OTHER TRANSACTION AUTHORITY

Best Practices for Industry and Government

ACT-IAC Acquisition Community of Interest

Date Released: July 10, 2020

Other Transaction Authority

Best Practices for Industry and Government

ACQUISITION COMMUNITY OF INTEREST

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> **Synopsis**
>
> Other Transaction Authorities (OTAs) are legally binding agreements that are different from traditional Federal contracts governed by the Federal Acquisition Regulation (FAR) and Agency policies and regulations, in addition to only being available for use by specific authorized agencies. Most agencies cite flexibility as a primary reason for the use of OTAs, considering that OTAs are generally used for research, development, testing, and evaluation (RDT&E) activities. OTAs neither follow a standard format, nor include terms and conditions or award processes required in traditional mechanisms, such as FAR-based contracts or Federal grants. Since Congress authorized 11[1] Federal agencies to use OTAs, their use has risen sharply since 2015.
>
> Therefore, OTAs can help meet project requirements and mission needs faster than traditional procurement methods and provide the promise of attracting non-traditional providers that identify standard Federal processes, terms, and conditions as costly barriers to entry. There are many benefits to the appropriate use of OTAs, but there are also issues that both government and industry should consider. This paper discusses these issues and identifies a diverse set of approaches for how to best use OTA, exploring the topic from both industry and government perspectives.

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[1] There are 11 agencies granted OTA as of the writing of this document: The 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), National Institutes of Health (NIH), DOT's Federal Aviation Administration (FAA), DHS's Transportation Security Administration (TSA), DHS's Domestic Nuclear Detection Office (DNDO), and DOE's Advanced Research Projects Agency–Energy (ARPA-E).

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The information, conclusions, and recommendations contained in this publication were produced by volunteers from Government and industry who share the ACT-IAC vision of a more effective and innovative Government. ACT-IAC volunteers represent a wide diversity of organizations (public and private) and functions. These volunteers use the ACT-IAC collaborative process, refined over thirty years of experience, to produce outcomes that are consensus-based. The findings and recommendations contained in this report are based on consensus and do not represent the views of any particular individual or organization. To maintain the objectivity and integrity of its collaborative process, ACT-IAC does not accept government funding.

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The ACT-IAC Acquisition Community of Interest (COI) mission is to connect Government (procurement and program) and industry to new ideas and approaches to improve federal acquisition in a forum that enables collaboration, encourages exploration and innovation, and generates results that have impact and endure.

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Introduction

Other transaction authorities (OTA) is a legally binding, streamlined acquisition authority that Congressionally-designated Federal agencies[1] can use to procure innovative technology (e.g., prototypes) while avoiding burdensome processes normally associated with government contracts, grants, and cooperative agreements. These types of arrangements are not subject to the Federal Acquisition Regulation (FAR) and agency supplements, like the Defense Federal Acquisition Regulation Supplement (DFARS), which makes them more similar to commercial sector contracts in that they offer a flexible and less regulated approach to connect government with industry for innovative solutions.

While this contracting method has been around since the 1950s, OTAs have seen a recent resurgence in attention.[2] As stated by the Department of Defense (DoD), this resurgence is driven by the desire to introduce more flexibility into the Federal procurement system, shorten acquisition timelines, and entice non-traditional government contractors to conduct business with the government. DoD OT Guidebook described in 2000 the major objectives of using an OTA: "The OT authorities were created to give DoD the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments. When leveraged appropriately, OTs provide the Government with access to state-of-the-art technology solutions from traditional and non-traditional defense contractors (NDCs), through a multitude of potential teaming arrangements tailored to the particular project and the needs of the participants." [3]

In recent years, however, Congressional and agencies' concerns over the use of OTAs has grown. Deputy Inspector General Donald Mancuso [4] "p*leaded with Congress to reign in OTA, testifying that 'Congress may consider legislative proposals for other transactions this year. Given the inapplicability of traditional controls to other transactions, any expansion of the authority for other transactions should provide the needed protections both for the Department and the American taxpayers.'"*

OTAs cannot be used for just any acquisition. The focus of this authority is RDT&E activities. Further, the scope of the authorities includes basic, applied, and advanced research and prototyping. Also, OT statutes for prototypes have recently been amended to allow for follow-on efforts into production as an OT or procurement contract without re-competition.

