OTHER TRANSACTIONS GUIDE

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for Acquisition and Sustainment

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Section I - General Information

A. About this Guide

1. Definitions

Some terms in this guide require a closer look, further explanation and/or examples. Such terms are identified with a "🔍" symbol to indicate that more information is available (see Appendix A - Glossary).

2. Myths

The flexibility of Other Transaction (OT) agreements, and their limited use across the Department of Defense (DoD), has led to misunderstandings as well as several myths. A list of common OT myths along with a discussion of the facts are identified with a "💣" symbol indicating that a myth exists for the item described (see Appendix D).

3. Purpose

This guide is issued by the Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD(A&S)), the organization responsible for promulgation of policy for OTs. This guide introduces all three types of OT agreements: research, prototype, and production. 💣[Myth 1]. This guide focuses on lessons learned on the planning, publicizing, soliciting, evaluating, negotiation, award, and administration of prototype and production OTs.

Consult with legal counsel for interpretation of statutory, regulatory, and formal policy requirements. If a strategy, practice, or procedure is in the best interest of the Government and is not prohibited by law, regulation, or Executive Order, the Government team should assume it is permitted.

4. Audience

This guide is intended for two primary audiences:

a. The Government team, including program/project managers, Agreements Officers (AOs)🔍, agreements specialists, systems engineers, small business representatives, legal counsel; and
b. Government partners, including industry, academia, other Federal agencies, and state and local authorities seeking information on OT best practices and DoD's objectives in leveraging OT authority.

5. Structure

This guide is divided into four sections:

a. Section I – General Information: provides an overview of OTs for those new to the authority or seeking general and historical information

b. Section II – Execution: provides practical *pre-award* information, processes, explanations, and other best practices

c. Section III – Administration: provides practical *post-award* information, processes, explanations, and other best practices for the practitioner administering an existing OT

d. Section IV – Additional Resources: provides additional resources, including OT definitions, myths, facts, and approval thresholds

B. History of Other Transactions

The National Aeronautics and Space Administration (NASA) pioneered the first use of OTs following the enactment of the National Aeronautics and Space Act of 1958 (Pub. L. 85-568) [Myth 2]. Since then, the term has generally been used to refer to the statutory authorities that permit a federal agency to enter into transactions other than contracts, grants, or cooperative agreements. In 1989, Congress codified title 10, United States Code (U.S.C.) §2371, providing Research project OT authority. Section 845 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 1994, Public Law 103-160 provided Prototype OT authority for the Director, Defense Advance Research Projects Agency (DARPA), to carry out "OTs for prototype projects." In 2015, this Prototype OT authority was made permanent and codified at 10 U.S.C. §2371b. (see Appendix B for a timeline of OT authority legislative history). Section 1841 of the William M. (Mac) Thornberry NDAA for FY21, Public Law 116-283, transferred sections 2371 and 2371b to sections 4002 and 4003 of title 10, U.S.C. Finally, section 1701(u) of the NDAA for FY22, Public Law 117-81, transferred sections 4002 and 4003 to section 4021 and 4022 of title 10, U.S.C.

C. Purpose and Types of OTs

1. Purpose of OTs

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.

OTs can help:

a. Foster new relationships and practices involving traditional and NDCs, especially those that may not be interested in entering into Federal Acquisition Regulation (FAR)-based contracts with the Government;

b. Broaden the industrial base available to Government;

c. Support dual-use projects;

d. Encourage flexible, quicker, and cheaper project design and execution;

e. Leverage commercial industry investment in technology development and partner with industry to ensure DoD requirements are incorporated into future technologies and products; and

f. Collaborate in innovative arrangements.

OTs are NOT:

a. FAR-based procurement contracts ; [Myth 3]

b. Grants;

c. Cooperative Agreements; or

d. Cooperative Research and Development Agreements.

The Government may make an OT award to a consortium or as a single offeror agreement [Myth 4]. For considerations when contemplating the use of a consortium or making a Prototype or Production OT award to a consortium, see Appendix F.

The determination of whether OTs are subject to DoD Instruction (DoDI) 5000.02 depends upon the acquisition pathway selected by the program office. OTs are neither inherently subject to, nor exempt from DoDI 5000.02. Selection of the award instrument is a separate, but complementary decision.

Therefore, any program executed under a DoDI 5000.02 pathway is subject to DoDI 5000.02 policy once this pathway is selected, regardless of whether an OT or traditional contract is used. [Myth 5].

CASE STUDY #1

Program Description

Robotic Servicing of Geosynchronous Satellites (RSGS) is DARPA's first public-private partnership in the Space Servicing Domain. The requirement is for RSGS in Geosynchronous Earth Orbit (GEO). High-cost GEO satellites are regularly discarded when there are no feasible options for upgrade, modification, or repair. RSGS will change that by providing dexterous robotic-servicing technologies in GEO. The long-term goal is to have regular, reliable, and responsive robotic-servicing capabilities in GEO, operated by a commercial entity that services both Government and commercial satellites. As a result of this new GEO activity, a new marketplace may emerge where both Government and private industry pay a fraction of the satellite's remaining value to a commercial firm to service, upgrade, modify, or repair the satellite to maintain its operability. Industry will provide the "bus" or space-lift vehicle for delivery into space for a fee. In turn, Government (or another commercial client(s)) will provide the "payload" or servicing robotic satellite to launch into space and/or update, modify, or repair other satellites.

Implementation and Execution

DARPA conducted extensive market research with public and private entities in the space, launch, and satellite industries over a two-year period. DARPA posted the solicitation in May 2016 and awarded a Prototype OT in April 2017, with a period of performance through the first quarter of Calendar Year 2022. Evaluations followed a four-step process:

1. Executive Summary to Determine Eligibility
2. Full Proposal Submission
3. Oral Presentations and Negotiations
4. Final Evaluation and Award

Outcomes and Lessons Learned

1. *Collaboration and Risk-sharing:* This is vital, as RSGS involves technological disruption and the creation of a new marketplace for space-based satellite servicing. Executing a Prototype OT allowed DARPA to collaborate with a commercial partner that shares the vision of transforming space robotics and satellite servicing and is willing to share in the investment by providing significant funding with qualified and creative talent.
2. *Resource sharing and recoupment:* The flexibility of Prototype OTs allowed unique resource sharing and special business arrangements, including $15 million in incentive-based payments and recoupment of Government payload costs, which would have been impossible with traditional Government contracting.

2. Types of OTs

OTs can be structured in a variety of ways. There are two different OT statutory authorities that can result in three different types of OT agreements: Research, Prototype, and Production (see Appendix C – OT Type Comparison Table for additional information).

a. Research OTs (sometimes referred to as "original" or science and technology OTs) are authorized under 10 U.S.C. §4021 for basic, applied, and advanced research projects. These OTs are intended to spur dual-use research and development (R&D), taking advantage of economies of scale without burdening companies with Government regulatory overhead, which would make them non- competitive in the commercial (non-defense) sector. Traditional defense contractors are also encouraged to engage in Research OTs, particularly if they seek to adopt commercial practices or standards, diversify into the commercial sector, or partner with NDCs. The Office of the Under Secretary of Defense for Research and Engineering (OUSD(R&E)) is responsible for promulgation of policy and guidance for Research OTs. OUSD(R&E) issued a Guide (see Appendix E) with advice and best practices on planning, publicizing, soliciting, evaluating, negotiating, awarding and administering Research OTs.

b. Prototype OTs are authorized under 10 U.S.C. §4022 to acquire prototype capabilities and allow for those prototypes to transition into Production OTs. Both dual-use and defense-specific projects are encouraged under section 4022. Per statute, successful Prototype OTs offer a streamlined method for transitioning into follow-on production without further competition [Myth 6]. The solicitation and Prototype OT agreement should include notice that a follow-on Production OT is possible (see Appendix E for policy documents and links).

c. Production OTs are authorized under 10 U.S.C. §4022(f) as follow-on OTs to a Prototype OT agreement that was competitively awarded and successfully completed. The memo entitled "Definitions and Requirements for Other Transactions" (see Appendix E for policy documents and links) requires organizations soliciting for and awarding a Prototype OT to consider the possibility of a follow-on effort and provide notice to performers in the solicitation and awarded agreements that the Government may choose to go directly into production under this authority without additional competition. While the requirement to provide notice of a follow-on production in the solicitation and agreement has since been superseded in the FY23 NDAA (and is no longer required per section 842), it still considered to be best practice. [Myth 7]

Note: Procurement for experimental purpose authorized under 10 U.S.C. §4023 does not create a new type of award instrument. Users should follow the policies for the type of award being issued for experimental purpose. The authority for experimental actions could result in a FAR-based contract, OT (prototype), OT (research), or even a grant/cooperative agreement. Users should follow the policy rules applicable to the instrument they choose to award.

CASE STUDY #2

Program Description

The Air Operations Center (AOC) Pathfinder Program purposefully structured its acquisition approach to leverage flexible and innovative processes and procedures. The initial project executed a proof of concept designed to implement a modern, dynamic web-based application to schedule air-refueling operations, which replaced an antiquated handwritten-whiteboard-on-the-wall system. This application resulted in fuel savings of approximately $200,000 per day based on more efficient use of available assets. Using the Commercial Solutions Opening (CSO) process, the Defense Innovation Unit (DIU) through Army Contracting Command-New Jersey (ACC-NJ) awarded a Prototype OT, on behalf of the USAF AOC program office, to build software applications that allowed faster integration of user feedback into future iterations.

Implementation and Execution

The DoD leveraged the Prototype OT to solve a capability gap through "a scalable software development and production platform to enable continuous integration, delivery, and operation of new applications…" DIU and the AOC Program Office collaborated to tailor a problem statement that provided an opportunity for companies to leverage commercial best practices to deploy software originally conceived under a traditional waterfall approach. ACC-NJ awarded the Prototype OT from proposal receipt to award in only 129 days. The U.S. Air Force (USAF) declared success after executing this methodology while developing and deploying four unique applications. In May 2018, the USAF awarded a follow-on Production OT for the scaling and employment of the initial prototype methodology and platform licenses across additional USAF software development teams and throughout the geographically dispersed AOC.

Outcomes and Lessons Learned

1. *Allow Industry to be Innovative*: The initial problem statement did not outline a detailed specification. This provided commercial companies an opportunity to propose their own unique and/or innovative solution sets. The competitively selected Prototype OT was ultimately predicated on leveraging a methodology, whereas other offerors focused on prototyping through other means.
2. *Follow-on Production Award*: Although ACC-NJ awarded the prototype, the USAF awarded its own follow-on Production OT, which allowed requirements owners to have full situational awareness as the program moved into execution.
3. *Teaming and collaboration*: AOC Pathfinder was leveraged throughout DoD to accomplish critical aspects of the initial Prototype OT, resulting in schedule efficiencies. For example, it leveraged a separate Services contract to hire software developers. The program office also performed a data call to users to enable face-to-face collaboration. Additionally, the program office transformed its structure to accommodate this new paradigm wherein the Government was responsible along with its performer for software development in lieu of a more traditional outsourcing business model.

