OTHER TRANSACTIONS GUIDE

Office of the Under Secretary of Defense
for Acquisition and Sustainment

November 2018
Version 1.0

Table of Contents

Section I – General Information 3

A. About This Guide 3
1. Definitions 3
2. Myths 3
3. Purpose 3
4. Audience 3
5. Structure 4

B. History of Other Transactions 4

C. Purpose and Types of Other Transactions 4
1. Purpose of Other Transactions 4
2. Types of Other Transactions 7

Section II – Execution 9

D. Planning 9
1. The Government Team 9
2. Market Intelligence 10
3. Defining the Problem 11
4. Understanding the Statutory and Regulatory Requirements 13
5. Identifying Available Funding 14
6. Planning for Follow-On Activities 14

E. Publicizing, Soliciting, and Evaluating 15
1. Publicizing for Solutions 15
2. Soliciting for Solutions 16
3. Evaluating Solutions 16
4. Selection and Negotiation of Terms 17

Section III – Administration 22

F. Reporting 22
1. Federal Procurement Reporting 22
2. Performance Reporting 22

G. OT Agreement Close-Out 22

H. Allowable Costs 23

I. Audit 23

J. Resource Sharing 23
1. Costs Incurred Before OT Award 23
2. Evaluating Reasonable Usage Cost 24
3. Resource Share Schedule and Monitoring 24

K. Payments 24
1. Payable Milestones 24
2. Advance Payments 25
3. Provisional Indirect Rates on Interim Payments 25

L. Legal Considerations 25
1. Legally Responsible Entity 25
2. Teaming 25
3. Security Requirements 25
4. Protests 26

Section IV – Additional Resources 28
Appendix A – Glossary 29
Appendix B – OT Authority - Legislative History 34
Appendix C – OT Type Comparison Table 36
Appendix D – Common OT Myths and Facts 37
Appendix E – Additional Information, Resources, and recent Policy 41
Appendix F – Intellectual Property Considerations 50

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 a number of 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

The Other Transactions Guide for Prototype Projects (version 1.2.0, dated January 2017) is rescinded in its entirety and replaced by this guide.

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 Other Transactions (OTs). This guide provides advice and lessons learned on the planning, publicizing, soliciting, evaluating, negotiation, award, and administration of OTs, to include all three types of OT agreements: Research, Prototype, and Production 💣[Myth 1]. While this document includes references to the controlling statutory and policy provisions for DoD OT authority, the document itself is not a formal policy document. Activities seeking to award OTs should 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 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, to include Project Managers, Agreements Officers (AOs)🔍, Agreements Specialists, Systems Engineers, Small Business representatives, Legal Counsel; and

b. Government partners, to include 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; and

d. Section IV – Additional Resources: provides additional resources, to include 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 the Defense Advanced Research Projects Agency (DARPA), and later others within DoD the authority to enter into Research OTs. Section 2371 was later amended by section 845 of the National Defense Authorization Act (NDAA) for FY 1994 to expand the original OT authority and to allow DARPA, and later others within DoD, to carry out "OTs for prototype projects." In 2015, this OT for Prototype authority was made permanent and codified at 10 U.S.C. §2371b. (see Appendix B for a timeline of OT authority legislative history).

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 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 (CRADAs)

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. Instead, the selection of the award instrument should be considered a separate, but complementary decision. ***Therefore, any program executed under the 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. Similarly, any program executed under the Middle Tier of Acquisition (MTA) pathway, in accordance with Section 804 of the National Defense Authorization Act for Fiscal Year 2016, is subject to MTA policy.***

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, which 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, which has a period of performance through the first quarter of CY 2022. Evaluations followed a four-step process:

1. Executive Summary to Determine Eligibility,
2. Full Proposal Submission,
3. Oral Presentations and Negotiations, and
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 team 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. *Cost sharing and recoupment:* The flexibility of Prototype OTs allowed unique cost sharing and special business arrangements to include $15 million in incentive-based payments and recoupment of Government payload costs which would not have been possible 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 (S&T) OTs) are authorized under 10 U.S.C. §2371 for basic, applied, and advanced research projects. These OTs were 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 were also encouraged to engage in Research OTs, particularly if they sought to adopt commercial practices or standards, diversify into the commercial sector, or partner with NDCs.

