experimental)
- CSOs (Commercial Solutions Opening)
- 2018 NDAA
- Common Obstacles and Pitfalls
- Funding of OTAs VS FAR Contracts
- What Should We Takeaway?
- Questions?
OTA’S: A LITTLE HISTORY

- NASA was the first Agency to be granted OTA Authority in 1958.
  - Originally called “Space Act Agreements”
  - Allowed NASA the flexibility to get to the moon within the decade
- DARPA (DOD) obtained its first authorization in 1989 for research projects
- DOD expanded its use in 1994 to include prototypes
- Since then, ~14 agencies have the authority to utilize OTAs
- Congress expanded use to get closer to Silicon Valley and non-traditional contractors
WHAT IS AN OTA?

Or an OTA is not...

- Legally binding instrument, agreement
- Not a standard FAR-based contract, grant or cooperative agreement
- “OTA” term that refers to 10 U.S.C. 2371 and 10 U.S.C 2371(b) authority to enter in to these agreements
- Poorly understood / unknown to many (And...why we are here).
WHAT IS AN OTA?

Or an OTA is not...

10 U.S. 2371 (Research and Development Other Transactions)

Allows entry “into transactions (other than contracts, cooperative agreements, and grants) under the authority of this subsection in carrying out basic, applied, and advanced research projects. The authority under this subsection is in addition to the authority provided in section 2358 of this title to use contracts, cooperative agreements, and grants in carrying out such projects.”

10 USC 2371(b) (Prototyping Other Transactions)

“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 the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.”
DO STANDARD CONTRACTING RULES AND REGULATIONS APPLY? Many Don’t...For Example...

- Agency Regs (DFARS, DEARS, etc)
- Competition in Contracting Act (CICA)
- Truth in Negotiations Act (Truthful Cost and Pricing)
- Cost Accounting Standards
- Contract Disputes Act
- Procurement Protest Process
- P.L. 85-804 and indemnification
- Cost plus a percentage of cost prohibition
- Buy American Act (in part)
- Bayh-Dole Act (patents)
- FAR/DFARS/Agency specific regulations

- Termination for Convenience or Default
- Changes Clause
- Mandatory flowdowns to subcontractors
- Some laws still do apply
- Criminal Laws (false claims/statements)
- Laws of general applicability (Civil Rights Act)
- Laws that would apply to anyone doing business in the U.S. (e.g. environmental laws, import/export control)
- Bidders Cannot Protest Awards
OTA GUIDANCE

But Guidance Does Exist

• DOD adopted its own guidance specific to each type of OTA:
  • Basic, applied, advanced research (including TIAs) - DoD’s Grant and Agreement Regulations (DODGARs)

• NIH also maintains specific guidance that supplements governing and statutory regulation

• Other agencies have their own guidance
OTA PROCUREMENT LAWS AND REGULATIONS

Utilize Guidance On...

Funding
- Fiscal Law and Agency-specific fiscal regulations apply
- Consult with Comptroller

Intellectual Property and Technical Data Rights
- Utilize Bayh-Dole / DFARs if possible (but do not legally apply)
- Able to negotiate specific rights as necessary
- Consult with Legal
WHAT IS THE APPEAL TO THE INDUSTRY?

First...Let's Review Procurement Challenges

• FAR-based procurement too slow and overloaded with regulation

• Burdensome cost-based pricing rules requiring accounting / audit systems specific to Government contracting

• Too much audit oversight (whether real or perceived)

• Intellectual property policy excessive for most non-traditional contractors
WHAT IS THE APPEAL TO THE INDUSTRY?

First...Let's Review Procurement Challenges

• OTA projects not subject to same regulations applied to standard procurements

• Has appeal to companies:
  • intimidated by the Government bureaucracy of procurement
  • that don’t have infrastructure/resources needed to do business with government that don’t want to give up rights to their IP
WHAT ARE THE ADVANTAGES?

Non-Traditional Contractors/Industry

• High-tech *companies* and *technology* evolve rapidly - Government procurement process can’t keep pace

• DoD cannot engage, collaborate quickly enough with high-tech, *non-traditional contractors*

• Not a one-size fits all agreement model

• Allows access to innovative solutions from a wider variety of suppliers
WHAT ARE THE ADVANTAGES?