Section II– Execution

D. Planning

1. The Government Team

A small, dedicated team of experienced individuals works best when planning an OT agreement and their coordinated input is critical to drafting quality OT agreements. In addition to the project manager, end user, and warranted AO, the agency needs to secure the early participation of subject matter experts on the cross-functional team, such as legal counsel, comptrollers, contract administrative support offices, pricing team, and small business representatives to advise on agreement terms and conditions. Each subject matter expert brings value to the team, which enables the Government to understand and manage risks throughout the lifecycle of the OT agreement to protect the Government interests and meet end user needs without unduly burdening performers. Involvement of the Defense Contract Management Agency (DCMA) and the Defense Contract Audit Agency (DCAA) may also be appropriate in helping to understand the risks throughout the OT life cycle, developing appropriate terms, and providing information on the status of the performer's accounting system. Adequate advance planning for both the award of an OT agreement and any expected follow-on award is an essential ingredient of a successful program. Early, continuous communication and collaboration among all cross-functional team members will enhance the likelihood of a successful project.

a. A Special Note on Agreements Officers

i. Appointments – It is a best practice for each DoD Component with authority to enter into OTs to establish a formal process for selecting and warranting AOs and for terminating their appointments. To support the demands of quick reaction efforts and key official priorities, Components are authorized to delegate AO appointment authority to an appropriate level within the contracting activity. It is recommended that AO appointments are in writing and state any limitations on the scope of authority to be exercised. Formal processes ensure that AOs are individuals who have demonstrated expertise in executing, managing, or administering complex acquisition instruments, and can function in a less structured environment where prudent judgment is essential. Follow your Agency's procedures for requirements associated with the warranting process for AOs. [Myth 8]

The Head of the Contracting Activity (HCA) may be delegated authority to appoint AOs and will establish internal requirements for appointment.

ii. Business Acumen – The AO is expected to possess a level of responsibility, business acumen, and judgment that enables them to operate in the relatively unstructured environment of OTs. AOs should not merely copy previously issued OT agreements, templates, or models. AOs are encouraged to consider all possible business options, including traditional Government and commercial business practices and innovative approaches; however, the AO is ultimately responsible for negotiating terms and conditions that

appropriately address the risk to be undertaken by all parties on the particular project. The AO should ensure the sovereign rights of the Government are protected and all applicable laws are addressed. [Myth 9]

iii. AOs need not be Contracting Officers, unless required by the Component's appointment process. Each Component is responsible for determining the Defense Acquisition University (DAU) and/or Component provided courses AOs are required to complete. DAU has offerings online as well as virtually led by instructors on OTs for members of the Government team.

BEST PRACTICE: As the Standard Form 1402– Certificate of Appointment cites the FAR as the authority for a warrant, it is best practice to either edit this certificate for AO warrants or create a custom letter type document.

iv. Approval Authority Thresholds – Per 10 U.S.C. §4022, the Senior Procurement Executive (SPE) of a Military Department or Agency Director for DARPA and Missile Defense Agency (MDA) has the approval authority in an organization for Prototype OTs up to $500 million. The SPE or Director may further delegate these authorities up to $100 million to the HCA and AO. Approval authorities for other Defense Agencies and Field Activities above $100 million are non-delegable per the statute. The AO is granted authority to enter into, administer, or terminate OT agreements and make related judgments on the appropriate use of the authority granted (10 U.S.C. §4022). The AO may bind the Government only to the extent of the authority delegated in the warrant certificate. See Appendix E for additional details, and for delegation of authority for follow-on production OTs.

b. Contract Administrative Support offices

i. DCMA − At the discretion of the AO, DCMA may be able to support administrative functions delegated to it and may be able to support activities such as price evaluations, and in select circumstances can support cost analyses.

ii. DCAA – At the discretion of the AO, DCAA may be able to provide financial advisory services to support the AO in awarding and administering OT agreements where requested. Early engagement and coordination are critical to determine the type of services DCAA can provide because of the flexibility and diversity in the solicitation terms and requirements.

2. Market Intelligence

The principles for market intelligence require research of the industry and use of the research as the basis for decision-making. The questions for market intelligence include:

- Who are the possible performers?
- What are the current business processes and available technologies?
- What are the industry terms and conditions?

Potential methods for market intelligence include researching industry and Government

resources and using informal and formal communications. Industry resources include trade publications, technology demonstrations, conferences, conventions, seminars, and trade shows. Outreach to industry may include conducting regular and reverse industry days, standards committees, communities of interest events, crowdsourcing events, and surveys. Particularly relevant resources may be social media services such as LinkedIn, Facebook, Twitter, and YouTube. Other resources could include chambers of commerce, APEX Accelerators (formerly Procurement Technical Assistance Centers), technology consortia, trade associations, and DoD Tech scouting activities. These resources may provide invaluable information on firms, technology, products, processes, and terms and conditions.

Government resources are also available, such as Government publications, community of practice groups, training events, and Government networking. Government resources are particularly valuable because they can share lessons learned on previous efforts from the Government's perspective. Important issues are more than just market intelligence strategies but also requirements analysis, instructions to potential performers, criteria for success, and negotiation issues, on both price and terms and conditions. As OTs are unique to the transaction itself, AOs should not rely on previously used forms or out of date market research, and instead need to leverage current means of outreach to potential performers and lessons learned.

When gathering market intelligence, a mixture of informal and formal communications may be necessary. For example, a formal communication from the Government, such as an industry day or posting in the System for Award Management (SAM) (https://sam.gov), could be used to communicate a need to industry. This could then identify several industry points of contact that then support subsequent informal communications. Informal communications could then identify questions that become the basis of additional formal communications to industry. These communications could also become the basis of subsequent negotiations. In this way, formal and informal communications could progress quickly from outreach to research to negotiation.

Market intelligence may also include holistic and predictive analysis of the marketplace. Acquisition professionals should take a strategic look at the trends in products, processes, and practices and consider possible implications for the future. This is particularly important in high-tech areas where innovation is constantly changing the landscape of the market.

Market intelligence efforts should pay particular attention to potential participation of firms formed under the laws of a foreign country or with significant foreign ownership or investment. The global marketplace provides an abundant resource of non-traditional firms that may be excellent sources of technology and may be more advanced than U.S. firms. Additionally, certain sources of supply may only be available from these foreign firms. Notwithstanding the potential availability of these sources, legal restrictions, such as security or export controls, may limit or prohibit foreign participation. Ultimately, acquisition professionals should work closely with the technical, legal, and security stakeholders to identify any opportunities or obstacles with foreign participation.

BEST PRACTICE: Advertise outside of traditional Government media. A traditional Government Point of Entry, like SAM.gov, may not be the most appropriate

place to advertise these types of opportunities since it will likely only reach traditional performers familiar with Government opportunities. To widen the DoD outreach to industry, the Government team should actively seek NDCs. A good communication and marketing plan will generally include members of the entire DoD organization. The Government may consider and employ a variety of marketing activities geared toward advertising the Government opportunity to as wide of an audience likely to yield a relevant response as possible. Acquisition professionals have maximum flexibility to innovate when it comes to marketing and engaging with commercial industry. Leveraging social media platforms (*e.g.*, LinkedIn, Facebook, Twitter, and YouTube) using high-quality design and visual elements can be successful in driving outreach. Moreover, Government teams are encouraged to employ lessons learned from other agencies and capitalize on innovative crowdsourcing and market intelligence campaigns (*e.g.*, www.challenge.gov, www.citizenscience.gov, https://afwerxchallenge.com). Agencies are encouraged to leverage other events, activities, or even authorities to attract potential non-traditional companies. Examples of successful activities include calls for white papers, tech demonstrations, hackathons, innovation workshops, "Shark Tank"-like presentations, and prize contests and other similar events that can be leveraged to engage industry.

3. Defining the Government's Intent

An important part of the Government team's planning activities will be to adequately identify and define the Government's intent whether that be a problem, area of need, or capability gap. When contemplating the requirements necessary to meet the Government's needs, the Government team is encouraged to minimize onerous requirement definitions to not constrain solutions, impede technical trades or inadvertently exclude use of existing commercial technologies. This maximizes the ability to make cost, schedule, or technical trades through the lifecycle of the project as well as to ensure affordability and manufacturability in the production phase and beyond.

CASE STUDY #3

Program Description

Global Hawk was a 1994 DARPA program for a high-altitude endurance unmanned aerial vehicle (UAV) and was DoD's first implementation of a Prototype OT. DARPA issued a two-page description of desired performance capabilities. In lieu of detailed specifications or an extensive Statement of Work, DARPA's requirement definition was for a UAV that could reach an altitude of 60,000 feet and remain aloft for 24 hours with a strict limitation on the price tag of $10 million. DARPA allowed industry to propose their own solution sets for achieving the requirement.

Implementation and Execution

In 1994, DARPA initially selected five performers in Phase I through a competitive solicitation. While the original program plan was to down-select to two competing performers in Phase II in 1995, budget constraints restricted selection to only one performer in this phase. Phase III spanned 1997 through 1999 and produced eight UAV prototypes. In the final Phase IV (2000–2001), the specifications were finalized for full production and transition to the USAF. This overall timeline of approximately seven years was deemed a success, as traditional aerial vehicle development programs typically spanned two decades or more. The funding over seven years was approximately $372 million.

Outcomes and Lessons Learned

1. *Allow Industry to be Innovative:* DARPA's use of Prototype OTs allowed industry innovation through creative flexibility in UAV development while remaining within budget and meeting DARPA's performance goals. The performer was given wide latitude to select and defend tradeoffs of performance parameters as long as the "flyaway" price tag of $10 million was achieved.
2. *Acquisition Strategies balance Innovation and Budget*: "Design-to-price" was a distinct departure from traditional acquisition programs, which typically focus on achieving the highest possible performance, which can result in cost increases.
3. *Collaboration*: Giving the performer freedom to design and run the program was also a departure from the normal process of extensive Government control. DARPA allowed Government and Industry to test the limits of technology collaboratively and successfully within the constraint of a price point of $10 million.

4. Understanding the Statutory Requirements

As the team plans how it will solicit, evaluate, negotiate, and award an agreement for the defined problem, it should ensure the appropriate OT statute is selected and the corresponding statutory requirements are met. There are two different OT statutory authorities that can result in three different types of OT agreements. The two distinct OT statutes – one for Research OTs and another for Prototype and Production OTs – are intended to address different needs and situations. It is strongly recommended that the team conduct a programmatic and statutory review when selecting the appropriate authority. Each statute has different requirements and different considerations.

a. In order to comply with 10 U.S.C. §4021 for Research OTs, the project team ***must*** ensure the following:

   i. The focus of the project is basic, applied, or advanced research.

   ii. To the maximum extent practicable, the research contemplated in the instant project does not duplicate research being done under other DoD programs.

   iii. To the maximum extent practicable, the funds from the Government do not exceed the total amount provided by the other parties. This resource-sharing requirement is intended to highlight the dual use focus of this authority and show commitment on the part of the performing team to pursue and/or commercialize the technology in the future. While the default position in the statute is generally a 50-50 resource share, the final amount of the share should be based on full consideration of factors such as the performing partner's resources, prior investment in the technology, commercial versus military relevance, unusual performance risk, and precompetitive nature of the project.

b. To comply with 10 U.S.C. §4022 for Prototype OTs, the AO should independently validate and document the Prototype OT's ability to satisfy the following conditions:

   i. The project includes a prototype per the statute and the transaction will "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of personnel of the Department of Defense or improving platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces…".

   ii. The Prototype OT satisfies at least one of the following conditions:

   - There is at least one NDC or non- profit research institution participating to a significant extent in the prototype project.
   - All significant participants in the transaction other than the Federal Government are small businesses, including those participating in the Small Business Innovation Research (SBIR) or Small Business Technology Transfer programs, or NDCs.

- At least one-third of the total cost of the prototype project is to be paid out of funds provided by parties other than the Federal Government.
- The SPE 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.

c. In order to comply with 10 U.S.C. §4022(f) for follow-on Production OTs, the project team ***must*** ensure the following:

   i. Award may be made without additional competitive procedures to a participant in the prototype OT if:

      - Competitive procedures were used for the selection of parties for participation in the prototype OT; and
      - The participant in the prototype OT successfully completed the prototype project.

   ii. If the performer is a consortium, the Department determines that the participants successfully completed an individual prototype or prototype subproject as part of a consortium.

d. OT agreements awarded under the authority of 10 U.S.C. 4022 are considered Federal agency procurements and are subject to the ethics requirements of the Procurement Integrity Act in Chapter 21 of Title 41, U.S.C. (PIA). AOs should consult with counsel on applying the ethics requirements of the PIA to OT agreements.