The expanding role of OTAs for research, prototype, and production, especially as it relates to scope, application, safeguards, transparency, and costs versus benefits, suggests the need for implementation of Federal "guardrails" and best practices to support the use of good judgment in the use of the authority. Without the proper level of transparency and effective communication between Federal acquisition professionals, industry, and the public, the nearly inevitable occurrence of improper use could lead to unfortunate restrictions by Congress, military officials, and agency leaders.
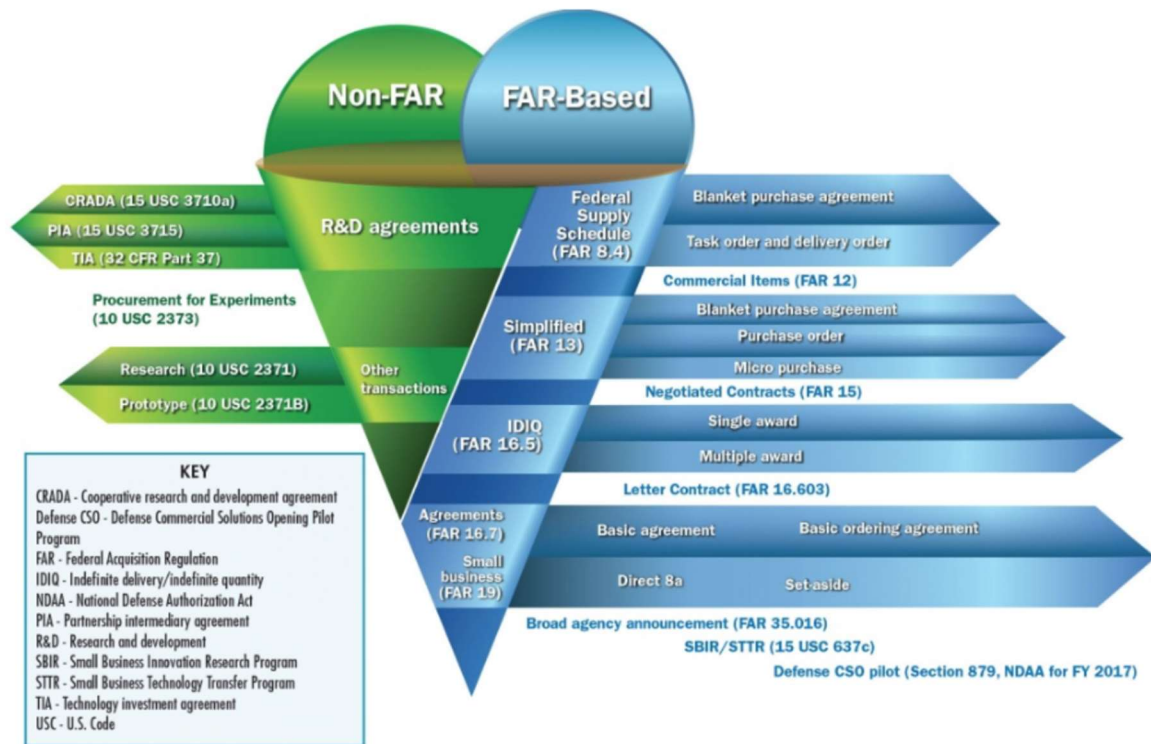
Figure 1: *Wealth of Choices for Innovation. Part of the Adaptive Acquisition Framework between the Defense Acquisition University (DAU) and The MITRE Corporation (Source: Georgia Tech Contracting Education Academy)[5]*

OTAs do not generally follow standard formats or traditional terms and conditions required in Federal contracting mechanisms such as contracts or grants.[6] These flexible arrangements have been increasingly used to improve procurement agility, enable smart risk taking, drive innovation within the boundaries of OTA authorities, and support organizations in experimenting with streamlined processes, relatively unencumbered by extensive processes and controls imposed by regulation, custom, case law, and common practice. To ensure effective guardrails are included in OTA execution to support the sustainment of OTAs, government actors should:

1. Integrate transparency when using OTAs.
2. Nurture a collaborative partnership culture.
3. Ensure OTAs are used for their original purpose.
4. Validate short-term and long-term interests of intellectual property terms.
5. Increase access for non-traditional firms.
6. Hold an Industry Day for each Request for Prototype.

Along with this, industry actors should use established OTA best practices, including:
1. Understanding the roles & responsibilities of a consortium, if one is used.[2]
2. Tailoring the consortium's blanket list of terms and conditions to each individual OTA.
3. Identifying methods for streamlining negotiations.
4. Assessing total costs for a prototype before responding to an OTA opportunity.

Although a consortium is not required, effective industry use of OTAs through a consortium requires full awareness and understanding of the specific consortium management and its requirements. Consortiums are "formalized groups of businesses banding together to solicit specific types of OT [Other Transaction] contracts.[7]" To bid on OTA opportunities, providers must formally be a member of an OT consortium or at least be aligned with a consortium member. From a government lens, consortiums ensure inappropriate contractual relationships are not established with contractors. From an industry perspective, consortiums help further streamline the OTA process by allowing the prime contractor to award subcontracts to one or more subcontractors. Overall, understanding consortiums, identifying innovative methods for OTA negotiations, and ensuring the total costs of a prototype meet a vendor's expectations are crucial best practices for the effective use and execution of OTAs.

This paper is meant to be agnostic of agency and provide the reader with industry and government perspectives on OTA best practices. Through the use of the best practices addressed in this paper, OTAs can serve as a valuable tool over the long-term in the Federal procurement process to enable strategic risk-taking and ensure OTAs are used for their intended purpose without increased scrutiny. This paper identifies the immediate challenges facing OTAs and provides recommendations and solutions for ensuring the authority is not restrained but expanded.

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[2] OTAs may also be executed directly without the use of a consortium. The use of consortium groups is recent but has increased such that it is a focal point of discussion for the purposes of this paper.

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OTA Best Practices – Industry

One of the most widely used mechanisms for OTs is the consortium model, which has been heavily used, and the use of which is increasing.[8] Given the popularity of this model, sponsorship by the DoD,[9] and continued formation of these organizations, the consortium model is the focus of this section.