Non-Traditional Contractors/Industry

- Can negotiate flexible contract terms
- OTAs not bound by most procurement regulations
- No Termination for Default or Convenience - may be considered by the Government depending on the situation - negotiated to meet Government expectations
- IP rights may be negotiable - do not require companies to relinquish their IP
- The Bayh-Dole Act (patents) and 10 U.S.C. 2320 (rights in technical data) does not apply
- No DCMA /DCAA audit requirements
WHAT ARE THE ADVANTAGES?

Non-Traditional Contractors/Industry

- Allows the option for subject inventions to remain trade secrets
  - Government interests must remain protected
- Allows advance payments and permits the Government to recover funds
- Removes CAS requirement if supplier is not currently CAS covered
- GAO protests are possible
  - Example: Oracle protest w/Army and REAN Cloud, LLC
WHAT ARE THE ADVANTAGES?

- Profit / fee allowed on non-cost share projects - negotiated based on situation agreement addresses
- AOs should exhaust all means possible prior to requesting cost information to determine price reasonableness
- Flexible competition methods
  - Should be competed as much as possible
- Competition in Contracting Act (CICA) is not applicable
WHAT ARE THE ADVANTAGES?

Non-Traditional Contractors/Industry

- Flexible payment methods - including milestone payments (preferred)
- Options for variety of flexible relationships, i.e., partnerships and teaming arrangements
- Attractive for those looking for flexibility in agreements - attracts companies that normally avoid DoD business
- Allows changes to terms to benefit the party absorbing most of the risk
WHAT ARE THE ADVANTAGES?

Non-Traditional Contractors/Industry

• Utilizes something closer to commercial contracting practices, i.e., negotiating terms and conditions

• Removes rigidity of traditional procurement

• Enables nontraditional Government contractors to focus on technical performance rather than contracting issues

• Exempts material submitted under OTA solicitation from Freedom of Information Act (FOIA) for 5 years from of receipt by DoD
WHAT ARE THE DISADVANTAGES?

Government

- Creates additional risk for the Government; terms of agreement could generate unknowns
- Removes rigidity of traditional procurement procedures - some familiar safeguards may be removed or take another form
- Can be more time-consuming to generate than traditional R&D contracts, especially for non-experienced Government employees
- Inadequate training and implementing guidance are likely the causes of issues with OTAs
WHAT ARE THE DISADVANTAGES?

**Government**

- Expects increased participation of the Government Program Manager - requires new ways to oversee contracts
- AOs must be warranted - Possess strong business acumen that allows AOs to operate in a relatively unstructured environment
- *Key* to success is program structure, management, business acumen - not the OTA
  - Past failures with OTAs have nothing to do with the methodology, ”but was the way the program was constructed and managed…” Soloway stated. (FWC, 2018)
ONE THAT FAILED

- 2005 Army Acquisition for Future Combat Systems (FCS)
- Multi-billion dollar deal to replace / modernize vehicles
- After Congressional inquiry, contract was converted to a FAR-based contract and eventually terminated
- Congress concerned with lack of oversight
- In the end, the Army paid $50 million in fees
- Lesson - is the OTA the right tool for the job?
HOW ARE OTAS USED?

Two Basic Ways

- Basic, applied, advanced research projects (OTA/TIA)
- Acquisition of certain prototype projects (OTA for Prototypes)
  - “jump-start the slow weapons- and technology-buying process” (Greeff, 2018)
- DOD and NASA use OTAs more than any other agency
OTAS FOR PROTOTYPES

How are they used?

• Develop prototypes for follow-on production of the initial prototype
  ◦ Prototype portion of the OTA must be completed prior to the follow-on OTA award for production of those prototypes.

• Example programs:
  ◦ DARPA: Maritime Fire Support Demonstrator ("Arsenal Ship")
  ◦ Air Force: Evolved Expendable Launch Vehicle (EELV) services currently used for launching National Security Space missions.
CONSORTIUMS

What are they?