5. Identifying Available Funding

BEST PRACTICE: It is a best practice for the Government team to consult with its financial manager to determine the applicability of funding restrictions (e.g., prohibitions on the use of funds for certain items from foreign sources), found in appropriations statutes, to the particular OT type. The decision to use an OT does not expand or restrict available appropriations. For example, funding for Research OTs is restricted to research, development, test, and evaluation (RDT&E) appropriations; however, other funding types may supplement RDT&E funds in rare instances with financial manager review and approval.

OTs for prototype projects are not necessarily limited to one type of funding. The appropriate funding type, including RDT&E, procurement, operations and maintenance appropriations, or even military construction, depends on the scope of the requirement and stage of the prototype. Therefore, the scope of the requirement and stage of development of the effort should be considered and the Government team should consult with fiscal managers, agency legal counsel, and comptrollers. [Myth 10].

When OT agreements provide for incremental funding or include expenditure-based characteristics, the Government team should include appropriate agreement terms that address the limits on Government obligations.

6. Planning for Follow-On Production

a. Follow-On Production – It is important to note that the follow-on production option is available only when a Prototype OT was competitively awarded for the preceding program stage. It may not be used to extend a Research OT into production, nor may it be used when the pre-production activities were conducted through a traditional FAR-based contract. To the extent that follow-on production is contemplated, and notice would not be misleading, a best practice is for the Government team to provide notice in the OT agreement of the possibility of a follow-on production award. This requirement is addressed in the policy memo titled "Definitions and Requirements for Other Transactions Under Title 10, United States Code, Section 2371b" (see Appendix E). [Myth 11]. Best practice is for the Government team to identify potential follow-on prototyping and/or production activities early in the process and review as necessary during the prototyping phase. Any competitively awarded OT for Prototype agreement can result in one or more follow-on production awards without further competition, assuming the applicable statutory and policy requirements are met.

AOs should share with offerors how the Government intends to evaluate the prototype for success when that information is available. As a general matter, success means that the performer (1) met the key technical goals of a project; (2) satisfied success metrics incorporated into the Prototype OT; or (3) accomplished a particularly favorable or unexpected result that justifies the transition to production. This definition is addressed in the policy memo titled "Definitions and Requirements for Other Transactions Under Title 10, United States Code, Section 2371b" (see link in Appendix E). The Government team may include a combination of objective and subjective measures in its success metrics. Particularly where there are multiple prototyping phases, the Government may need to update the key technical goals of a project or the success metrics. Best practice is for the Government to share these updates with performers, keeping in mind the statutory competition requirement.

AOs are encouraged to share information with industry regarding the anticipated dollar value or quantity of an eventual production award when that information is known. As a practical matter, where the Government seeks a solution to a broad problem and industry is asked to respond with an innovative solution, the Government may not have reliable information about the potential dollar value of the effort when the solicitation is issued. The AO may reasonably conclude that the description of the problem sufficiently informed industry of the potential adoption of the solution without a dollar value or quantity.

b. Determinations – A formal determination documents the basis for the follow-on production OT authority [10 U.S.C. §4022(f)]. There are no statutory requirements

necessitating determinations for awards for Research OTs. The need for a determination is only applicable, (1) for the written documentation that a prototype was successful pursuant to 10 U.S.C. §4022 to be eligible for a follow-on production award, and (2) pursuant to the statute for certain larger dollar follow-on production awards or contracts. Where the team identifies exceptional circumstances exist that justify a determination pursuant to 10 U.S.C. §4022(d)(1)(D), the Government team should process a determination request to the appropriate designated approval authority as early as practicable. For time sensitive efforts, the AO may elect to release the solicitation prior to the exceptional circumstances determination provided the solicitation document identifies to industry that the determination is pending and affording an opportunity for industry to place conditions on their submitted solution, specific to the status of the determination.

c. Approvals –

i. Research OTs do not have any statutory approval thresholds or requirements.

ii. Prototype and Production OTs are subject to statutory approval requirements at various levels and are divided by dollar thresholds (see Appendix E for policy documents and links). For planning purposes, when the team determines that a Prototype OT is the appropriate award instrument, it is a best practice to identify the likely approval level and authority as early as practicable and identify any agency-specific documentation and routing requirements.

E. Publicizing, Soliciting, and Evaluating

1. Publicizing for Solutions

When publicizing a problem set, area of need, or capability gap for industry solution submission, the Government team should leverage the results of its market intelligence efforts to target the community/communities of potential performers. The Government's active engagement with industry maximizes the exposure of the problem set to potential performers, both traditional and NDCs, and may be marketed through multiple avenues and publication sources.

2. Soliciting and Evaluating Solutions

Agencies that intend to award only OTs from a solicitation are free to create their own process to solicit and assess potential solutions.

Just as there is a wide range of methods to research or publicize OTs, there is an equally wide range of methods by which to solicit solutions. The Government team is not confined to using a written Request for Proposals process. By way of example, solicitations may be oral as well as written and may approach the requirement with varying degrees of specificity. The solicitation could be a large-scale program-wide notice or specific to an individual effort. Depending on the need, white papers, oral

presentations, and panel pitches may be appropriate. Alternatively, in some cases, the Government team may pursue more formal approaches, such as Broad Agency Announcements (BAA), Annual Plan Call for White Papers, or a CSO .

Additionally, agencies are encouraged to leverage a variety of events, activities, and even authorities to provide for the collection of potential solutions. Some examples where Government teams have been creative in performing solicitation outreach include tech demonstrations, design sprints, hackathons, innovation workshops, rodeos, "Shark Tank"-like presentations, prize contests and other similar events that can be leveraged to solicit solutions (see Appendix A - Glossary for descriptions of examples above). Such activities can be conducted by the agency, through other Government resources (*e.g.*, www.challenge.gov), or through other Government-sponsored arrangements. The selected solicitation approach should be tailored to the complexity and potential value of the problem set.

For the content of the solicitations themselves, at a minimum they should generally describe the problem, provide instructions (and, if applicable, the criteria for determining success), and any known terms of the award. The Government team should write the description of the problem without Government jargon. In order to leverage industry innovation, the Government team generally should not prescribe an approach or include technical requirements that are premised upon a particular approach. In the instructions, the Government should take into consideration what information is needed at which stage to make an informed decision. For example, the Government team may need information from the potential performer as part of the initial stage to understand how the performer will meet the statutory requirements. By way of further example, the Government team may obtain sufficient information for its initial review in a few pages of a white paper, in videos demonstrating certain products, or in a live oral presentation with a question-and-answer session.

Where the Government has identified certain laws or terms that will apply, the Government is encouraged to include those in the solicitation. However, nothing precludes the Government from adding terms and conditions, particularly those necessitated as a result of a particular performer's approach, at a later stage. AOs should consult legal counsel and the DoD Intellectual Property Cadre policy and guidance (See Appendix E) on the strategy for intellectual property (IP), including licensing agreements, prior to release of the solicitation. The solicitation may request that potential performers propose their own terms and conditions.

The OT statutes do not prescribe a method of evaluation or restrict the Government team from employing any particular type of evaluation. As a general matter, the Government's evaluation process should enable the Government team to review submissions effectively and efficiently. The Government team may, for example, employ an interactive process where it issues follow-up questions in writing or as part of a virtual session.

A common practice is for the Government team to initially request white papers of a relatively short length. In order to clarify any important information, the Government may ask follow-on questions. For those white papers the Government wishes to review in more detail, the Government may request a full technical proposal. This saves the

Government, as well as industry, time, and resources. This also allows the Government to focus on the best proposed approaches.

3. Selection and Negotiation of Terms

a. Selection – Government teams have significant flexibility in developing an appropriate award process for their projects, considering that FAR, Defense Federal Acquisition Regulation Supplement DoD Source Selection Procedures, and the Competition in Contracting Act (CICA) **do not** apply. Teams may streamline the award process. [Myth 12].

b. Negotiation – Depending on where the project falls on the research, prototype, and production spectrum, the ability to establish firm cost, schedule, and performance requirements will vary from best effort to clearly identifiable and enforceable fixed requirements. The Government team is responsible to ensure the terms and conditions negotiated are appropriate for the particular project and provide for any expected future program needs. Terms and conditions can evolve via modification as a project proceeds through multiple phases of differing degrees of technological maturity. In negotiating terms, the Government team may consider the following:

i. Price Reasonableness – Price reasonableness is a key consideration prior to award. The Government team may obtain and consider, among other data, commercial pricing data, market data, parametric data, or cost information. However, given that NDCs generally do not capture cost data and that providing cost data to the Government is frequently cited as a deterrent to contracting with the Government, the AO should exhaust other means to establish price reasonableness before resorting to requesting cost information from any performer.

ii. Intellectual Property (IP) Considerations – IP is an important part of planning and implementing OTs and the Government has greater flexibility to negotiate IP terms for OTs than in traditional Government contracts.

BEST PRACTICE: The Government team may find developing an outcome-focused strategy to be beneficial. This strategy provides a detailed narrative of what the end user seeks to achieve throughout the life cycle to meet the Government's needs and why it is necessary. The strategy development process details the direction the end user wants to go with the effort with defined data/software deliverables and associated rights needed to meet its life cycle goals.

For more information, please see the DoD Intellectual Property Cadre policy and r (See Appendix E).

iii. Physical Property Considerations − The Government is not required to, and generally should *not*, take title to physical property acquired or produced by a private party signatory to an OT, except property the agreement identifies as a deliverable. In deciding whether to take title to property under an OT, a best practice for the Government to consider is whether known or future efforts may be fostered by Government ownership of the property. If the Government takes title

to property or furnishes Government property, then the property is subject to the Federal Property and Administrative Services Act, and at a minimum, the agreement terms should include the following:

- A list of property to which the Government will obtain title and when title will transfer to the Government;
  - Whether the performer or the Government is responsible for maintenance, repair, or replacement;
  - Whether the performer or the Government is liable for loss, theft, destruction of, or damage to the property; or
  - Whether the performer or the Government is liable for loss or damage resulting from use of the property.
- The procedures for accounting for, controlling, and disposing of the property. Generally, when the performer is an NDC, the company's commercial property control system should be used to account for Government property;
- What guarantees (if any) the Government makes regarding the property's suitability for its intended use, the condition in which the property should be returned, and any limitations on how or the time the property may be used;
- A list of Government-owned property that will be provided during the performance of the agreement in accordance with the Federal Property and Administrative Services Act. The Government Furnished Property (GFP) attachment within the Procurement Integrated Enterprise Environment (PIEE) GFP Module (https://piee.eb.mil/piee-landing/) is a tool to ensure accountability of GFP and to enable reuse of data by the Government and the performer. The GFP Module should also be used to conduct performer reporting of receipt, shipment, transfer, and loss of GFP on OTs (see Appendix E); and
- When the performer has title to property that will be factored into the resource share amount, the performer and the Government should agree on the method for determining the value of the property.

iv. Disclosure and Security − Certain types of information submitted during the solicitation and award process of an OT are exempt from disclosure requirements of 5 U.S.C. §552, the Freedom of Information Act (FOIA), for a period of five years from the date the Department receives the information. Specifically, 10 U.S.C. §4021(i), as amended, provides that disclosure of this type of information is *not required*, and *may not* be compelled, under FOIA during that period if a party submits the information in a competitive or noncompetitive process having the potential for an award of an OT. Such information includes the following:

- A proposal, proposal abstract, and supporting documents;
- A business plan submitted on a business proprietary basis; and

- Technical information submitted on a controlled basis as outlined in DoDI 5230.24, Distribution Statements on Technical Documents.

BEST PRACTICE: *Notice to Performers*. The Government team should include a notice in solicitations that requires potential performers to mark business plans and technical information that are to be protected from FOIA disclosure for five years, with a legend identifying the documents as being submitted on a confidential basis.