The OTA consortium model has existed for more than a decade and has cumulatively resulted in the award of billions of dollars for prototype development.[10] While there are several variants of OTA consortia, the general premise is that a federal agency can award an OTA not with a single entity, but an organized group of entities that agree to participate under a common rule set.

The consortium model is centered on a group of traditional and nontraditional government contractors that self-organize around one or more specific technological areas.[11] A consortium management company, often a non-profit, is given exclusive access to the requirements to distribute among its association's members.

Consortia typically employ a management organization to address administrative needs and manage the flow of information between the agency and the consortia. Typically, these consortia are designed to minimize barriers for new companies to participate. As the consortium model becomes the central conduit for OTA awards, this section focuses on issues associated with OTA execution that industry should be mindful of as they pursue OTA opportunities to grow their businesses or enter the federal market. For more information on current consortiums, please reference the The Mitre Corporation's Acquisition in the Digital Age's (AIDA's) listings [here.][3]

1. Ensure Companies Understand the Contractual Obligations of a Consortium
Understand OTA Requirements and Responsibilities
As the process for OTA implementation matures, industry actors must understand the requirements and responsibilities of an OTA to avoid critical contractual pitfalls or risks. Originally, OTAs were not intended to create prototypes, but rather to gather knowledge on various theoretical, forward-facing technological topics. A prototype can often help determine the practicability and viability of approaches to the selected topics. However, government may not have expertise in the emerging technologies it seeks.

As a neutral third party, the consortium plays an important role in bridging the expertise gap between industry and government to allow for clarity around key information shared throughout the OTA process. OTAs and consortia represent atypical government acquisition

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[3] https://aida.mitre.org/ota/existing-ota-consortia/

approaches and, in some cases, may be confusing for traditional government contractors, government contracting officers, and non-traditional businesses.

The process for joining a consortium is simple compared to the responsibilities that come with it. For example, at one time, joining a consortium only required a credit card transaction. Companies who completed this transaction without reviewing consortium requirements not only signed the company up to receive notices about OTAs, but more importantly, immediately bound the company to the OTA's full set of terms and conditions.

Organizations interested in joining a consortium—especially small companies and organizations not accustomed to working with the Government—should establish an internal process to review the contracting terms and conditions of the master agreement before joining. Specifically, industry actors must:

1. Have the organization's contracting professionals understand and agree to the consortium's full set of terms and conditions with the same level of fidelity that they would with any other contractual agreements (to assess its level of risk and potential required investments).
2. Dissuade business development professionals from joining without fully understanding the outlined requirements and responsibilities of a consortium.

With OTAs still achieving real understanding and acceptance by the federal acquisition community, business processes which ensure a thorough review of OTA requirements can prevent potentially harmful confusion and eliminate unnecessary requirements and responsibilities.

2. Tailor the Consortium's Blanket List of Terms and Conditions to Individual OTAs

While it is understandable that the consortium expects organizations to agree to blanket conditions up front, applying them to each prototype could disincentivize potential contractors, especially non-traditional ones, when they cannot determine how particular terms and conditions apply to an agreement. The blanket terms and conditions set forth by the consortium for use in each award can be onerous and their application is a concern (h*ow each of the terms and conditions is expected to be applied to each procurement).* For example, a large contractor can be awarded an OTA in which the actual project/sub-agreement—which serves a similar function as a task order under a FAR-based contract—is about five pages long. However, the same 80-plus page set of terms and conditions still apply to the prototype award, even though roughly half of them have nothing to do with the particular nature of the OTA or the type of prototype the company is developing.

Including non-essential terms and conditions in every OTA award is an impediment for a variety of reasons, though the biggest is that it makes organizations vulnerable to unnecessary exposure. It would be better if the terms and conditions for an individual prototype award are tailored from the more encompassing requirements to only the ones that deal with the specific prototype. Speed and agility are the primary benefits of using OTAs, so the use of overly burdensome or prescriptive use of terms and conditions is not recommended.

3. Examine Different Approaches toward Streamlining Negotiations

As previously discussed, the consortia model is an important tool to streamline negotiations but may pose difficulties due to the layered communications involved throughout the process. There are several ways to leverage consortiums to clarify communications and streamline negotiations. In situations where two companies are required to collaborate on a specified prototype, the consortium can serve to clarify roles in the process to ensure roles and responsibilities are clear for all firms involved in a specific OTA initiative. For example, if the initiative involves taking part in a prototype from one offeror and part of a prototype from another offeror—a request that is not uncommon—both entities may work together on production. In these situations, the government does not typically engage in detailed negotiations that may take place as a result of this approach, to prevent the perception of favoring one party over another by using a consortium.

The consortium performs a valuable service in this instance by enhancing and streamlining communications such that synchronization of these two parties allows the government to execute one agreement. Further, the consortium model can leverage their collaborative approach to OTA initiatives to translate technical aspects of a prototype to federal representatives. Since the government is unlikely to have expertise in the emerging technologies it seeks, companies in the OTA process can effectively leverage a consortium to clarify and share key information across a greater breadth of stakeholders. This type of streamlined and collaborative communications can help with OTA negotiations and help accelerate the OTA process.