   **When using Technology Investment Agreements (TIAs), be sure to read this guide in conjunction with the DoD Grant and Agreement Regulations (DoDGARs) — see Part 21 of Title 32 of the Code of Federal Regulations (32 CFR Part 21).

b. Prototype OTs (sometimes referred to as "2371b" or "prototype project" OTs) are authorized under 10 U.S.C. §2371b 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 2371b. Per statute, successful Prototype OTs offer a streamlined method for transitioning into follow-on production without competition [Myth 4]. The solicitation and original Prototype OT agreement ***shall*** include notice that a follow-on Production OT is possible to allow greater flexibility to those Government organizations planning to leverage production efforts without re-competing (see Appendix E for recent policy documents and links). This should also increase competition and reduce the risk of future protest.

c. Production OTs are authorized under 10 U.S.C. §2371b(f) as noncompetitive, follow-on OTs to a Prototype OT agreement that was competitively awarded and successfully completed. This statute requires that advanced consideration be given and notice be made of the potential for a follow-on OT; this is a necessary precondition for a follow-on Production OT. As such, solicitation documents and the Prototype OT agreement ***shall*** include notice that a follow-on Production OT is possible. [Myth 5]

CASE STUDY #2

Program Description:

The Air Operations Center (AOC) Pathfinder Program purposefully structured its acquisition strategy 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 Innovative Unit (DIU) through Army Contracting Command-New Jersey (ACC-NJ) awarded a Prototype OT on behalf of the Air Force AOC program office, to build software applications which 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 Air Force declared success after executing this methodology while developing and deploying four unique applications. In May 2018, the Air Force awarded a sole-source, 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 vendors focused on prototyping through other means.
2. *Follow-on Production Award without competition*: Although ACC-NJ awarded the prototype, the Air Force chose to award its own sole-source, 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. They 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 contractors 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. In addition to the Project Manager, end user, and warranted AO, the agency needs to secure the early participation of subject matter experts on their cross-functional team, such as legal counsel, comptrollers, contract administrative support offices, and small business representatives to advise on agreement terms and conditions. Adequate advance planning for both the award of an OT agreement and any expected follow-on activity 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 – Each DoD Component with contracting authority that enters into OTs should establish a formal process for selecting and warranting AOs and for terminating their appointments. Formal processes should 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 Agencies procedures for requirements associated with the warranting process for AOs.

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. An AO should 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 6]

b. Contract Administrative Support offices

i. Defense Contract Management Agency (DCMA) − OTs are not required to be administered by DCMA; however, DCMA may be able to support administrative functions delegated to them.

ii. Defense Contract Audit Agency (DCAA) – OTs are not required to be audited by DCAA; however, DCAA is sometimes able to provide financial advisory services to support the AO in awarding and administering OT agreements where requested.

2. Market Intelligence

Gaining market intelligence is an integral part of the development of the acquisition approach and is an ongoing process. To understand industry norms, the current state of technology across multiple sectors, and identify the innovative leaders in industry, the team must conduct research and outreach activities within the relevant technology sectors. Research and outreach activities can include, but are not limited to: researching trade publications; attending technology demonstrations, conferences, conventions, seminars, and trade shows; compiling a capabilities database; conducting reverse industry days; and participating in standards committees and communities of interest. In some cases, the team may find the following efforts beneficial: conducting crowdsourcing events; publishing surveys; participating in technology focused social media groups; conducting industry events; leveraging chambers of commerce, Procurement Technical Assistance Centers, technology consortia [Myth 7], and trade associations; and/or leveraging DoD Tech scouting activities. When the team publishes surveys or requests for capabilities through the Government Point of Entry (www.FedBizOpps.gov) or other open forum, it should strive to find innovative ways to attract the right performers and encourage them to participate. Comprehensive market intelligence should identify the industry leaders and the state-of-the-art in a given technology area.