Additional Requirements.

- To the extent that the OT involves classified information, the Government team shall ensure that the OT agreement is conducted as required by the National Industrial Security Policy outlined in Part 117 of Title 32, Code of Federal Regulations (formerly DoD 5220.22-M) and DD Form 441.
- To the extent that the OT involves DoD controlled unclassified information, the Government team shall ensure that the OT agreement is conducted as required by DoDI 5200.48, Controlled Unclassified Information. Additionally, the Government team should ensure compliance with National Institute of Standards and Technology (NIST) SP 800-171, Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations, for safeguarding the performer's unclassified internal information system.
- Compliance with certain statutory prohibitions is also required. These include Section 889 of the FY19 NDAA, Section 1634 of Division A of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), and Section 102 of Division R of the Consolidated Appropriations Act, 2023 (Pub. L. 117-328) (see link in Appendix E for more details on Section 889).
- To the extent that the OT will involve national security systems, as that term is defined at 44 USC 3252(b) (see 10 U.S.C. 3252), the Government team shall ensure the work under agreement is conducted, as required, to allow for the ability to exclude suppliers on the National Security System Restricted List in SPRS, https://www.sprs.csd.disa.mil/reference.htm.
- The requirements for properly handling and disseminating controlled and restricted information shall flow down to respective personnel, consortium management firms/member, entities, agents, prime/subcontractors, at all levels receiving access to such data. Consulting your Security specialist to ensure the appropriate security requirements and flow down of requirements is a best practice for ensuring proper handling of controlled and restricted data.

v. Modifications − Modifications of ongoing prototype and production OT projects are common. Best practice is for the AO is to address how modifications will be handled in the OT agreement. Where a project is developing a new prototype in a unique environment, the Government and the performer should understand that the project may yield outcomes that surprise the participants. AOs are encouraged to apply their business acumen as it relates to flexibility of the prototype project and

make modifications that will enable successful project outcomes. However, projects should not go on indefinitely. In the event a change occurs that differs from the original intent, the Government team may apply judgment on whether to continue performance of the OT agreement.

BEST PRACTICE: It is a best practice for the Government team to consider whether the Government will have the right to make unilateral changes. The Government may wish to include a statement that it may make administrative changes unilaterally (for example, changing the name of the AO, or changing funding information that does not impact the amount the performer is paid). However, if the Government contemplates changing the terms and conditions of the agreements without the performer's consent, the AO should consider addressing, as part of the agreement, whether the performer will be entitled to compensation for such unilateral changes, the process by which the performer may request additional compensation or the Government will reduce compensation, and how the parties (including sub performers) will resolve any disagreement about the interpretation of the unilateral change and the impact on the price, particularly in agreements with fixed-amount characteristics. The Government may need a contractual right to make a unilateral change to the OT to ensure that critical requirements are met or to reflect changes in the availability of Government funding for the project.

vi. Disputes − OTs are not subject to the Contract Disputes Act.[1] Thus, there is no statutory process for resolving disagreements about the terms or performance of the OT. As a result, the Government team may wish to address the basis and procedures for resolving disagreements such as allegations that one party breached the terms of the OT.

BEST PRACTICE: Consulting legal counsel with respect to how disagreements under the OT may be resolved is best practice. Among other matters, the AO may wish to seek counsel's advice with respect to whether the Agency is authorized to use alternative dispute resolution (ADR) to resolve disagreements and, if so, what terms are appropriate and when ADR is the exclusive method for resolving disagreements. In addition, AOs may leverage counsel's expertise on developing enforceable terms surrounding an escalation process to resolve disputes at the lowest level between the parties prior to pursuing litigation, timelines for identifying disagreements, response times once an issue arises, and defenses that may be waived as a result of a performer's delay.

vii. Termination – The OT agreement should address when each of the parties may terminate the agreement in whole or in part, under what conditions (for example, whether a change in the composition of the performer team triggers termination or grants the Government an option to terminate) such termination may occur, the process by which the termination may be exercised (for example, is there a

[1] Note that if the Government awards a follow-on FAR-based production contract, such an instrument is subject to the Contract Disputes Act.

minimum notice period), and how any amount due as a result of the termination will be calculated. For most OT agreements, best practice is for the Government to include a term that enables it to terminate as a result of insufficient funding as well. The performer may seek the right to terminate in cases in which there is an apportionment of risk allocation and resource sharing and the performer discovers that the expected commercial value of the technology does not justify continued investment or the Government fails to act in a timely manner. Termination by one party does not necessarily mean that the other party should be compensated for expended efforts; AOs should review their market intelligence to determine what risk performers commonly take in the industry to determine an appropriate method to calculate any amount to be paid resulting from termination (for example, whether payment is not due unless a milestone is reached, reimbursement is due for related costs incurred prior to the date of termination or a percentage of completion is due, among others).

Remedies − When agreements allow for the Government's right to terminate or provide the performer the right to terminate, it is best practice for the agreement to also address what remedies may be due to the Government. For example, it may be appropriate to require:

- recoupment of the Government's investment; or
- Other consideration, including IP deliverables (e.g., technical data and computer software created during the effort, and associated IP license rights).

viii. Follow-On Production Award – In order to make a follow-on production award, the statutory requirements of competition and a successful prototype must first be satisfied. A follow-on production award may be part of the Prototype OT award, or it may be a separate award. The Government may issue a Production OT for a successful prototype or may structure the follow-on production award as a series of separate awards for the project and any subprojects. 10 U.S.C. §4022 authorizes the Government to make the award as an "agreement" pursuant to the statute or as a "contract" subject to Chapter 137, often called a "FAR-based contract." (Note that at the time of this Guide's revision, Title 10 was renumbered, and Chapter 137 has a new set of Title 10 cross-references).

BEST PRACTICE: Where the Government issues a Prototype OT with a plan for a follow-on Production OT, best practice is for the Government to have clearly defined criteria for success as well as pricing for any potential follow-on production award set forth prior to selection of the successful prototype for production. The maturity of the technology in this circumstance is critical to enabling the Government to take advantage of the competitive environment in negotiations.

BEST PRACTICE: Furthermore, best practice in connection with the planning for a follow-on production award dictates that the Government team assess the impact of restrictions on IP deliverables and rights. The failure to obtain necessary

IP deliverables (*e.g.*, technical data or computer software), or associated license rights impacts the Government's total-life cycle cost of the technology. This can occur in costs attributable to required deliverables or licenses in the future, if available, or in costs associated with the inability to obtain competition for the future production, operation, maintenance, upgrade, and modification of the prototype technology. These IP impacts should be assessed when making the initial and follow-on production award decisions.

The Government organization that awards a Prototype OT under 10 U.S.C. §4022 ***does not*** have to be the Government organization that awards the follow-on production effort. Additionally, multiple DoD organizations can award their own follow-on production awards or contracts based on an individual successful Prototype OT that has satisfied the statutory competition requirement.

ix. Recovery of Funds − OT agreements made under the authority of 10 U.S.C. §4021 and §4022 provide that an OT project may include terms and conditions that allow for recoupment of Government investment funding from the performer in certain situations. More commonly, this authority has been used under separate OT agreements whereby the performer buys back the prototype or other program materials from the Government for some negotiated amount. That amount represents the recovery of funds which would be placed in the agency's designated Treasury account and would be available for the agency to use on subsequent programs. The Government team should consult its comptroller representative and legal counsel on the application of this provision, the disposition of the amount collected, and whether accounts can be established to capture recovered funds. Recoupment could also be in the form of some service or other asset or activity of equivalent value to that provided by the Government. Adequate recoupment is not required to involve cash.

x. Government Team Access and Supporting Documentation – It is a best practice for the Government team to consider how its members and any other key stakeholders will be able to access the OT and associated records for necessary Government access, such as records retention in accordance with component/agency policies. At a minimum, the AO must upload the OT to the Electronic Document Access (EDA) site.

The Government team is also responsible for creating and maintaining key supporting documentation for each OT. Such documentation can validate compliance with applicable laws and support business decisions from project initiation through project close-out. Examples of key supporting documentation may include, but are not limited to, market intelligence performed, approval authority documents and determinations, documentation that the price is fair and reasonable, evidence of competition, milestones and determination of successful prototype, resource-sharing arrangements, and OT agreement awards and modifications.

xi. Comptroller General Access − Per 10 U.S.C. §4022(c)(1), a Prototype or follow-on production OT that provides for payments in a total amount in excess of $5

million ***must*** include a clause that provides Comptroller General access to records. This clause is not required for Research OTs.

xii. Flow-Down Provisions – It is a best practice for the Government team to consider which OT terms and conditions the performer should flow down to sub-performers. In developing this negotiation position, the Government team should consider both the needs of the Government (*e.g.*, audits, security, etc.) and the protections (*e.g.*, IP) afforded to all participants.

xiii. Accounting Systems − When structuring the OT agreement for an expenditure-based or resource-shared type project, it is a best practice for the Government team to consider the capability of the performer's accounting system. Agreements that impose requirements that will cause a performer to revise or alter its existing accounting system are strongly discouraged. It is recommended for the Government team to not enter into an OT agreement that provides for payment based on amounts generated from the performer's financial or cost records if the performer does not have an accounting system capable of complying with Generally Accepted Accounting Principles; the performer's accounting system should have effective controls over all project funds, including Federal funds and any required resource share. The system should have complete, accurate, and current records that document the sources of funds and the purposes for which they are disbursed. It should also have procedures for ensuring that project funds are used only for purposes permitted by the OT terms. When the performer is currently performing under other expenditure-based Federal procurement contracts or assistance awards, the Government team should consider language that requires the performer to be subject to the same standards for financial management/accounting systems that apply to those other awards. DCAA and DCMA are available to provide information on the status of a prospective awardee's accounting system.

Section III – Administration

F. Entity Registration

Prior to being awarded an OT, the primary awardee must be fully registered for All Awards in SAM (https://sam.gov). Additionally, under a consortium OT award, each member serving as the primary performer on an award must obtain a Unique Entity Identifier (UEI) from SAM and provide it to the government for reporting for any orders underneath the OT agreement. The registrant should choose the registration reason "I want to be able to bid on federal contracts or other procurement opportunities. I also want to be able to apply for grants, loans, and other financial assistance programs." This covers all procurement and other transactions (for research, prototype, and production) required by this guide. This registration is necessary to ensure compliance with, at a minimum, with the Debt Collection Improvement Act of 1996, the Federal Funding Accountability and Traceability Act of 2008, and the Digital Accountability and Transparency Act of 2014; as well as enables efficient processing of performer invoices and payments. Registration will result in the assignment of a Commercial and Government Entity (CAGE) code that is required for identification of the performer in many DoD systems.

AOs should check SAM prior to OT award to ensure that the potential awardee 1) has an active registration (in the case of consortium award, the consortia lead/manager and lead performer(s) must be registered), and 2) is not excluded or debarred from Government procurements.

G. Reporting

1. Federal Procurement Reporting

AOs should consult the OUSD (A&S) Memorandum, "Required and Recommended Use of eBusiness Tools When Awarding and Administering Other Transactions", dated 12 Jul 2022, referenced in Appendix E for additional information on reporting.

The Government team ***must*** record Research OTs, including modifications, in the Financial Assistance Award Data Collection (FAADC).

The Government team ***must*** continue to report Prototype and Production OTs in the Federal Procurement Data System located at https://www.fpds.gov. When using a contract writing system (*e.g.,* Standard Procurement System – Procurement Defense-Desktop (SPS/PD2)) to execute Prototype and Production OTs, AOs may utilize the automated Contract Action Report (CAR) process to propagate OT data into FPDS. Otherwise, to report Prototype and Production OTs, AOs must utilize the OT module within FPDS.

OTs awarded to a consortium should be reported in accordance with Appendix F.