4. Account for Prototyping Costs before Responding to an OTA

While putting forth the effort to win any sort of contract comes with its own inherent set of costs and risks, attempting to estimate the total cost of responding to an OTA—from whitepaper to prototype and, eventually, to production—comes with a unique set of issues. In addition, the onus is on businesses to assess the viability of a response. Most notably, rather than simply developing binders full of content on proposed project and financial data (as is the case with a traditional government procurement efforts), most OTAs require the submission of a whitepaper. Producing a whitepaper in and of itself does not usually entail a great financial risk. However, the devil is in the details, and the details in this case are the cost to develop the prototype.

The upfront cost to develop a prototype is the biggest difference between responding to traditional government acquisitions and OTAs—since only one prototype will proceed into development. This can be a sticking point for small businesses with limited resources and/or those that are not accustomed to working in the government contracting space. These organizations need to be aware that the costs of responding to OTAs are not limited just to the development of a whitepaper describing what they would do if chosen; they also have to account for the associated costs of developing the prototype despite the fact that the vast majority may not be reimbursed for its development costs.

Prototype development can be expensive.[12] It is vital that organizations ensure that what they propose in their whitepapers is not only within the realm of possibility, but can also be completed within a reasonable amount of time and within their company's financial capabilities. It is important to be realistic in evaluating what the next steps entail (i.e., starting with the end state in mind).

Of course, there are consequences for large contractors, as well. Many OTAs include a number of requirements and provisions that direct small businesses to contribute a significant amount of time and effort to the prototype that is being developed and/or for large businesses to "share the pot" (often about 30 percent) with their smaller counterparts.[13] Because of this, larger businesses may actually have to take on a bigger share of the prototype costs in order to attract smaller, innovative companies, a contracting pool that government is always looking to expand. This, in turn, provides an incentive for small businesses to expand into the government space by forming teaming partnerships with large contractors (i.e., non-traditional contractors).

In the end, OTAs are designed to be an innovative way to attract non-traditional contractors that typically do not have the resources to engage with the traditional hurdles of winning government work. However, confronting companies with dozens of pages of terms and conditions runs counter to enticing innovative companies new to the government procurement process. From an industry perspective, a little planning and precaution to ensure that companies properly budget their time and resources (not just as a standalone, but also within their overall plan) can make a critical difference.

Conclusion

Education and Planning Are Key to Successful OTA Execution

These best practices can help government, consortia, and industry work together to help improve the OTA process. However, it is important to note that even if all practices cannot be addressed, keeping a few overarching themes in mind—namely heavy doses of communication and planning—can help organizations successfully compete for OTAs as their usage becomes more prevalent. First and foremost, a thorough education campaign, which includes training and educational opportunities, forged by government, consortia, and industry can increase understanding around OTAs, their capabilities, and how they are properly executed. This

training must be tempered with the understanding that it increases cost and time that traditionally non-government contractors are not accustomed to bearing. On the government and consortia side, it is vital that contractors understand as much as possible the process they are about to undertake, as well as the substantial differences between OTAs and typical FAR Part 15 contracts.[14]

Industry would be well served by reading the congressional intent of the OTAs for each agency because not all the authorities are the same. Being well-versed on both sides of the aisle will help interested parties better understand the boundaries, limitations, and possibilities of OTAs. On the industry side, companies often talk about acquisition strategy and acquisition planning. There is a reason for that—those steps are important. And even though those steps can be abbreviated due to the nature of OTAs, they are still core to the effort's framework and ultimate success.

Make sure to begin with the end state in mind then determine what the hurdles are, what the decision points are, and how to best handle them while maintaining flexibility and also being able to either stop the effort if the results dictate it or continue to the next phase. To create terms and conditions of an OTA consortia, perhaps a Government Wide Acquisition Contract (GWAC) model can be created[15]. After a company is awarded a spot on a GWAC—agreeing to a blanket set of terms and conditions at contract award—only the specific terms and conditions that apply to each individual task order award are included with the contract. With this in mind, if a company is bidding on the development of a land-based IT system through one of its GWAC contracts, any of the terms and conditions that were not designed for this purpose are negotiated out of the agreement. The same general approach should be applied to each OTA where the terms and conditions for an individual prototype award can be tailored from the more encompassing requirements to only the ones that deal with the specific prototype.

Finally, since OTAs are seemingly here to stay, large and small businesses would be wise to begin incorporating OTAs as part of their business models going forward.[16] Ensure that acquisition professionals and engineers are equally familiar with OTAs so both can become "experts" in the process. This can help organizations respond to the OTAs that are consistent with their business capabilities and reasonably handle the response while also producing viable prototypes. OTAs offer a very valuable tool in the acquisition professional's toolbox but some additional focus on planning from government and industry representatives can improve results for both parties, while drawing in more non-traditional government contractors. While far from the only tool—OTAs should not be overly relied upon—they can be a valuable instrument when executed under the current acquisition landscape.