The Government should consider and employ a variety of marketing activities geared toward advertising the Government opportunity to as wide a forum as possible. In this environment, the Government is seeking premier solutions and business partners and the traditional advertising methods (i.e. www.FedBizOpps.gov and www.grants.gov for TIAs) may not reach the broad breadth of potential performers that are working in a particular industry segment. The Government technical team members can be an excellent resource in determining advertising opportunities. They are subject matter experts in their field and should have a good sense of how and where practitioners in their field would look for opportunities. Additionally, outside subject matter experts as well as industry sources may be consulted as the Government team creates its marketing plan.

The team should also consider the level of foreign participation it is willing to allow in the program. Foreign providers may be excellent sources of technology and may be more advanced than U.S. options. Certain sources of supply may only be available from foreign sources. There may be legal restrictions that would limit foreign participation or restrict it completely, but OTs have been very successful in the past in utilizing foreign performers to broaden the potential technology options. Even when

a program may have classified elements or issues with export control, the Government team should consider allowing the performing teams the option to offer ways to include foreign participation with plans for working within any security or export control limitations.

3. Defining the Problem

The most important part of the team's planning activities is defining the problem, area of need, or capability gap. This is critical in determining the correct acquisition pathway and the correct procurement vehicle to utilize in the acquisition strategy. When issuing a solicitation for a Prototype OT, the Government provides a problem statement, area of need or interest, or capability gap and industry submits a proposed solution. Depending on industry norms, the solutions proposed for a given problem may vary significantly in technical approach, schedule, and/or cost. The team is responsible for understanding and clearly articulating to offerors the problem, area of need, or capability gap to allow for innovative trade space for a wide-range of solutions.

CASE STUDY #3

Program Description:

Global Hawk was a 1994 Defense Advanced Research Projects Agency 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 contractors 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 years of 2000- 2001, the specifications were finalized for full production and transition to the United States Air Force. 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 usage of Prototype OTs allowed industry innovation through creative flexibility in UAV development while remaining within budget and meeting DARPA's performance goals. The contractor 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 should 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 Contractor 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 collaboratively and successfully test the limits of technology within the constraint of a price point of $10 million.

4. Understanding the Statutory and Regulatory Requirements

As the team plans how it will solicit, evaluate, negotiate, and award an agreement for the defined problem, it must ensure the appropriate OT statute is selected and the corresponding statutory and regulatory 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 are intended to address different needs and situations. The team should conduct a thorough requirements analysis when selecting the appropriate authority. Each statute has different requirements and different considerations.

a. In order to be compliant with 10 U.S.C. §2371, 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 partner's resources, prior investment in the technology, commercial vs. military relevance, unusual performance risk, and precompetitive nature of the project

   iv. A statement is made by the Government team that the use of a standard contract, grant, or cooperative agreement for this project was not feasible or appropriate.

b. In order to be compliant with 10 U.S.C. §2371b, the project team ***must*** ensure the following:

   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 military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces;" and

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

   - There is at least one non-traditional defense contractor (NDC) or non-profit research institution participating to a significant extent in the prototype project; or
   - 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 (STTR) programs] or NDCs; or

- 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; or
- The senior procurement executive (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.

5. Identifying Available Funding

The Government team should consult with their 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. For example, funding for Research OTs is restricted to Research, Development, Test, and Evaluation (RDT&E) appropriations, however, incidental funding may supplement RDT&E funds in rare instances with financial manager justification and approval. Fiscal law requirements are applicable to OTs and are contained in agency fiscal regulations.