Research OTs ***must*** identify the 9th position of the award number as a "3," and Prototype and Production OTs ***must*** identify the 9th position of the award number as a "9." The other positions of the award number and modifications will be assigned the same as

procurement contracts. If the award supports a significant federal government or Department effort or initiative, Defense Pricing and Contracting will issue instruction for what identifier should be added to the 'Description of Requirements' field to easily track these actions when reporting to FPDS.

H. Distribution of Documents

1. Agreement Structure

While the structure of an agreement may vary, the agreement should capture critical and common pieces of information. A recommended practice is to use line items to define deliverables where possible.

2. Distribution via GEX

To ensure that payment and financial organizations have access to the award, the Government team must distribute OTs electronically using the Global Exchange (GEX) by providing a human-readable copy of OT documents in an indexed Portable Document Format (PDF) to the EDA (http://eda.ogden.disa.mil) system. See Appendix E for more information. When available, send a copy of the OT via GEX to:

- The Contract Administration Office
- The Payment Office
- Each accounting office whose funds are cited in the contract

3. Performance Reporting

Effective performance reporting addresses cost, schedule, and technical progress. It compares the work accomplished and actual cost to the work planned and the estimated cost and explains any variances. There is not a "one-size-fits-all" approach. There could be little, if any, performance reporting required if the agreement price is fixed and financing is provided at fixed payable milestones. However, if this is not the case, the Government team may wish to consider performance reporting.

If the Government team chooses to require performance reporting, the performer is typically responsible for managing and monitoring each project. The document governing the stage of the process should identify the frequency and type of performance reports necessary to support effective management. For example, if the Government team identifies reporting prior to the issuance of the solicitation, the document governing that stage would be the solicitation. However, if the Government identifies a need for reporting while reviewing potential performers' white papers, the OT agreement may be the appropriate document for identifying the reporting requirement. The Government should clearly identify when the performer is responsible for reporting on sub-performers and, to the extent a performer is teaming with sub-performers (*e.g.*, consortium, joint venture, other partnership structure) for the project, the Government team may consider

if performance reporting on all sub-performers would be appropriate.

BEST PRACTICE: For those reports the Government has determined are significant, the Government team may consider establishing line items or separate payable milestones associated with the reports or calling out the reporting requirements as a part of a larger line item or payable milestone. If a report is not delivered, best practice is for the Government to withhold an appropriate amount.

I. OT Agreement Close-Out

It is a best practice to coordinate OT agreement closeout requirements with the entity administering the OT to ensure that all performance and payments are complete and that all activities have been resolved, including reporting on physical property, subject inventions/patent applications, and performance.

BEST PRACTICE: OT agreement closeout documentation should be sent to EDA to implement records retention, as well as the required notification to FPDS that an award is closed. This can be accomplished through the PIEE Closeout Module or through a component-specific application.

BEST PRACTICE: Timelines should also be established for closeout to ensure issues get timely attention and funds reconciliation (rates, payment issues, etc.) is performed. This will provide structure to AOs to encourage proper administration actions.

J. Allowable Costs

This section applies only when the OT agreement uses amounts generated from the performer's financial or cost records as the basis for payment, and/or requires resource sharing to be provided by non-Federal parties pursuant to statute. Under those circumstances, it is recommended that the agreement stipulate that Federal funds and the performer's resource-shared amount, if any, are to be used for costs that a reasonable and prudent person would incur in carrying out the project. AOs should consider defining what costs may or may not be considered allowable up front in the agreement.

K. Audit

Except as provided in 10 U.S.C. §4022, and for OT policy in 32 C.F.R. 3.8, audits and access to financial records are subject to negotiation. Generally, fixed amount agreements ***should not*** require any type of audit provisions. When audits may be necessary, the Government team has the flexibility to use outside independent auditors in certain situations and determine the scope of the audits. A possible exception is for OT agreements that provide for reimbursement of incurred costs related to a milestone the performer was unable to complete due to early termination of the agreement or effort if milestone payments involve high-dollar amounts.

L. Resource Sharing

Resource-sharing in an OT agreement occurs when a portion of the total cost of the

project is paid out of funds provided by sources other than the Federal Government. Contributions can be in cash or non-cash form, and costs can be either direct or indirect, so long as they are allowable, allocable, reasonable, and consistently accounted for by the performer. Resource sharing may include labor, materials, equipment, IP rights, and facilities, as well as independent research and development costs (IR&D) that may be reimbursed later by DoD through overhead rates on other awarded efforts. Foregone fee or profit on another contract or agreement, or cost of money would not be consistent with general cost principles and should not be included in any resource-sharing arrangement. Profit or fee should not be included in resource-shared agreements.

One statutory condition for the use of a Prototype OT is if the performing team does not include either a NDC or a small business concern is participating to a significant extent in the prototype project, at least one third of the total cost of the prototype project is to be paid out of funds provided by the parties to the transaction other than the Federal Government. This requirement is included as a mechanism to encourage large and/or traditional defense contractors to seek out nontraditional performers or small businesses to include on their performing team. This helps achieve the goal of attracting and including new and innovative performers in the defense industrial base.

The AO also has authority to structure a resource-sharing arrangement even when not required by statute. This option should be considered and utilized by an AO if such an arrangement would effectively incentivize and encourage the project's outcomes but should not be used if the primary purpose is to cover a program shortfall. Additionally, the Government should not generally mandate resource-sharing requirements for defense unique items or where it is not required by statute. Use of OT authorities that invoke resource-sharing requirements should typically be limited to those situations where there are commercial or other benefits to the performer. The resources used as the share do not have to come from the lead or prime performer but can come from any of the performing team's members or third-party resource-sharing. What is important for the Government team to know at the time of award is how the aggregate share will be split amongst the team or their financiers and whether the team has the authority to utilize and commit the resources they propose to share.

1. Costs Incurred Before OT Award

If resource-sharing is used, then the non-Federal amounts counted as provided, or to be provided, by parties other than the Federal Government may not include costs that were incurred before the date on which the OT agreement becomes effective. Costs offered as a resource-share that were incurred for a project after the beginning of negotiations, but prior to the date the OT agreement becomes effective, may be counted as non-Federal amounts if and to the extent that the AO determines in writing that (1) the party other than the Federal Government incurred the costs in anticipation of the OT agreement, and (2) it was appropriate for the entity to incur the costs before the OT agreement became effective in order to ensure the successful implementation of the OT agreement. AO approval of costs incurred before the effective date, and verification procedures for performer's contributions should ensure resource-sharing, and the OT files should clearly

document elements of the performer's contribution.

2. Evaluating Reasonable Usage Cost

The Government team should typically understand and evaluate the nature of the performer's share. Resource-sharing generally consists of labor, materials, equipment, software, and facilities costs (including allocable indirect costs). It is best practice for any part of the resource share that includes an amount for a fully depreciated asset to be limited to a reasonable usage charge. In determining the reasonable usage charge, the Government team may consider the original cost of the asset, total estimated remaining useful life at the time of negotiations, the effect of any increased maintenance charges or decreased efficiency due to age, and the amount of depreciation previously charged to procurement contracts. In determining the amount of resource sharing, the agreement should not generally count, as part of the performing team's share, the cost of Government-funded research, prior IR&D, or indirect costs that are not allocable to the agreement.

3. Resource Share Schedule and Monitoring

Generally, the Government's payments or financing should be representative of its share as the work progresses, rather than front loading Government contributions. OT agreements that require resource-sharing should generally provide for adjustment of Government or private sector investment or some other remedy if the other party is not able to make its required investment. It is best practice for such OTs to address the procedures for verifying resource-sharing contributions, the conditions that will trigger an adjustment, and the procedures for making the adjustment**.**

OTs that use amounts generated from the performer's financial or cost records as the basis for payment or require at least one third of the total costs to be provided by non-Federal parties pursuant to statute should require financial reporting that provides appropriate visibility into expenditures of Government funds and expenditures of private sector funds and provides for appropriate audit access.

M. Payments

Project payment structures are negotiable. OT agreements should identify the basis and procedures for payment. This includes, by way of example, identification of financing payments, payments tied to deliverables or milestones, what form/format shall be used for payments, and what tools will be used.

10 U.S.C. §2227, Electronic Invoicing, states that the Secretary of Defense shall require that any claim for payment under a Department of Defense contract and agreement shall be submitted to the Department of Defense in electronic form. Electronic invoicing is defined as any request for contract financing payment or invoice payment submitted by the performer under the OT, transmitted electronically from the initiating system to affected systems. In accordance with DPC Policy Memo, "Required and Recommended Use of eBusiness Tools When Awarding and Administering Other Transactions" (Appendix E),

Wide Area Workflow (WAWF) within the PIEE (https://piee.eb.mil) shall be used for this purpose, payment can be made through the use of the Government-wide commercial purchase card. The Government should specify the document type(s) that the performer should use for invoicing, such as: commercial invoice, commercial item financing request, performance-based payment, or non-procurement voucher. It is a preferred practice that, where possible, line items are used on the invoice to define deliverables.

1. Payable Milestones

Well-structured, payable milestones can serve the dual purpose of meeting cash-flow needs of the performer and as a management tool to verify observable achievements on the critical path to project success. Failure to achieve milestone/technical goals forces management analysis and a decision on the payable milestone. There is not one uniform clause or set of procedures for payable milestones. Payable milestone procedures vary, depending on the inherent nature of the agreement. The procedures may be non-consecutive, conditional, contingency-based, incrementally funded, included as priced options within the prototype project, or designed in any other manner or combination of manners that are appropriate under the circumstances of the individual effort. It is important to note that optional milestones do not become part of the project agreement terms unless exercised and funded by the Government.

2. Advance Payments

Both OT statutes allow for advance payments, and the Government team should exercise business judgment to determine when to allow advance payments. Some instances in which advance payments may be beneficial include reducing financing costs for large, up-front expenditures and ensuring sufficient cash flow for small companies. If advanced payments are used, the Government team should typically address interest earned, including whether to establish an interest-bearing account.

3. Provisional Indirect Rates on Interim Payments

When the OT agreement provides for interim reimbursement based on amounts generated from the performer's financial or cost records, any indirect rates used for the purpose of that interim reimbursement should generally be no higher than the performers provisionally approved indirect rates, when such rates are available.

N. Legal Considerations

1. Legally Responsible Party

The Government team should ensure that the OT agreement is entered into with an entity or entities that can execute the agreement and legally bind the entity or entities. That entity may be a single company, joint venture, partnership, consortium, or team (through its members or authorized agent), or a prime performer with subcontract relationships,

among others.

See Appendix F for specific issues related to consortia. Consortia can be structured in a wide variety of ways. Consortia members may be technical performers, financial contributors, potential end users of products and technologies developed by the consortia, or other unspecified interested parties in the project or projects being funded.

2. Teaming

OTs enable the DoD to collaboratively design projects with performers to execute the most effective solution to a problem. Rather than prescribing a particular requirement or project solution, the DoD may choose to simply highlight a problem and invite industry to propose solutions to address that problem. The DoD can then collaboratively design a project proposal/statement of work with industry to solve the DoD's problem. The DoD may encourage the formulation of teams without mandating collaboration. It is recommended that the Government make it clear that the performer team relationships are industry's responsibility.

3. Protests

As is described elsewhere in this Guide, AOs are encouraged to resolve potential disagreements at the lowest possible level before the threat of review by a third party. To that end, AOs are encouraged, where practicable, to share information with unsuccessful performers to provide feedback and explain the Government's decisions.