OTA Best Practices – Government

1. Ensure Transparency When Using OTAs

Encouraging full and open competition is a key element in delivering the best solutions to government and the end user. However, this requires a robust and proactive approach to communicating requirements for OTA usage. Although OTAs are an excellent tool for rapid acquisition, the potential benefits come with risks, which include diminished oversight and exemption from laws and regulations designed to protect government and taxpayer interests. Some reviews of OTA use have raised concerns over transparency, and how these agreements are being employed.[17]

Discussing an OTA for cloud services that was protested and ultimately cancelled by DoD, one observer argued: [18]

> *"The cloud contract provides a teachable moment for procurement reform-minded officials in the Pentagon and Capitol Hill. The problem was not with the OTA mechanism, which remains an essential element of reforming Pentagon procurement. Rather, the problem was with a lack of transparency with how the mechanism was employed."*

Scott Amey, General Counsel of the Project on Government Oversight, cautioned:[19]

> *"We have to seriously consider how we are using [OTs]; whether we are using them as intended, whether we are getting the goods and services that we really want and need, whether we are getting them at the best cost and process, and we are using this procurement vehicle as a way to circumvent the rules and have contractors not have the administration and oversight they need to hold them accountable. I'm just afraid this is going to result in a lot of waste, fraud, and abuse in the future."*

Transparency also extends to the framework of the individual agreements. For instance, the more open and specific government can be on available funding or the target they are seeking, the more focused the responses will be so that government can pick from amongst only those that are within the limitations. Several agreement officers (AO) and consortia are viewing OTAs as a FAR-light acquisition and have yet to fully embrace the sharing of information that can lead to more competitive responses, thereby hindering their own efforts. Transparency to external stakeholders as well as within the confines of the agreement will not only preserve this authority while also improving the pool of realistic responses that meet the government's needs within its limitations.

OTA scrutiny will continue and transparency must be integrated to properly execute OTAs.[20] Although reporting requirements from Congress are not new, future reporting requirements may also result in congressional frustration with a lack of transparency and data on how DoD, in

particular, uses OTs. This future frustration may lead to further laws and regulations, and in turn, reductions in the distinctions between FAR acquisition and OTAs.

2. Increase Access to OTA Opportunities

Extensive transparency should be the default, not the exception. Solicitations for OTA initiatives should be distributed broadly through public platforms, including but not limited to government publication platforms like beta.gov.sam. Since the target audience of OTAs are non-traditional firms and small businesses, all requests for technology solutions and solicitations should be available for anyone to see through non-traditional government communications channels like social media or periodicals frequented by the type of industries and talent sought. Social media is a powerful and inexpensive tool to promote transparency and allow for a broad segment of the public to enable the desired openness to solicitations. A great example of using social media is the LinkedIn page for the Department of Homeland Security (DHS) Science and Technology Directorate (S&T).[4] The Air Force has held successful "Pitch Days" to facilitate outreach and communication.

In November, 2018, the Office of the Undersecretary of Defense for Acquisition and Sustainment (OUSDA&S) issued its broad "Other Transactions (OT) Guide" which notes that "traditional advertising methods (i.e., FBO.gov and Grants.gov) may not reach the broad breadth of potential performers" and encourages the government to "consider and employ a variety of marketing activities."[21] A broader view of marketing is critical, as non-traditional contractors or non-profit research institution participation should be maximized to "significant extent" in the prototype project.[22]

Based on past awards, it is clear that traditional firms received the vast majority of OTA awards further calling their usage into question.[23] The DoD Inspector General's office findings reported that of the OTAs awarded in the late 1990s, 72 percent of research funds and 97 percent of prototype funds went to traditional contractors. [24] The lack of representation for small businesses and non-traditional organizations must be addressed. A first step toward addressing these results is to leverage online platforms, including social media platforms to more effectively share and describe OTA opportunities.

3. Create a Collaborative Partnership Culture

Frequent, open communication helps industry and government better understand each party's needs and limitations. A collaborative approach is necessary to draft the best agreements that benefit both parties and allow industry to be innovative. OTAs should be used to solve problems; therefore, requirements documentation for OTAs should not outline detailed specifications as part of the problem statement. This will allow commercial companies an opportunity to propose their own unique and/or innovative solutions. As a result of this

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[4] https://www.linkedin.com/company/dhsscitech/

engagement, the government is afforded the opportunity to select the best solution, and then negotiate terms, as opposed to the reverse, which is a common factor in failures to effectively use OTA. This approach can only be successful if both parties are actively engaged to communicate needs and possible solutions.

Reaching non-traditional businesses is a major focus of OTAs. According to a 2018 study conducted by the bipartisan Center for Strategic and International Studies (CSIS), the number of new entrants to the federal market has sharply declined in the past 10 years.[25] Eighty pages of terms and conditions are a major disincentive for many companies not accustomed to the government acquisition process. Therefore, OTAs are more effective when they are created through a collaborative partnership (i.e., between government and industry) and start with zero terms and conditions with the intent of including only those that are absolutely necessary. This increases transparency around OTAs through collaboration and ensures the inclusion of only the terms and conditions aligned with the objectives of using an OTA.

From the standpoint of government and consortia, requiring organizations to complete an OTA training program before bidding on an OTA and signing-up to a consortium can also improve communications and collaboration. The training program does not need to be overly involved; it can be a couple of slide decks posted on a website that explain how a consortium works, run through the differences between OTAs and traditional contract acquisition, discuss the blanket terms and conditions, identify key government resources, and ensure applicants are aware of activities unique to prototypes. A review of Defense Acquisition University (DAU)[26] or Federal Acquisition Institute (FAI) material could be a useful starting point.