The determination of appropriateness of available funding and fund type are independent of the choice of the award instrument; the agency decision to use an OT does not expand, nor restrict available appropriations [Myth 8]. To determine the appropriate funding type, the intent and stage of development of the effort should be considered and the Government team should consult with fiscal managers, agency legal counsel and comptrollers. Multiple funding types may be appropriate depending on the intent and stage of the effort. For example, if the intent of the effort is developing something new, then RDT&E funds would be appropriate; however, if that development is complementary to other commercial off the shelf components (e.g. software licenses, or basic commodities), then Operation and Maintenance (O&M) funding may be appropriate, or a combination of funding types.

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

6. Planning for Follow-On Activities

a. Follow-On Activities – It is important to note that the follow-on activities option is

only available when a Prototype OT was 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. During the planning of the acquisition, the Government team should identify any potential follow-on prototyping and/or production activities. At a minimum, potential follow-on activities, to include follow-on production ***shall*** be identified in the solicitation and any resulting OT Agreements. The level of fidelity for production follow-on efforts is naturally limited by the nature of prototyping efforts. Therefore, the level of detail required as to follow-on activities needs to be sufficient for prospective technology providers within the technology sector to make an informed decision whether to bid on the prototyping effort, with the understanding that size, scope and value of potential follow-on activities may vary.

b. Determinations – There are no statutory requirements necessitating determinations for awards for Research OTs. The need for a determination is only applicable to the decision to award a Prototype OT. Where the team identifies exceptional circumstances exist that justify a determination pursuant to 10 U.S.C. §2371b(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 Government team may elect to release the solicitation prior to the 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 – Research OTs do not have any statutory approval thresholds or requirements. Prototype OTs are subject to statutory approval requirements at varying levels, and are divided by dollar thresholds (see Appendix E for recent policy documents and links). For planning purposes, when the team determines that a Prototype OT is the appropriate award instrument, it should identify the likely approval level and authority as early as practicable and identify any agency-specific documentation and routing requirements. [Myth 9]

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 team should leverage the results of its market intelligence efforts to target the community of relevant technology providers. Methods for publication should be chosen to maximize exposure of the problem set to relevant technology providers, both traditional and NDCs, and should be marketed through multiple avenues.

2. Soliciting for Solutions

Agencies that intend to award only OTs from a solicitation are free to create their own process to solicit and assess potential solutions provided it is a fair and transparent process, provides for competitive procedures to be used to the maximum extent practicable (or merit-based competitive procedures for TIAs), and documents the rationale for making the Government investment decision. Just as there is a wide range of methods to publicize OT problem sets, there is an equally wide range of methods by which to solicit solutions and the Government team need not be confined to using a Request for Proposals (RFP) process. Overarching calls for solutions similar to a Broad Agency Announcement (BAA) , Annual Plan Call for White Papers, or a Commercial Solutions Opening are just a few examples of possible solicitation methods to make calls for solutions across a wide array of problem sets. Requests for white paper, oral presentations, panel pitches are also common methods for effectively soliciting OT solutions. Additionally, agencies are encouraged to leverage other events, activities, or even authorities to provide for the collection of potential solutions. Some examples where acquisition 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 for solutions (see Glossary for descriptions of examples above). Such activities can be conducted by the agency, through other Government resources (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, as well as industry norms. At a minimum, www.grants.gov must be used for TIA solicitations.

3. Evaluating Solutions

The evaluation of any set of solutions must be fair and transparent, and should be conducted in accordance with industry norms for the technology being solicited. Additionally, because technical solutions and price may vary significantly, it is a best practice to provide for the efficient and timely evaluation of solutions as to not delay award. Requests for white papers and rough order of magnitude (ROM) pricing, followed by a panel pitch or request for proposals, is an example of an efficient method to expedite selection and award. Specifically, by using white papers and ROMs, the Government is able to review, for example, 3-10 page white papers and to request a panel pitch or proposal from those offerors that are of potential interest to the Government vice requesting proposals from all potential offerors. As a result, the Government saves time and resources and offerors save time and proposal preparation costs. Ultimately, with fewer proposals to award, the Government's proposal evaluation period is lessened while award and delivery of mission capability is expedited.