In the event the AO becomes aware of a protest, they should immediately confer with legal counsel. During the initial contact, at a minimum, the AO should share with legal counsel: (1) a copy of the subject of the protest (for example, the solicitation or agreement) and an explanation of the effort's current stage (for example, first phase of a Prototype OT, Production OT, FAR-based follow-on production contract), (2) any documents they have received indicating a protest has been filed or is being pursued, (3) any particular concerns about the impact of the protest, *e.g.*, national security concerns or potential safety issues or loss of life, and (4) if the protested award involves classified or export-controlled information. Depending on the specific circumstances of the protest, legal counsel likely will, among other actions, request documents they determine to be relevant, issue a litigation hold to preserve documents, and request a list of contact information for those individuals who have been involved in the protested action. The AO should clarify with legal counsel whether they need to wait before proceeding with any pending action, as well as obtain an understanding of any relevant deadlines as the agency's failure to respond in a timely manner may prejudice the agency's ability to defend its position. The AO should not discuss the protest with the protester (or protester's representative, such as protester's counsel) or any other party involved in the subject of the protest without first conferring with their government legal counsel.

There is nothing prohibiting agencies from establishing a process for an agency-level protest. In the event the OT is subject to such a process, it should be set forth in the applicable solicitation.

Section IV – Additional Resources

This section provides appendices with additional resources and information. It is organized as follows:

Appendix A – Glossary

Appendix B – OT Authority – Legislative History

Appendix C – OT Type Comparison Table

Appendix D – Common OT Myths and Facts

Appendix E – Additional Information, Resources, and Policy

Appendix F – Use of Consortia in Prototype and Production Other Transaction Agreements

Appendix A – Glossary

Agreement. The mutually agreed terms and conditions of the parties to an OT. Absent exceptional circumstances, it will take the form of a legally binding written instrument.

Agreements Officer (AO). A warranted individual with authority to enter into, administer, or terminate OTs. To be appointed as an AO, the individual must possess a level of responsibility, business acumen, and judgment that enables them to operate in the relatively unstructured environment of OTs. AOs need not be contracting officers, unless required by the Component's appointment process.

Ask Me Anything Events. A potential tool for conducting beneficial market intelligence is live or virtual event that provides an opportunity for acquisition professionals (*e.g.,* industry, military, civilian, academia, media) to directly engage in a question-and-answer session hosted by leader(s) with expertise in a particular topic or technology to provide information and insights.

Broad Agency Announcement (BAA). A BAA is a general solicitation used to solicit for research and development when the Government reserves the right to award a contract or another type of agreement, such as a grant, cooperative agreement, or other transaction. It is best practice to clearly articulate this in the solicitation.

Challenge-Based Acquisition (ChBA). An acquisition process that spurs innovation and efficiency by pushing acquisition objectives into the competitive marketplace. Challenges bypass traditional federal acquisition methods built around stringent specifications, lengthy development cycles, and arms-length performer relationships, and instead promote a competitive environment, demonstrated performance, and an increased partnership with industry to produce improved outputs and outcomes.

Commercial Solutions Opening (CSO). This guide describes the CSO solicitation process that leverages OT authority as opposed to the authority under the class deviation DARS Class Deviation 2022-O0007, Defense Commercial Solutions Opening, which is distinct from OT authorities (See Appendix E). At its core, the CSO is a competitive solicitation process with three-phases focused on being "*fast, flexible, & collaborative"* for innovative prototype projects. Phase 1 is an evaluation of company solution briefs, typically five (5) page white papers or fifteen (15) slides. Companies are downselected based on solution briefs: relevancy, technical merit, business viability, and innovativeness. Companies invited to Phase 2 will pitch to the Government additional details on project *rough order magnitude,* cost, and schedule, as well as discuss data rights. Companies invited to Phase 3 will submit proposals to be reviewed and negotiated by the Government.

Computer Software. Computer programs, source code, source code listings, object code listings,

design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

Computer Software Documentation. Owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Consortium – In an OT context, consortium is a relationship between a government sponsor and a collection of traditional and non-traditional vendors, non-profit organizations, and academia aligned to a technology domain area (i.e., cyber, space, undersea, propulsion) that may be managed by a single entity or consortium member, focused on innovative solutions to government technology challenges that meet the intended scope and purpose of OTs.

Directly Relevant. Under the authority of 10 U.S.C. §4022, prototype projects ***must*** be *directly relevant* to enhancing the mission effectiveness of personnel of the Department of Defense or improving 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. In this context, the phrase "directly relevant" focuses on the agency determination of the direct relationship of the prototype project (as opposed to a tangential association) with the DoD mission.

Design Sprints. A methodology for solving problems through designing, prototyping, and testing ideas with users. Design sprints quickly align teams under a shared vision with clearly defined goals and deliverables. DoD organizations that excel at this community of practice include USAF CyberWorx. Several commercial companies specialize in this practice, using unique methodologies for solving difficult problems.

Expenditure-based OT. Agreements where payments are exclusively or primarily based on amounts generated from the performer's financial or cost records.

Fixed-price OT. Agreements where the primary method of payment is not based on amounts generated from the performer's financial or cost records, including agreements where the price is fixed against established milestones and/or estimated level-of-effort.

Hackathon. A competitive event in which people work in groups on projects (generally software), with the goal of creating functioning products by the end of the event. An interesting example of where this has been applied in the DoD is the Hack the Pentagon Bug Bounty program. Organizations like the National Security Innovation Network specialize in helping DoD customers execute these types of programs.

Innovation Workshops. A multi-day engagement focused on defining problems in a business, process, or technology with specific attention to the overall user experience.

Non-Traditional Defense Contractor (NDC). An entity 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 the DoD that is subject to full coverage under the cost accounting standards (CAS) prescribed pursuant to section 1502 of

title 41 and the regulations implementing such section (see 10 U.S.C. §3014). For the purpose of this Guide, the phrase "the solicitation of sources" refers to the initial agreement solicitation only. A nontraditional defense contractor is considered a nontraditional defense contractor for the duration of the prototype project/agreement's period of performance, or for any in-scope work modified under the same agreement.

Note: Per the statutory definition, NDCs are all entities that have not performed under a narrowly defined set of circumstances within one year of solicitation of the current OT opportunity. In order for an entity to qualify for NDC status, it would need to meet all elements of the prescribed definition within that time period. This includes performance of a DoD contract or subcontract subject to full CAS coverage within one year prior to solicitation of the Prototype OT opportunity. The effect of this narrow definition is that many entities will fall into the NDC category, including nearly all small business concerns, and even those firms that work exclusively with DoD. This is in part due to the exemptions to CAS coverage under 41 U.S.C. §1502 and FAR Part 30, which exempt commercial contracts, Firm Fixed Price contracts based on adequate price competition, and any contract or subcontract with a small business concern, among other exemptions. Further, even where an entity is not outright exempt from CAS coverage, the entity may not have been subject to "full" CAS coverage. This is because full CAS coverage applies only to firms that receive a single CAS-covered contract award of $50 million or more; or received $50 million or more in net CAS-covered awards during its preceding cost-accounting period. AOs should validate and document an NDC's status prior to OT award to ensure the conditions of section 10 U.S.C. § 3014 are met, including steps to review the relationship between companies claiming to be an NDC when necessary. While there is no prescribed method for validating an entities NDC status, an AO may run an FPDS report against the CAS clause code for the entity to validate it has had no CAS covered contracts within 12 months preceding the release of the solicitation.

Performer. Any responsible entity or individual that is a signatory to an OT agreement.

Prize Contests. Implemented under 10 U.S.C. §4025, these contests can result in advanced technology achievements for basic, applied, and advanced research, as well as prototype development that has the potential for application to the performance of military missions.

Procurement Contract. A contract awarded pursuant to the FAR.

Prototype Project. The definition of a "prototype project" in the context of an OT is as follows: (A) a prototype project addresses a proof of concept, model, (B) reverse engineering to address obsolescence, (C) a pilot or novel application of commercial technologies for defense purposes, (D) agile development activity, (E) the creation, design, development, demonstration of technical or operational utility, or (F) combinations of the foregoing. A process, including a business process, may be the subject of a prototype project.

Although assistance terms are generally not appropriate in OT agreements, ancillary work efforts that are necessary for completion of the prototype project, such as test site training or limited logistics support, may be included in prototype projects. A prototype may be physical, virtual, or conceptual in nature. A prototype project may be fully funded by DoD, jointly funded by multiple federal agencies, cost-shared, funded in whole or part by third parties, or involve a mutual commitment of resources other than an exchange of funds.

Reverse Industry Day. An event that allows industry leaders to provide audiences of Government acquisition and program professionals with opportunities to learn about the issues that are most important to industry when doing business with the Government. The events can provide a better understanding of how different types and sizes of companies identify, track, price, bid, and perform to enhance the business environment.

Rodeos. A forum for enthusiasts where they demonstrate capability in an industry. Participants may receive prizes if they meet standard criteria.

Senior Procurement Executive (SPE) for the agency. The Under Secretary for Defense for Acquisition and Sustainment (USD(A&S)) is designated as the SPE for the Department of Defense. This designation does not apply to the military departments, the Defense Advanced Research Projects Agency (DARPA), and the Missile Defense Agency (MDA), which have their own authorities prescribed in statute. The USD(A&S) designated the Directors of the Defense Agencies, the Directors of Field Activities with contracting authority, the Commanding Officers of Combatant Commands (CCMDs) with contracting authority and the Director of the Defense Innovation Unit as having the authority to carry out Prototype OTs and follow-on Production OTs as permitted by section 10 U.S.C. §4022(a) (see Appendix E for policy).

"Shark Tank"-like Presentations. An arrangement where "investors" meet with entrepreneurs who pitch their solution/product with terms of an agreement decided following the pitch.

Significant Extent. In evaluating the significance of expected NDC/nonprofit research institution participation, pursuant to 10 U.S.C. §4022(d)(1)(A), the AO is expected to consider input from relevant technical advisors (legal, engineering, program management, pricing, logistics, etc.) in assessing the totality of the circumstances for each proposed prototype project before making an independent judgment as to the *significance* of expected NDC or nonprofit research institution participation.

The AO should generally consider, by way of illustration and not limitation, whether the NDC/nonprofit research institution will supply a new key technology, product, or process; supply a novel application or approach to an existing technology, product, or process; provide a material increase in the performance, efficiency, quality, or versatility of a key technology, product, or process; accomplish a significant amount of the prototype project; cause a material reduction in the cost or schedule of the prototype project; or, provide for a material increase in performance of the prototype project.

AOs should not establish blanket rules or thresholds for determination of *significance*, and agencies must not establish local policies that infringe on the AO's judgment in making such determinations. An example would be blanket policies that say expected NDC/nonprofit research institution participation must represent a predetermined percentage of total project value, or total labor dollars, to be considered "significant." Such arbitrary policies infringe upon the AO's responsibility to make a reasoned, prudent, and independent determination for each individual prototype project.

Small Business Concern. As defined in 10 U.S.C. §4022(e)(4).

Successfully Completed. A transaction for a prototype project is complete upon the written determination of the appropriate approving official for the matter in question that efforts conducted under a Prototype OT (1) met the key technical goals of a project, (2) satisfied success metrics incorporated into the Prototype OT, or (3) accomplished a particularly favorable or unexpected result that justifies the transition to production. Furthermore, successful completion can occur prior to the conclusion of a prototype project to allow the Government to transition any aspect of the prototype project determined to provide utility into production while other aspects of the prototype project have yet to be completed.

Tech Demonstrations. A forum where a prototype, rough example, or an otherwise incomplete version of a conceivable product or future system, is demonstrated as a proof of concept with the primary purpose of showcasing the possible applications, feasibility, performance, and method of an idea for a new technology.

Technical Data. This means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, management information, or information incidental to contract administration.

Transaction. The entire process of interactions related to entering into an agreement or executing and transitioning a prototype project.