Pulling in a third party to manage negotiations between two other parties is not viewed as advantageous to all non-traditional government contractors, so this could serve as a deterrent. The OTA's objective should consider whether traditionally non-government entities desire involvement from a third party or whether they are interested in forming a contractual relationship with a second offeror where they might have to divulge proprietary and/or sensitive information. Perhaps the scope of the OTAs should be decreased in such cases and only awarded to one offeror instead of combining two or more solutions. However, the consortium model is not always an ideal go-between. Having both the consortium and the end user involved in linear negotiations—especially after a single party has been awarded the prototype—can increase the amount of time and coordination required during negotiations by adding an additional and unnecessary step to the process.

One way to help improve this process is to have consortia employ contract professionals that have practical and technical experience with OTAs so that actors on both sides of the fence can speak the same language. Especially since government acquisition professionals are not always experienced in OTAs—in part due to the retirement of some of the more senior professionals—it relies more heavily on the consortium to do a lot of that translating. Contract terms and conditions would seem to be an inherently governmental action and ought to be executed by

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the government through direct communication with the awardee(s). It is possible consortia could harness some of the knowledge of these government retirees for their experience and training. Additionally, due to the streamlined nature of the OTA process, these acquisitions are often understaffed resulting in longer than usual wait times for basic communications since there are simply not enough personnel to assign to all the tasks. Overall, using seasoned professionals with negotiation experience across the continuum can help enhance collaboration and communications throughout the process.

4. Use OTAs for Their Intended Purpose

Perhaps the biggest issue is the application of OTA processes for purposes and objectives for which it was never intended. The government must take the time to identify its true objective (e.g., speed, ease, shared investment, access to traditionally non-government contractors, etc.) and then determine whether the OTA process is the proper option. Once that determination is made, it can design the particular OTA with this objective in mind. Realistically, while this could add time to the OTA process, it will eliminate terms and conditions that provide little to no benefits to the government, consortium, or contractors leading to unintended consequences— or unmitigated risks—down the road. Although OTAs continue to grow as a percentage of contract dollars, most notably at the Pentagon, the idea they could become a wholesale replacement for the traditional acquisition process is misguided.

Continued OTA awards of nine-figures to non-traditional firms demonstrate a fundamental misunderstanding of their purpose, endangering their continued positive innovation impacts and creating risk of future legislative restrictions that might require OTAs to behave more like FAR procurements. For example, challenges to Transportation Command's $950 million use of an OTA to award to REAN Cloud highlighted these issues, as Oracle America successfully argued to the Government Accountability Office (GAO) that the follow-on OTA was improper, and made without adequate notice, competition, or consideration.[27] The case has raised important questions around how OTA awards are perceived and put those on notice that would like to circumvent the FAR. In an effort to provide guidance on not only appropriate use, but provide structure, the OUSDA&S issued its broad "OT Guide."[28] This is important not only for Defense usage, which is by far the largest OTA user,[29] but other agencies that have OTA authority and do not have clear guidance on effective use.

Overall, OTAs are a tool that represent progress in the pursuit of greater flexibility and innovation in the Federal acquisition process. As such, government actors must establish their objective upfront to ensure OTA serves as the best procurement solution. It is up to OTA users to proactively guard against their misuse and use OTA for its intended purpose, research, prototype development, and production.[30]

5. Address Short and Long-term Interests for Intellectual Property Terms

Intellectual Property (IP) terms should be customized to consider the needs of each party in terms of scope, size, market, geography, and time. Because OTAs are not FAR-based procurements, they should not be treated as a standard procurement contract since the statutes, regulations, or decisions that apply to FAR-based acquisition do not always apply to OTAs.

As a result, data rights statutes at 10 U.S.C. §§ 2320[31] and 2321[32], their corresponding FAR[33] and DFARS[34] provisions and data rights clauses, and the Bayh-Dole Act[35], do not apply. Although these data rights clauses may be used, there is no obligation, nor is it recommended they not be used since it is a slippery slope to a "FAR-based" OTA. There is simply no mandatory "standard" OT agreements or IP clauses. Further, previously used OTAs should not be used as a "template" since every agreement should be tailored to the specifics as outlined.
Appendix F – Intellectual Property Considerations, of the DoD OTA Guide, is an excellent resource to frame the IP terms of an OTA:[36]

> *"The negotiated IP terms and conditions should facilitate all parties' business plans and project goals, including any likely production and follow-on support of the prototype developed, and balance the relative investments and risks borne by the parties both in past development of the technology and in future development and maintenance of the technology. The Government team should consider the effect of other forms of IP (e.g., trademarks, registered vessel hulls, etc.), that may impact the acquisition strategy for the technology."* (p. 50)

The guide also discusses the minimum issues that the Agreement Officer (AO) should address and leverage. The parties should work together to create an IP arrangement that benefits all interests. It should not be prohibitive to create barriers to entry or take more of the company's IP than is necessary to perform the OTA,[37] nor should it be so one-sided as to allow companies to unilaterally profit from programs and research that are funded by taxpayers.