4. Selection and Negotiation of Terms

a. Selection – With OT competitive procedures, offerors with the most advantageous solution(s) are typically selected for negotiation. Unlike FAR-based contracts, the terms and conditions for the award of an OT may take considerable time to negotiate as the proposed solutions, schedules, terms and conditions, and price are likely to vary significantly amongst competitors [Myth 10]. As a result, the Government may make multiple selections and only come to terms with one offeror. In cases where the Government and the selected offeror cannot come to agreement on the agreement terms and conditions, the Government may choose to negotiate with the next most advantageous offeror that was not initially selected for negotiation. Where multiple prototype solutions are awarded for a single problem set or requirement, the agreement and agreement file ***must*** both document the rationale for award of a follow-on production contract or transaction to a single participant of the overarching effort. As long as competitive procedures were utilized, the participant successfully completed the prototype, and the solicitation and original agreement allowed for a follow-on for production contract or other transaction, a sole-source award may be made to a single participant.

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. It is the Government team's responsibility to ensure the terms and conditions negotiated are appropriate for the particular project and provide for any expected future program needs. It is important to note that 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 should consider the following:

   i. Price Reasonableness − The Government team ***shall*** determine price reasonableness. The Government team may need data to establish price reasonableness, including commercial pricing data, market data, parametric data, or cost information. However, the AO should exhaust other means to establish price reasonableness before resorting to requesting cost information.

   ii. Intellectual Property (IP) − It is important that the Government team have a baseline understanding of the allocation of intellectual property (IP) rights under the Bayh-Dole Act (35 U.S.C. §201-204) for patents, and 10 U.S.C. §2320-21 for technical data , even though none of these statutes apply to OTs. IP rights are fully negotiable under all types of OTs. The negotiated IP clauses should consider the project goals, including any likely commercialization of the research or production and follow-on support of the prototype, and balance the relative investments and risks borne by the parties both in past development of the technology and in future development and maintenance of the technology (see Appendix F for a detailed explanation of

IP considerations).

iii. Title to Property − 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 or not to take title to property under an OT, the Government should consider 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 awardee or the Government is responsible for maintenance, repair, or replacement;
  - Whether the awardee or the Government is liable for loss, theft, destruction of, or damage to the property;
  - Whether the awardee 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 awardee is a company that does not traditionally do business with the Government, 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; and
- A list of property the Government will furnish for the performance of the agreement.
- When the private party signatory has title to property that will be factored into the signatory's cost share amount, the private party signatory and the Government should agree on the method for determining the value of the property.

iv. Payments – The Government teams should leverage electronic invoicing 'eInvoice' procedures to make payments to vendors. However, it is not mandatory for project teams when using OT's to leverage 'Invoicing, Receipt, Acceptance and Property Transfer' (iRAPT – formerly known as Wide Area Work Flow 'WAWF'). Government teams are encouraged to use eInvoice

platforms that best meet the intent of the project environment.

v. Modifications − Modifications of ongoing OT projects are fairly common. The OT agreement should address how changes will be handled. Where a project is developing a new prototype in a unique environment, the Government and the awardee should understand that the project will yield outcomes that may 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 and in the event a change occurs that differs from the original intent the Government team should apply judgement as to the fairness of such a change to prospective interested parties.