• An association, usually of multiple companies
• Formed to utilize resources of a group
• Two ways to participate in DOD
  ◦ Join an existing
  ◦ Form a new one

• Take on different forms
  ◦ Industry / Government
  ◦ Industry partnerships w/ Gov funding
  ◦ Industry partnerships no Gov funding
• Do not need to be a member to be awarded an OT Agreement
DEFENSE INNOVATION UNIT EXPERIMENTAL

DIUx

- Formed as a “fast-moving Government entity” to bring technology to the DOD faster normal
- Works with individual companies/consortiums of all sizes
- Employs OTA
- Contracts executed under 90 days - Goal 30 days
- Awarded 48 prototype agreements worth $104M in 2017, according to the DIUx annual report.
- Recently transitioned the first ever prototype to production contract using OTAs.
  - Has transitioned 3 to date utilizing OTAs
CSO – COMMERCIAL SOLUTIONS OPENING

- Solicitation Method
- Uses "Best Value" not "Merit Based" selection strategy
- $100M limit per transaction
  - $>100M requires USD(R&E)/SAE approval
- DAU states: FP/FP Incentive Fee contracts only; Other sources state contract type not dictated
- Pilots, technologies, R&D acquired under CSO are treated as commercial items
- DIUx CSO Managed by Army Contracting Command
## OTA COMPARISON (CONSORTIUM/NON-CONSORTIUM)

<table>
<thead>
<tr>
<th>Considerations</th>
<th>Consortium</th>
<th>Non-Consortium</th>
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</thead>
<tbody>
<tr>
<td>Project Scope</td>
<td>Larger, more complex scopes that involve multiple participants favor a consortium approach.</td>
<td>Procurements of a specific service from one provider can be accomplished without a consortium.</td>
</tr>
<tr>
<td>Source Selection</td>
<td>In instances where sources have not been identified by the government, a consortium approach can assist in the identification of sources.</td>
<td>In instances where the government has already identified a unique source, a consortium may not be needed.</td>
</tr>
<tr>
<td>Small Business Requirements</td>
<td>In instances where the goal is to involve small businesses when possible, a consortium facilitates the participation of small businesses.</td>
<td>A consortium is less necessary in those instance when small business participation is not a priority.</td>
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FY 2018 NDAA SECTIONS APPLICABLE TO OTAS

Subtitle G - Provisions Related to Other Transaction Authority and Prototyping

- Section 861 (Contract Authority for advanced development of initial or additional prototype units)
- Section 862 (Methods of entering into research agreements)
- Section 863 (Education and training for transactions other than contracts and grants)
- Section 864 (Other Transaction Authority for certain prototype projects)
- Section 865 (Amendment to nontraditional and small contractor innovation prototyping program)
- Section 866 (Middle tier of acquisition for rapid prototype and rapid fielding)
- Section 867 (Preference for use of other transactions and experimental authority)
- Section 868 (Prototype projects to digitize defense acquisition regulations, policies, and guidance, and empower user tailoring of acquisition process)


**SECTION 864 (OTHER TRANSACTION AUTHORITY FOR CERTAIN PROTOTYPE PROJECTS), SUBSECTION (a)**

(a) Expanded Authority for Prototype Projects.--Subsection (a)(2) of section 2371b of title 10, United States Code, is amended-- (1) by striking “for a prototype project” each place such term appears and inserting “for a transaction (for a prototype project)”; (2) in subparagraph (A)-- (A) by striking “$50,000,000” and inserting “$100,000,000”; and (B) by striking “$250,000,000” and inserting “$500,000,000”; and (3) in subparagraph (B), by striking “$250,000,000” and inserting “$500,000,000”.

- The change to “for a transaction” may seem minor but it may allow for multiple transactions under one prototype project, that cumulatively could be large.
- 2371b, (a)(2)(A) Requires a written determination by the senior procurement executive for the agency.
- 2371b, (a)(2)(B) Requires a written determination by Under Secretary of Defense for Acquisition, Technology, and Logistics.
(b) Clarification of Inclusion of Small Businesses Participating in SBIR or STTR.---Subparagraph (B) of section 2371b(d)(1) of title 10, United States Code, is amended by inserting "(including small businesses participating in a program described under section [[Page 131 STAT. 1495]] 9 of the Small Business Act(15 U.S.C. 638))" after "small businesses".