6. Increase Opportunities for Nontraditional Firms

One of the main goals for OTAs is to create a new set of companies to drive innovation, especially with firms that do not normally contract with the government, or who specialize in defense business. These firms are referred to as "nontraditional companies," which come with a unique set of challenges. Under the DoD OTA Guide, the term "nontraditional defense contractor" is defined as: [38]

> *"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*

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that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section."

The definition does carry flexibility, although the spirit of the definition provides room for improvement in how OTAs are being created. Traditional defense contractors can be awarded OTA projects if they partner with a nontraditional contractor who participate to a "significant" extent, if the traditional contractor provides financial or in-kind cost sharing, or if the Service Acquisition Executive makes a written determination that exceptional circumstances justify use of OTA.
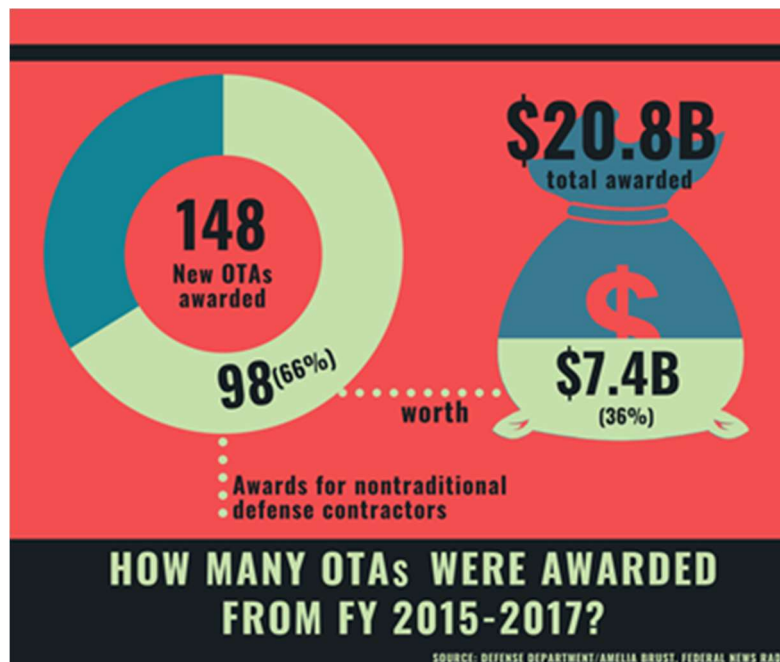

Figure 2: The Overwhelming Amount of OTA Funding Going to Traditional Firms[39]

As such, one of the most common ways DoD does business through an OTA is to partner with a consortium of companies, that typically specialize in one subject, such as artificial intelligence. The issue is that the law does not define what "significant" means. Given the flexibilities, and according to Bloomberg Government, the largest defense contractors are the overwhelming recipients of OTA funding, not "nontraditional companies."[40] One factor that can improve the situation to expand the spirit of the law is to lower barriers to firms with innovative technology through loosening of restrictions when it comes to Cost Account Standards (CAS).

A significant barrier for nontraditional organization is the requirement to possess a CAS compliant / Defense Contract Audit Agency (DCAA) approved accounting system in order to receive a Cost-type OTA. As previously mentioned, to qualify as a nontraditional defense firm, the company must not have received a CAS contract in the last year. This can become a tedious situation. If the company accepts an OTA with CAS compliance, they cannot compete for

additional OTAs as a nontraditional defense firm. If they do not, then they have to accept a Firm Fixed Price (FFP) OTA (assuming the AO will allow this) with the inherent financial risk. The DoD OTA guide states: [41]

> "When the business unit receiving the award is not performing any work subject to the Cost Principles (48 CFR Part 31) and/or the Cost Accounting Standards (CAS) (48 CFR Part 99) at the time of award, the Agreements Officer should structure the agreement to avoid incorporating the Cost Principles and/or CAS requirements, since such an incorporation may require the awardee to revise its existing accounting system."

However, some AOs have been reluctant to work with the nontraditional firms to allow them to receive Cost-type OTAs, even if they have adequate but non-CAS/non-DCAA approved systems. This could be a root-cause of why traditional firms are generally considered a "safe" choice and an overwhelming number of recipients of OTA funding are traditional firms. OTAs are only a valuable tool if used properly. They allow nontraditional and small firms to compete for government RDT&E work and allow government acquisition organizations to have access to potentially innovative products and expertise that wouldn't normally be available in their marketplace. In some instances, however, it appears that acquisition organizations are not using OTAs properly or are placing unnecessary and burdensome processes/approvals on their use. [42]

Some contracting organizations are, either in solicitations or basic ordering agreements, allowing offerors to propose either a FAR or OTA instrument. Although this makes sense to retain maximum flexibility, government tends to fall back on the FAR contract even if the offeror proposes an OTA. This seeming bait-and-switch creates artificial barriers to entry for nontraditional firms and must be addressed.