The Government team should consider whether or not the Government will have the right to make unilateral changes. If contemplating unilateral changes, consider the fact that unilateral changes may lead to disputes and claims, particularly in agreements with fixed-amount characteristics. The Government may need the right to make a unilateral change to the agreement to ensure that critical requirements are met, or when there are changes to the availability of Government funding for the project.

vi. Disputes − Although OTs are not subject to the Contract Disputes Act, an OT dispute can potentially be the subject of a claim in the Court of Federal Claims. The Government team should ensure each OT addresses the basis and procedures for resolving disputes. The Government team should seek to reduce the risk of costly litigation by negotiating disputes clauses which maximize the use of Alternate Dispute Resolution (ADR) procedures when possible and appropriate. The Government team should consult with legal counsel for assistance in crafting ADR clauses. Incorporating language that allows disputes to be handled at the lowest level possible is generally a best practice.

vii. Termination − The Government team should consider termination clauses in light of the circumstances of the particular OT project. In cases in which there is an apportionment of risk allocation and cost sharing, it could be appropriate to allow an awardee the right to terminate as well. Such a termination could occur in instances in which an awardee discovers that the expected commercial value of the technology does not justify continued investment or the Government fails to provide funding in accordance with the agreement. Termination clauses should identify the conditions that would permit terminations and include the procedures for notifying the other party and deciding termination settlements.

viii. Remedies − When agreements provide for the Government's right to terminate for cause or provide the awardee the right to terminate, the agreement ***must*** also address what remedies are due to the Government. For

example, it may be appropriate to require recoupment of the Government's investment or to obtain unlimited or Government purpose license rights to IP created during performance that are necessary to continue a prototype project.

ix. Follow-On Activities − In negotiating and drafting the terms of the Prototype OT agreement, the parties ***must*** provide for any anticipated follow-on activities, to include follow-on production. Anticipated follow-on activities may include issues such as life cycle costs, logistics products, sustainment, test and evaluation, IP requirements, and future competition. Any Prototype OT ***shall*** contain a provision that sets forth the conditions under which that prototype agreement must be successfully completed . The Government team should establish metrics for their project that help define successful completion for the effort.

In cases where the prototype project is intended to, or likely to, result in follow-on production and deployment, the Government team should assess the impact of restrictions on IP rights, or the failure to obtain necessary IP deliverables (e.g. technical data or computer software), on the Government's total life cycle cost of the technology, both in costs attributable to royalties from required licenses, and in costs associated with the inability to obtain competition for the future production, operation, maintenance, upgrade, and modification of prototype technology.

Where multiple prototype solutions are awarded for a requirement, the agreement ***must*** define successful completion and identify the potential for award of a follow-on production contract or transaction to one or more solutions. No additional evaluation or competition is required to award to a single participant if the initial award was competed, the awardee successfully completed the prototype, and the solicitation documents and the original Prototype OT agreement included the potential for a follow-on production contract or transaction.

Participants include the Government as the awarder of the OT and the company as the awardee. Government organizations that award a Prototype OT under 10 U.S.C. §2371b ***do not*** have to be the Government organization that awards the follow-on production contract.

x. Recovery of Funds − OT agreements made under the authority of 10 U.S.C. §2371 and 2371b 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 their 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.

xi. Comptroller General Access − Per section 2371b(c)(1), a Prototype 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 − The Government team should consider which OT terms and conditions the awardee should flow down to sub-awardees. In developing this negotiation position, the Government team should consider both the needs of the Government (e.g. audits) and the protections (e.g. IP) afforded to all participants.

xiii. Accounting Systems − When structuring the OT agreement for an expenditure-based or resource-sharing type project, the Government team should consider the capability of the awardee's accounting system. Agreements that impose requirements that will cause an awardee to revise or alter its existing accounting system are discouraged. The Government team should not enter into an OT agreement that provides for payment based on amounts generated from the awardee's financial or cost records if the awardee does not have an accounting system capable of identifying the amounts/costs to individual agreements/contracts.

Section III – Administration

F. Reporting

1. Federal Procurement Reporting

The Government team ***must*** continue to record Research OTs in the Defense Assistance Awards Data System (DAADS). The Government team ***must*** continue to report Prototype OTs in the Federal Procurement Data System-Next Generation located at https://www.fpds.gov. Research OTs ***must*** identify the 9th position of the award number as a "3", and Prototype 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.