• Section 2371b (d)(1) states one or more of the following must be met for OTA approved under this authority:
  • At least one nontraditional defense contractor as part of project
  • All participants are small businesses (see expanded definition above)
  • At least one third of project is funded by other than the federal government
  • Exceptional circumstances (Senior Procurement Executive must document in writing)
SECTION 864 (OTHER TRANSACTION AUTHORITY FOR CERTAIN PROTOTYPE PROJECTS), SUBSECTION (c)

(c) Modification of Cost Sharing Requirement for Use of Other Transaction Authority.-- Subparagraph (C) of such section is amended by striking “provided by parties to the transaction” and inserting “provided by sources other than”.

- This change to the 1/3 rule (discussed on the previous slide) indicates that, now, the cost sharing can come from other than the parties to the transaction, as long as it isn’t coming from the federal government.
SECTION 864 (OTHER TRANSACTION AUTHORITY FOR CERTAIN PROTOTYPE PROJECTS), SUBSECTION (d)

(d) Use of Other Transaction Authority for Ongoing Prototype Projects.--Subsection (f)(1) of section 2371b of title 10, United States Code, is amended by adding at the end the following: “A transaction includes all individual prototype subprojects awarded under the transaction to a consortium of United States industry and academic institutions”.

- This is an important change for consortiums.
- This enables the award of individual sub projects to members of the consortium under one overall “transaction”
In the execution of science and technology and prototyping programs, the Secretary of Defense shall establish a preference, to be applied in circumstances determined appropriate by the Secretary, for using transactions other than contracts, cooperative agreements, and grants entered into pursuant to sections 2371 and 2371b of title 10, United States Code, and authority for procurement for experimental purposes pursuant to section 2373 of title 10, United States Code.

• In the past, utilizing standard Federal Acquisition Regulation (FAR) based contracts provided perceived risk avoidance to the contracting officer as compared to OTAs.
• The preference for OTAs discussed in Section 867 has the potential to change that. Now, contracting officers may have to defend why they did not use an OTA approach for those acquisitions that would appear to qualify as an OTA.
• This is expected to motivate government contracting officers to use OTAs more frequently, and for larger projects than was the case in the past.
COMMON OBSTACLES AND PITFALLS TO GOVERNMENT USE OF OTAS

• **Outreach and solicitation**: Since the goal is often to look for new service providers, how do you find them?

• **Approach to negotiations**: If you are used to following FAR’s contracting by negotiation (Part 15) rules, how do you negotiate?

• **Contract modifications and disputes**: If FAR modifications and disputes clauses don’t apply, how to ensure that agreement contemplates these adequately?

• **Methods of payment and Invoicing**: What will be required in order to process and pay an invoice? What expectations are necessary with regards to accounting and billing system requirements of awardees?

• **Limitation of damages**: How to structure agreement so that claims are limited to direct damages only, and do not include punitive, incidental, claims for lost profit or other indirect damages?

• **Training for government procurement personnel**: To achieve successful use of OTAs, buying organizations must commit to developing procedures for OTA procurement and for delivering training to successfully implement the procedures.

Source: 2018 Guide to Other Transaction Authority, Strategic Institute for Innovation in Government Contracting
# OTA COMPARISON (FUNDING)

<table>
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<tr>
<th>Funding Considerations</th>
<th>FAR Based Contracts</th>
<th>OTAs</th>
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<tbody>
<tr>
<td>Flow of Funds</td>
<td>Generally, one way (government to contractor)</td>
<td>Section 2371 allows for two-way flow of funds if applicable</td>
</tr>
<tr>
<td>Fund by Participants</td>
<td>Usually only Government funds</td>
<td>Government can “partner” with commercial companies to fund</td>
</tr>
<tr>
<td>Multiple Government Funders</td>
<td>Usually one Government entity funds</td>
<td>Joint funding agreements can be readily facilitated</td>
</tr>
<tr>
<td>Unfunded Agreements</td>
<td>Not likely</td>
<td>Quite possible with OTAs</td>
</tr>
</tbody>
</table>
OTHER RESOURCES

United States Government Accountability Office
Report to the Committee on Armed Services, U.S. Senate