7. Hold an Industry Day for Each Request for Prototype

As one larger contractor was getting into the business of responding to OTAs, company contracting professionals were able to attend a DoD OTA Industry Day event that discussed upcoming procurements. This initial foray into attending an OTA Industry Day proved beneficial. The consortium invited an entire Program Executive Office (PEO) to present a roadmap on all of the OTAs it planned to release over the next few years. The government discussed the upcoming procurements, explaining the exact nature of each acquisition. Specifically, each Program Manager gave a presentation that stated the challenge the OTA was attempting to address, what it needed to solve the challenge, the desired end state and a comprehensive timeline, along with the requisite question and answer session. [43]

This information provided contractors with the knowledge necessary to submit a qualified whitepaper in response to each OTA as they went live. For those unfamiliar with the OTA process, the day proved invaluable and acted as the perfect "best practice" to help potential participants become more knowledgeable, especially as they came to better understand the

nature of OTAs and how exactly the process would work its way through the consortium. Industry Days can provide organizations of all types—but especially small businesses and nontraditional government contractors—with key insights into responding to OTAs with whitepapers while also helping all organizations better understand what the government is looking to buy.

In an effort to ensure that Industry Days provide the most value, the process outlined above— providing presentations on multiple OTAs on a single Industry Day conducted by an entire PEO—is the most efficient in terms of both time and resources for government and industry. As time and budget permits, it is beneficial for everyone involved if Industry Days were to be a part and parcel of the OTA process, especially at this stage in their resurgence when many acquisition professionals are still learning the particulars about how OTAs are structured and awarded.

Conclusion

The use of OTAs is not an opportunity to simply go around normal procurement channels, nor is it a silver bullet to "rapid acquisition". The following issues should be considered:

- One of the main goals of OTA is to attract nontraditional organizations to provide innovative solutions to the government and this should be at the forefront of the OT strategy. Although statutes exempt OT agreements from the traditional procurement statutes, regulations, and processes, this increased efficiency is not simply about speed and rapid acquisition.[44]

- OTAs are meant to follow streamlined acquisition and contracting processes and simply falling back into a FAR Part 15 process defeats the purpose. One of the obstacles to using OTAs across government is that the pervasive risk-averse contracting culture tends to apply a process very similar to a typical FAR contract and causes project management offices to avoid pursuing OTAs since there is no schedule benefit. The dichotomy is about balancing not only flexibility and streamlining processes for speed, but also to protect the government's interests, since they should not be mutually exclusive

- The inherent flexibility of OT authority allows for the consideration of a variety of teaming options, and not just through consortia. These arrangements could include traditional prime/subcontractor relationships, partnerships, and joint ventures. Government should allow the organizations to determine the best way to structure their teams. Like any other requirement, the government should first determine what it is trying to accomplish and what the end state goal is. The best award vehicle and business structure to accomplish that goal is then considered, not automatically relying on consortia as the default arrangements for industry partnerships.[45]

- To attract nontraditional performers to work with the federal government, OTAs should require the use of competitive practices to the maximum extent practicable. These statutes allow for flexibility and provide guidance to determine what the competition will look like and how it will be structured. Solicitations should be widely disseminated to attract innovation so the best solutions may be gathered.

- One of the prime advantages of OTAs are rapid acquisition and innovative approaches to getting technology in the hands of end users. However, OTAs were never designed or intended to be a full-on substitute for the traditional acquisition lifecycle. The traditional acquisition process was created to buy normal operational supplies and services and should be used for everyday non-RDT&E purchases. If OTAs are marketed as a way to "get around the FAR", this will prove problematic, and allow opportunities for increased scrutiny, regulations, and more than likely have unintended consequences that may prohibit their use.[46]

- More long-term planning is required, with the end state in mind, for OTA prototype awards. Often, the focus is on doing things faster and evaluating a large number of prototypes without having a long-term strategic plan. There are advantages to progressing slowly and thoroughly. Government entities would be well-served in making sure they assess the desired end state and if the prototype(s) solve(s) the problem statement.

- The key to efficiently tailoring terms and conditions for each prototype is building a comprehensive matrix that classifies each OTA by type. In this manner, unnecessary terms and conditions are ruled out from the start, leaving only the pertinent ones to be transferred to the final agreement. Creating and implementing these predetermined "swim lanes" acts as an impactful solution leaving negotiations to only those few terms and conditions that remain unclear.

- More must be done to expand available OTA resources and training. An OTA knowledge repository, such as the *Acquisition Gateway* provided by the General Services Administration, would centralize OTA knowledge across government. Although DAU has one of the better resource repositories available, one area that should be considered are templates and guides on the development of commercial style contracts. Having a repository of available templates that could be tailored for the specific OTA would not only be a valuable training aid, but also provide government contracting professionals with the tools to avoid falling back to FAR-based contracts out of comfort and the desire for risk aversion. Another possible solution is to have DAU offer more robust online-based training scenarios to help acquisition professionals, especially more junior ones, become more knowledgeable and comfortable in the procurement of OTAs. The better educated and trained these acquisition professionals become, the more the process can become streamlined.

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- Since OTA is a mechanism to let acquisition professionals use good judgment and be free of current FAR-based restrictions, OTAs could be measured on the following outcomes:
  - How many new entrants are enticed in with low barriers to entry?
  - What terms and conditions were easier for them to use than the FAR based ones?
  - What streamlined processes were used to encourage innovation and novel participation?
  - If OTAs can be measured on success factors other than dollars, what lessons could be transferred into FAR-based acquisition?

These are the types of issues that should be considered to measure if OTAs are succeeding and putting those lessons into action by seeing what they are doing differently from FAR, and how much of that can be replicated with or without legal or regulatory changes.

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