2. 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 by fixed payable milestones. However, if this is not the case, performance reporting should be considered.

a. The awardee is responsible for managing and monitoring each project and all sub-awardees. The solicitation and resulting agreement should identify the frequency and type of performance reports necessary to support effective management. If an awardee is teaming with other sub-awardees (e.g. consortium, joint venture) for the project, the Government team should consider if performance reporting on all sub-awardees would be appropriate.

b. The Government team should consider whether reports required of the OT awardee are important enough to warrant establishment of line items or separate payable milestones or if reporting requirements should be incorporated as a part of a larger line item or payable milestone. In either case, an appropriate amount should be withheld if a report is not delivered.

G. OT Agreement Close-Out

OT agreement close-out should occur in accordance with agency procedures, considering special areas such as audit requirements, cost sharing, payments, property, patents, and OT awardee reports. (See DoDGARs for close-out procedures for TIAs)

H. Allowable Costs

This section applies only when the OT agreement uses amounts generated from the awardee'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 the agreement should stipulate that Federal funds and the OT awardee'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.

I. Audit

Except as provided in 10 U.S.C. §2371b, 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 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.

J. Resource Sharing

Resource-sharing in a transaction occurs when a portion of the total cost of the project is to be 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 contributions are allowable, allocable, reasonable, and consistently accounted for by the awardee. This may include labor, materials, equipment, usage rights in Intellectual Property, and facilities costs, as well as independent R&D costs that may be reimbursed later by DoD through overhead rates on other awarded efforts. Forfeiture of fee, profit, or cost of money would not be consistent with general cost principles and should not be included in any resource-shared arrangement.

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 Agreements Officer 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.

2. Evaluating reasonable usage cost

The Government team should understand and evaluate the nature of the performer's share. Resource sharing should generally consist of labor, materials, equipment, software, and facilities costs (including allocable indirect costs). Any part of the resource share that includes an amount for a fully depreciated asset should be limited to a reasonable usage charge. In determining the reasonable usage charge, the Government team should 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 and subcontracts. In determining the amount of resource sharing, the agreement should not count, as part of the awardee's share, the cost of Government-funded research, prior independent R&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. OTs 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. Such other transactions should address the procedures for verifying resource share contributions, the conditions that will trigger an adjustment, and the procedures for making the adjustment**.**

K. Payments

Project payment structures are negotiable. The agreement must clearly identify the basis and procedures for payment.

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 a management analysis and decision. 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 and as such, 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 when determining 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 address interest earned, including whether to establish an interest-bearing account.

3. Provisional Indirect Rates on Interim Payments

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

L. 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 contractor with subcontract relationships, among others. 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 otherwise interested in the project or projects being funded.

2. Teaming

OTs can allow DoD to collaboratively design projects with contractors to execute the most effective solution to a problem. Rather than prescribing a particular requirement or project solution, DoD may choose to simply highlight a problem and invite industry to propose solutions to address that problem. DoD can then collaboratively design a project proposal/statement of work with industry to solve the DoD's problem.

3. Security Requirements

Certain types of information submitted to the Department in a process having the potential for award 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. §2371(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.

a. Such information includes the following:

   i. A proposal, proposal abstract, and supporting documents.

   ii. A business plan submitted on a Business Proprietary basis.

   iii. Technical information submitted on a controlled basis as outlined in DoDI 5230.24.

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

c. Additional Requirements.

   i. To the extent that the OT involves classified information, the Government team shall ensure that the agreement is conducted as required by the National Industrial Security Policy outlined in, DoD 5220.22-M and DD Form 441.

   ii. To the extent that the OT involves DoD controlled unclassified information, the Government team should ensure that the offeror complies with DoDI 8582.01 and DoDM 5200.01 Volume 4; that the offeror implements the security requirements in NIST SP 800-171 for safeguarding the offeror's unclassified internal information system; and reports cyber incidents that affect the controlled unclassified information directly to DoD at https://dibnet.dod.mil.

   iii. To the extent that the OT will involve National Security, the Government team shall ensure the agreement is conducted as required to allow for the ability to exclude suppliers on the National Security System Restricted List

4. Protests.

While bid protests are rare for OTs, agencies should be mindful of the possibility. Agency-level protests are possible if the agency choses to include language in its solicitation describing the procedures. While not required, agencies may want to include such language to encourage any issues to be handled internally and quickly. GAO has limited jurisdiction to review OT decisions and protests to GAO regarding OT awards are rare. Protests to the U.S. Court of Federal Claims are also possible but are rare occurrence.