MILITARY ACQUISITIONS

DOD Is Taking Steps to Address Challenges Faced by Certain Companies

COMMERCIAL SOLUTIONS OPENING

Innovation in Contracting

Other Transactions Guide for Prototype Projects

Office of the Under Secretary of Defense for Acquisition, Technology and Logistics (Defense Procurement and Acquisition Policy)

May 17, 2017

January 2017
(Version 1.2.0)
OTHER RESOURCES

NIH Office of Acquisition Management and Policy
Standard Operating Procedures for Other Transactions

Department of Homeland Security
Management Directive System
MD Number: 0771.1
Issue Date: 07/08/2005
OTHER TRANSACTION AUTHORITY

FAST, FLEXIBLE, AND COLLABORATIVE:
THE COMMERCIAL SOLUTIONS OPENING (CSO) and
DIUx’s APPROACH TO OTHER TRANSACTIONS (OT) FOR
PROTOTYPE PROJECTS
WHAT SHOULD WE TAKE AWAY?

• “The rise in OTA use has opened the door to a discussion of unique scope and depth. It raises the prospect that a genuinely streamlined, faster and more open acquisition process outside the traditional FAR construct can work for a diverse array of needs and drive real change and innovation - while still keeping faith with core principles” (Soloway, 2018)

• Articles and discussions are cropping up all over as acquisition professionals and contractors become more intrigued by the possibilities

• Personally, anything that makes the contracting process easier also makes it less adversarial
WHAT SHOULD WE TAKE AWAY?

- OTAs Encourage:
  - trust, cooperation with nontraditional contractors
  - non-traditional contractors to "dip their toe" in the water with Government contracting
  - viewed as necessary by the Government with firms able to provide cutting edge technology

- Turning to OTAs to fulfill the promise of procurement reform

- One way for the DOD to cut contract delivery time by 50% (Deltek, 2018)
ADDITIONAL THOUGHTS...

• An OTA is not the magic cure to acquisition woes...OTAs have a few challenges

• An OTA is a powerful tool in the acquisition toolbox

• Allows more access to nontraditional contractors holding emerging technology necessary to support the warfighter
  ◦ Fills in the technology acquisition gaps left by slow and burdensome traditional acquisition
ADDITIONAL THOUGHTS...

- Application of some socioeconomic policies to OTAs remains unresolved
  - However, Title VI of the Civil Rights Act, applicable to any federal program, would apply

- Legal consultation and review required just like a FAR-based contract
Many believe the OTA tool is vital in order to integrate the civilian companies and the military with the goal to provide the best possible technology to our warfighters while reducing acquisition costs.
QUESTIONS/COMMENTS
RESOURCES


RESOURCES

6. HQ USAF. *Everything You Always Wanted to Know About OTAs But Were Afraid to Ask.*


8. Ulrey, Scott (July 26, 2016). *Other Transactions 101.* DARPA.

BACKUP
OTA’S: A LITTLE HISTORY

• DHS awarded its first OTA in 2016 after creating the “Silicon Valley program to ‘reach out to…non-traditional performers—the perfect example of what a startup is…”” (Boyd, 2018).

• Congress wanted to get closer to startups and Silicon Valley companies - expanded authorizations

• According to Soloway “ OTA use grew more than 500% between 2012 and 2017”
OTA'S: A LITTLE HISTORY

SEMATECH OTAs

• Boyd explains first use by DOD was with the Semiconductor Manufacturing Technology consortium (Sematech)
  ◦ Chip production had fallen <50% by the mid-80s
  ◦ The DOD relies heavily on microchips; decided to join with industry
  ◦ Semiconductor firms/DOD lobbied Congress for research money; Sematech established (1986)
  ◦ Each side contributed $500M
  ◦ Five years, semiconductor industry recovered (Boyd, April 18, 2018)

• With this success, DARPA expanded use of OTA - Technology Reinvestment Project
OTAS FOR PROTOTYPES

How are they used?

Perform projects “directly relevant to enhancing the mission effectiveness of military personnel” (HQ USAF, n.d.)

Develop/acquire “supporting platforms, systems, components, or materials proposed to be acquired or developed by the DoD, or improvements of platforms, systems, components, or materials in use by the armed forces” (HQ USAF, n.d.)