Appendix B – OT Authority – Legislative History

Year	Congressional Authorization
1958	OTA authority originates with the passage of the National Aeronautics and Space Act
1989	Section 251 of the FY90 NDAA codifies the OTA authority for Defense Advanced Research Project Agency (DARPA) for "advanced research projects" only
1993	Section 845 of the FY94 NDAA expands DARPA's authority to include prototype development on a temporary basis with a three-year sunset provision
1996	Section 804 of the FY97 NDAA authorizes OTAs for the military services and designated officials and extends the authority for another three years
1997	Section 832 of the FY98 NDAA adds subsection (i) for protection of information from disclosure
1998	Section 241 of the FY99 NDAA extends the authority for another two years
1999	Section 801 of the FY00 NDAA adds Comptroller General Review
2000	Section 803 of the FY01 NDAA introduces the concepts for cost-sharing and non-traditional defense contractors
2001	Section 822 of the FY02 NDAA creates follow-on production authority restricted to a specific number of units at a specific target price
2003	Section 847 of the FY04 NDAA expands the definition of weapons system, authorizes pilot program for follow-on contracting for the production of commercial items, and extends the authority for an additional four years
2005	Section 823 of the FY06 NDAA adds dollar-value threshold review levels and applies the Procurement Integrity Act to OTs
2008	Section 824 of the FY08 NDAA expands the scope of the NDAA FY04 pilot program and extends the authority for an additional five years
2010	Section 826 of the FY11 NDAA includes all options in dollar-value threshold review levels
2012	Section 863 of the FY13 NDAA extends the authority for an additional five years
2014	Section 812 of the FY15 NDAA broadens scope and exempts small business from the cost-sharing requirement

2015	Section 815 of the FY16 NDAA permanently codifies OTs in 10 U.S.C. §2371b thereby rescinding the authority under Sec 845, redefines and codifies non-traditional defense contractors in 10 U.S.C. §2302(9), and expands follow-on production
2017	Section 863-864 of the FY18 NDAA adds education and training requirements, increases approval thresholds, includes language to clarify approval levels applied to OTs, includes express authority to allow for the award of Prototype OTs in the SBIR program and non-profit research institutions, and broadens the follow-on production language to include individual sub-awards under an OT consortium
2018	Section 211 of the FY19 NDAA removes USD(AT&L) as the highest-level approver and replaces it with USD(A&S) or USD(R&E) and clarifies the application of follow-on production authority for projects carried out through consortia; Section 873 provisioned for the collection, storage, use, and reporting of OT usage data; the Joint Explanatory Statement accompanying the Department of Defense Appropriations Act, 2019 (Public Law 115-245), pages 153-154, established additional reporting requirements
2021	Section 821 of the National Defense Authorization Act for Fiscal Year 2022, Public Law 117-81, deleted the requirement for research OTs that a transaction authorized by subsection (a) may be used for a research project when the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate.
2021	Section 1841 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, transferred sections 2371 and 2371b to sections 4002 and 4003 of title 10, U.S.C. Section 1701(u) of the National Defense Authorization Act for Fiscal Year 2022, Public Law 117-81, transfers sections 4002 and 4003 to section 4021 (research OTs) and 4022 (prototype project OTs) of title 10, U.S.C.
2023	Sections 842 and 843 of the National Defense Authorization Act for Fiscal Year 2023, Public Law 117-263 amends section 4022 by: modifying the mission requirements for OTs in subsection (a)(1); modifying the approval thresholds in subsection (a)(2); adding definitions in section (e) of the terms – “covered official”, “service acquisition executive”, and “prototype project”; amending subsection (f) to authorize follow-on production OTs or contracts if the requirements are met, even if explicit notification was not listed within the request for proposal for the transaction; and adding temporary authority in a new subsection (i) for a pilot program for installation or facilities prototyping.

Appendix C – OT Type Comparison Table

A comparison of Research, Prototype, and Production OTs

Research OT	**Prototype OT**
Applicability:	
▪ Basic, applied, and advanced research	▪ Prototype Project ▪ Directly relevant to enhancing mission effectiveness of DoD personnel, supporting platform, systems, components, or materials to be acquired by DoD, or improvements thereto
Conditions for Use:	
▪ No duplications of research to maximum extent practicable (generally non-issue) ▪ 50-50 Resource Share to the extent practicable	▪ All participants small or non-traditional; **or** ▪ At least one non-traditional defense contractor or non-profit research institution must participate to a significant extent in the prototype project; **or** ▪ At least 1/3 of total costs must be paid by parties to the OT other than the Government; **or** ▪ Senior procurement executive for the agency determines, in writing, that exceptional circumstances justify the use of an OT ▪ Resource share not required (if non-traditional contractor participates); fee/profit negotiable ▪ Competitive procedures to maximum extent practicable

Production OT

- A production effort utilizing the authority of 10 U.S.C. §4022(f) can only be awarded as a follow-on to a Prototype OT award
- Follow-on production transactions are not subject to the participant requirements in 10 U.S.C. §4022(d) and will be awarded to the parties in the Prototype OT agreement
- Follow-on contract or transaction may be awarded without the use of competitive procedures if
    - Competitive procedures were used in the Prototype OT,
    - The prototype project in the transaction was "successfully completed," and
    - Resource-share only applies to the Prototype OT and not to the Production OT.

Appendix D – Common OT Myths and Facts

- Myth 1: Only one type of OT is available to DoD.
    - **FALSE**. Two different OT statutory authorities exist, and they can result in three different types of OTs. The first authority is for basic, applied, and advanced research projects (10 U.S.C. §4021). The second is for prototype projects (10 U.S.C. §4022). Because of differences between the two authorities, agencies should consider which makes the most sense for their problem set. The OT for Prototype authority is much more commonly known; however, this does not mean it is appropriate for all circumstances. Consider the following when determining which authority is appropriate:
        - 1. Does the technology have a dual-use application (application in both the commercial and Government sectors)? Is the Government entering this program to push the state-of-the-art in a particular technology area? Does the Government need to create items to test out the approach to determine how far it has pushed the technology, even though keeping the test items was incidental to the overall effort? If yes, then this program could result in an OT under 10 U.S.C. §4021.
        - 2. Is the application of the technology for primarily military use? Is the ultimate goal of the program to create a prototype asset that will be delivered to the Government? Is the main desire to acquire a reasonable number of prototypes to test in the field before making the decision to purchase in quantity? If yes, then this program could result in an OT under 10 U.S.C. §4022.
        - 3. Once a prototype agreement is awarded and it satisfies the requirements of 10 U.S.C. §4022(f), it can be followed by an award for the production phase of the program without further competition. The follow-on production phase can take many forms, including a new OT for Production agreement.
- Myth 2: The OT authorities are new and rarely used.
    - **FALSE**. The underlying concept of OTs has been around for more than 60 years. Beginning with the NASA Space Act in 1958, OTs have been a tool available to the Federal R&D community. DoD was given the authority for Research OTs in FY89 and Prototype OTs in FY94. More than seven civilian agencies, in addition to NASA, have the authority to use either one or both types of OTs. While the use of these authorities has ebbed and flowed in these organizations over the years, largely tied to the swings of acquisition reform, they have been continuously used since FY89.

- Myth 3: Since an OT is termed an "agreement," it is not a contract.
    - **FALSE**. When most people in the Government hear the term "contract," they automatically think "FAR-based procurement contract" awarded under the traditional acquisition process and subject to all of the federal acquisition statutes and regulations. OT agreements are not procurement contracts, but they are legally valid contracts. They have all six legal elements for a contract (offer, acceptance, consideration, authority, legal purpose, and meeting of the minds) and will be signed by someone who has the authority to bind the Federal Government (*i.e.*, an AO). The terms and conditions can be enforced by and against either party. The organizations within DoD routinely using OTs have called them agreements to avoid confusion between these arrangements and FAR-based procurement contracts.
- Myth 4: OTs can be awarded only through a consortium.
    - **FALSE**. Many teaming arrangements are permitted, including award to a single company, joint venture, partnership, consortium (through its members or authorized agent), or a prime performer with subcontract relationships. The possibilities are endless for OTs (and for FAR-based contracts). Each construct has its advantages and issues, and each situation may dictate a different approach. Ideally, the Government should allow the performers to determine the best way to organize their teams. Artificially forcing performers into a particular team structure often has adverse effects on efficiency and performance.
- Myth 5: Middle Tier Acquisition (MTA) must utilize OTA.
    - **FALSE.** MTA is an acquisition pathway (see DoDI 5000.02, Para 4.2), the result of which could be transitioning a prototype to follow-on production via FAR-based contract or OT agreement.
- Myth 6: Since the CICA does not apply to OTs, competition and fairness are not considerations.
    - **FALSE**. Both OT statutory authorities require the use of competitive practices to the maximum extent practicable. Agencies are not required to complete the formal competition structure laid out in CICA (*i.e.*, three tiers of competition: full and open, limited, and sole source with justification and approval), nor follow the competition rules in the FAR. The OT statutes and guidance allow the agency to determine what the competition will look like and how it will be structured. Competition is a good thing. It helps keep prices low and quality high, and it gives the Government leverage in negotiations.
    - If an agency wishes to award a follow-on from a Prototype OT into either a Production OT or a procurement contract without further competition, the solicitation documents and the original OT award ***must*** have been competitive.
- Myth 7: OTs cannot be protested.
    - **FALSE**. While bid protests are rare for OTs, agencies should be mindful of the possibility. See additional details in Section III, N. 3.

- Myth 8: Anyone in DoD can award an OT.
    - **FALSE**. The USD(A&S) has designated the directors of the Defense Agencies, the directors of Field Activities with contracting authority, the CCMDs with contracting authority and the director of the Defense Innovation Unit as having the authority to carry out Prototype OTs and follow-on Production OTs as permitted by section 4022. The military departments, the DARPA, and the MDA have their own authorities prescribed in statute (see Appendix E for policy).
- Myth 9: None of the federal statutes or regulations apply to OTs.
    - **FALSE**. OT authorities are authorized by law with clear statutory guidelines. Generally, the statutes and regulations applicable to acquisition and assistance do not apply to OTs. Since OTs are defined in the negative—they are NOT procurement contracts, grants, or cooperative agreements—any statute, regulation, or policy that applies solely to those types of contractual arrangements will not apply to OTs. However, statutes and regulations applicable to acquisition and assistance are only a subset of all federal statutes or regulations. Laws and regulations that are unrelated to the acquisition or assistance process will still apply to OTs. These can include, but are not limited to, appropriations, security, export control, socio-economic, and criminal laws.
- Myth 10: The OT authorities can only use RDT&E appropriations.
    - **FALSE.** While the majority of Prototype and Production OT efforts focus on RDT&E activities, the statute does not prohibit the use of other fiscal appropriations. It is important to consider the nature of the intended effort and whether the appropriation being used is suitable for the activity of the project. This determination ultimately rests with the funding agency comptroller, but leveraging OTs does not automatically preclude use of non-RDT&E appropriations
- Myth 11: Following a successful prototype OT, the production effort must be FAR-based.
    - **FALSE.** 10 U.S.C. §4022(f) authorizes follow-on efforts to a Prototype OT agreement without further competition. That follow-on production effort may be structured with the same flexibilities as the original OT, or it *may* be FAR-based.
- Myth 12: OTs will always be faster to award than other contractual instruments.
    - **FALSE**. The OT award process will not always be faster than the traditional procurement processes and sometimes can be as long or longer. The speed of award is tied to numerous factors, many of which are internal to the organization. For example, some agencies will award an OT, but conduct the source selection process as if it were subject to FAR Part 15. In that case, awarding the OT could take nearly as long as a procurement contract. Likewise, if the OT award must go through the same approval chain as a procurement contract, it could take as long. Also, because all of the terms and conditions in an OT are negotiable, drafting the agreement and negotiating it between the Government and the performer can take a long time. The OT award process can be faster if the Government team embraces the flexibility of the authority and is prepared, and if the process remains as streamlined as possible.

Appendix E – Additional Information, Resources, and Policy

These sites provide additional information on OTs:

- Defense Acquisition University (DAU) Contracting Community of Practice (CoP): https://www.dau.edu/cop/contracting/Pages/Default.aspx
- DAU OT CoP: https://www.dau.edu/cop/ot/Pages/Default.aspx
- DARPA Acquisition Innovation: https://acquisitioninnovation.darpa.mil/
- Office of the Under Secretary of Defense for Research and Engineering, Guide for Research OTs
- DoD Intellectual Property Policy and Guidance from the Intellectual Property Cadre of the Office of the Assistant Secretary of Defense for Acquisition (ASD(A)): https://www.acq.osd.mil/asda/ae/ada/ip-cadre.html
- US Army Contracting Command - New Jersey: http://acc.army.mil/contractingcenters/acc-nj/index.html
- US Army Development Command (DEVCOM): https://www.army.mil/devcom/ (replaces Army Tank Automotive Research, Development and Engineering Center (TARDEC))
- DAF Contracting Central, Knowledge Center, Acquisition Toolbox (accessible to USAF CAC holders only): https://usaf.dps.mil/sites/AFCC/AQCP/OI/Innovation%20Toolbox

These sites, hosted by the Defense Pricing and Contracting, Office of the Assistant Secretary of Defense for Acquisition (ASD(A)), provide additional resources on OTs:

- See the "Innovation in Contracting" site: https://www.acq.osd.mil/asda/dpc/cp/index.html
- See the "Specific Policy Areas" site for a list of recent policies: https://www.acq.osd.mil/asda/dpc/cp/policy/other-policy-areas.html#fpi

Links to OT-related memos and policy:

- Authority for Use of Other Transactions for Prototype Projects under 10, United States Code, Section 2371b (Nov 20, 2018)
- Definitions and Requirements for Other Transactions Under Title 10, United States Code, Section 2371b (Nov 20, 2018)
- Required and Recommended Use of eBusiness Tools When Awarding and Administering Other Transactions (July 12, 2022)
- Implementation Guidance for Section 889(a)(1)(B) Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment on Other Transactions for Prototype Projects (Aug. 13, 2020)

Appendix F – Use of Consortia in Prototype and Production Other Transaction Agreements

10 U.S.C. § 4022 neither defines nor limits the types or uses of consortia with respect to OTs. Agreements officers have broad discretion to leverage consortia in using the authority of 10 U.S.C. § 4022 to award OTs. Given the wide variety of structures and functions of consortia, this attachment sets forth considerations for agreements officers to consider and document where they deem appropriate. Except as noted below, this appendix is not binding on agreements officers, and should not be treated as DoD policy.

As a guiding principle, when contemplating whether to leverage a consortium, the objective is to promote collaboration, gain exposure and access to a variety of potential performers, facilitate adoption of efficient business practices, and obtain access to a ready network of suppliers with specialized abilities. The priority for the Government is identifying and teaming with capable partners. This may mean that the Government's goals are best served where traditional defense contractors, non-traditional defense contractors (NDCs), academia, small businesses, or a combination of these are working together to achieve a common goal.

Myth: The Government Must Leverage the Consortium Model to Award an OT

There is no preference or policy dictating the use of the consortium model for OTs. The decision to select a business model for any acquisition, OT or otherwise, must be based on the individual facts of the program or projects, and the relevant statutory, regulatory, and policy considerations. The agreements officer is responsible for exercising his or her discretion inchoosing the appropriate

While the Government may encourage or require a specific type of consortium in solicitations that would be best suited to the program goals and acquisition strategy, ideally, the Government will allow the performers to determine the best way to organize their teams, since forcing performers into a particular team structure often has adverse effects on efficiency and performance. Consortium arrangements are commercial agreements and DoD is not necessarily a party to the consortium. The consortium may choose one participant (often called a member) to function as the lead member and agent of the group or a consortium may be managed by a consortium manager that is a single entity responsible for performing the administrative duties of the consortium.

OT Consortium Considerations

While OTs should enable agreements officers to exercise flexibility in their approach, and there is no standard checklist of issues they are required to address, agreements officers should consider the following. Note that these considerations may be relevant at any point during the process of contemplating, awarding and administering an OT. The agreements officer should consider the following:

- How is the consortium structured? How will the structure facilitate the Government's planned purpose?

- What is the business model for the consortium? Is there a consortium manager or a lead company? What functions will the lead company or consortium manager perform?
- What expertise or capability will the consortium provide to the Government?
- What is the relationship between the consortium and the participants, and what are its implications for how the government will award and manage the OT? Are participants competitors or partners? How will work be distributed among participants?
- How will the addition or deletion of consortium participants impact performance? Would the Government's interests be served by having input over changes in the pool or qualifications of participants?

Myth: The Government Must Create a New Consortium for Every Customer Base

There is no preference or policy dictating the use of a consortium model for OTs and the decision of whether to prompt creation of a new consortium or leverage an existing consortium falls within the discretion of the agreements officer.

- What functions does the Government expect the consortium or consortium manager to perform? What functions does the Government consider inappropriate for the consortium to perform (such as those considered to be inherently governmental)? Are the functions and any restricted functions clearly described in writing?
- Is there an existing consortium available that meets the Government's needs?
- How will the Government monitor the consortium's performance? Are separate measures of performance appropriate for management of the consortium and for projects awarded under the umbrella of the consortium?
- How will the Government ensure the 10 U.S.C. § 4022 statutory requirements are met? What oversight will be put in place to ensure compliance with the statute?
- What costs are associated with the consortium? How will the Government determine whether each of the types of payments made under a consortium model are fair and reasonable?
- What information does the agreements officer need from the consortium to satisfy reporting requirements? What entity is responsible for reporting that information, how and when?
- What entity or entities should be signatories to the OT agreement with the Government?
- Does the consortium include foreign participants? Is that an advantage or a disadvantage for the program? Does the participation of any participant, including but not limited to, foreign participants raise any security issues?
- In comparison to a standalone OT award, what benefits, or challenges does the consortium award present? For example, is a consortium a common structure used by performers in the particular market segment? Are consortia well suited for the particular program? Is a consortium the best way to reach the optimal performers?

- If an OT is awarded to a consortium, the determination for approval must be consistent with established dollar approval thresholds for all project awards to ensure uniform application of the approval process is followed by agreements officers and the consortium.

OT Consortium Reporting: SAM, FPDS and Additional Reporting

The System for Award Management (SAM)

SAM is a centralized web-based tool used by the federal Government's executive agencies as the authoritative source for federal awardee data. SAM's Entity Information module maintains annually self-reported entity information including address and contact information, banking information, and representations and certifications.

Companies and other organizations who are prime awardees for OT agreements must register in SAM for the purpose of "All Awards" and maintain an Active registration status. In the case of a consortium, the consortium lead company or the consortium manager, must be fully registered for all awards as a prime awardee. The prime awardee should use its Unique Entity Identifier (UEI) from SAM (https://sam.gov).

Additionally, each consortium participant that is directly awarded an OT agreement by the Government or that receives funding for a project from a consortium must obtain a UEI from SAM and provide it to the Government for reporting. Consortium participants that are separately and already registered in SAM should use the UEI assigned to that registration. Consortium participants that are not separately registered in SAM should request a UEI be established at the SAM website (https://sam.gov) without the need for a complete registration. Note that if the consortium participant needs a Commercial and Government Entity (CAGE) code to be assigned to process Government Furnished Property transfers or have facility clearances accomplished, a full SAM registration is required. See also Appendix E, OUSD (A&S) Memorandum on Required and Recommended Use of eBusiness Tools When Awarding and Administering Other Transactions.

Federal Procurement Data System (FPDS)

The Government must report OT awards in FPDS. This includes OT awards made to a consortium, as well as OT awards made directly to a consortium participant. Note for these purposes an award from a consortium manager or lead company to a consortium participant, where the Government is not making the award, is not an OT and is not tracked in FPDS.

Where indirect individual OT awards to consortium participants are contemplated under the umbrella of a consortium agreement, the Government should establish an OT Indefinite Delivery Vehicle (IDV) version of a contract action report for the overarching agreement to the consortium manager. As the Government awards projects to consortium participants, those should be reported as "orders" against that IDV identifying the consortium participant as the awardee. For purposes of clarification, not all OTs are structured in this manner; this is simply the way to capture information for reporting if that is the structure the agreements officer chooses.

Additional Reporting

Annual Data Call. With respect to consortium awards made to consortium participants, Defense Pricing and Contracting (DPC) will manually collect information through the Department's annual data call for the Report to Congress on the use of OTs for Prototype Projects. The existing Excel template and instructions will be modified to collect the overarching (Reference) procurement instrument identification number (PIID) for the consortium, the individual prototype project agreement PIID to the consortium participant, date awarded, estimated completion date, product or service code and description, the consortium participant's name (if applicable), total award amount, total obligation, fee[1] (if any) paid to the consortium manager, name of the agreements officer and the agreement officer's contact number, appropriations year/type, budget line, purpose/goal/description/status of project, and whether the participant is a nontraditional defense contractor or nonprofit research institution. In planning and execution of consortium agreements, agreements officers should consider the treatment of reporting requirements in the consortium agreement.

Consortia Point of Contact Information. DPC will develop and maintain a current list of DoD OT consortia that are available to other DoD components to utilize. The information will be posted on the DAU OT Community of Practice website to ensure widest dissemination to the DoD acquisition community. The information will include the name of the consortium, the industry focus areas, the OT agreement unique award number (PIID), and point of contact information.

Competition

The exercise of the authority to award a prototype OT pursuant to 10 U.S.C. § 4022 (b)(2) requires that "to the maximum extent practicable, competitive procedures shall be used." Further, for a successful prototype to be eligible for a follow-on production contract or transaction, pursuant to 10 U.S.C. § 4022(f), competitive procedures must have been used for the selection of the parties for participation in the prototype transaction. While the Competition in Contracting Act is not applicable, agreements officers should include a document trail as to when and how the statutory competition requirement was met. Depending on the surrounding circumstances, competition may have been satisfied with the award to the consortium. Alternatively, an agreements officer could reasonably document satisfying the competition requirement among consortium participants for an individual prototype project or prototype subproject.

Approval Levels

Prototype and Production OTs are subject to statutory approval requirements at various levels as established in Appendix E of the OT Guide. The approval levels apply to OT awards made by the Government regardless of whether the award uses the consortia model.

Training

[1] A lead company may include any payment for its role as part of the amount paid for the prototype award, in which case there is no fee that needs to be reported separately. The consortium manager fee for purposes of this reporting is limited to the fee paid to a consortium manager as a separate line item for administering the business of the consortium.

Defense Acquisition University (DAU), in coordination with DPC, has deployed CCON 023, the Other Transaction Authority Credential that addresses, among other topics when an OT is appropriate, how to best utilize the flexibilities afforded by Congress, how to structure an OT based on the actual requirement, and how to mitigate risk. The concept of awarding OTs to consortia is captured within the assets of OT Authority Credential**.**

Unique Issues for Consortia Managed by a Consortium Manager

If the Government chooses a consortium model that leverages a consortium management organization (CMO), the Government must ensure that it tracks fees subject to reporting2 and that the fees charged to the Government are fair and reasonable. The agreements officer should also consider the following:

- What are the duties and responsibilities of the CMO? Where are those defined?
- Does the OT agreement include terms that provide for renegotiation of the fee on a periodic basis or under specified circumstances?
- What is the rationale for the fee as compared to the CMO's duties? Are the fees commensurate with the perceived benefit to the Government?
- Is an appropriate mechanism in place for the agreements officer to identify and avoid duplicate or erroneous payments for individual components of the fee?
- If milestone-based, advance, or interim payments are allowed, is there a mechanism in place to track financing payments and other relevant data at the appropriate level (for example, for each individual project)?
- Does the Government anticipate enough throughput to make use of a consortium beneficial from the perspective of cost, schedule, and performance?

[2] The consortium manager fee is limited to the fee paid to a consortium manager as a separate line item for administering the business of the consortium.