CASE STUDY #4

Program Description:

United States Transportation Command (TRANSCOM) formulated an acquisition strategy to migrate its legacy infrastructure into a cloud environment. In May 2017, the Department of the Army awarded a Prototype OT to migrate six distinctive applications in a native cloud environment by either re-hosting, re-factoring, or re-developing methodologies.

Implementation and Execution:

Upon successful migration of the initial six applications, the Government modified the Prototype OT instrument to include migration of an entire enclave to recognize potential efficacy of such an approach with a Period of Performance of August 2017 through March 2018. During the Period of Performance for the enclave requirement, the Government entered into negotiations for the follow-on Production OT, predicated upon migrating individual applications. The Government awarded the Production OT in February 2018, which was ultimately protested. While the protestor did not compete for the initial Prototype OT, the Government Accountability Office (GAO) found the protestor did have standing. GAO sustained the protest as:

1. The Prototype OT did not include language addressing the possibility of follow-on production work in the agreement between the vendor and the Government.
2. The work under the initial Prototype OT was not successfully completed prior to award of the follow-on Production OT.

Outcomes and Lessons Learned:

1. *Follow-on Production Award without competition*: Solicitations and Awards of Prototype OTs ***shall*** include notice that a follow-on Production OT is possible.
2. *Define Successful Completion*. Any Prototype OT ***shall*** contain a provision that sets forth the conditions under which that prototype agreement must be successfully completed. Unless success is defined otherwise, the Prototype OT must be entirely completed prior to moving into a Production OT.
3. *Acquisition Strategy should address Prototyping while in Production phased approach*: Modifications to Prototype OTs can increase risk regarding the Government's ability to move forward into production. In an effort to remove subjectivity from this forward schedule movement, project teams should try to outline a phased approach at the inception of a requirement, if possible. Project teams may elect to establish entry and exit criteria to facilitate expectations with vendors. Doing so will help streamline project ability to move successfully complete aspects to production.
4. *Acquisition Strategy should establish Success Metrics*: Objective and transparent technical assessment of existing systems is necessary to set project expectations. The Government should identify the metrics as part of its Acquisition Strategy that will determine success of prototyping for a new requirement or technology.

Section IV – Additional Resources

Section IV - Additional Resources, provides appendices with additional resources and information, and 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 recent Policy

Appendix F – Intellectual Property Considerations

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.

Awardee. Any responsible entity that is a signatory to an OT agreement. A sub-awardee is any responsible entity performing effort under the OT agreement, other than the awardee.

Broad Agency Announcement (BAA). A BAA is a general solicitation as defined at 10 U.S.C. 2303. BAAs should only be 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. This must be clearly articulated in the solicitation.

Commercial Solutions Opening (CSO). This guide describes the CSO pioneered by Defense Innovation Unit (DIU) and Army Contracting Command New Jersey (ACC-NJ) which leverages OT authority (see Appendix E for the CSO memo concerning class deviation under the DFARs, which is distinct from OT authorities covered in this guide). 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* (ROM), 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. For additional information on the DIU CSO please visit their website (www.diux.mil).

Be advised, CSOs are very flexible solicitation instruments and AOs are not required to follow the DIU method described above (see Appendix E for additional information concerning CSOs).

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.

Directly Relevant. Under the authority of 10 U.S.C. §2371b, prototype projects ***must*** be *directly relevant* to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the 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, listed under 'Soliciting for Solutions' section of the guide, 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 Air Force CyberWorx. There are several commercial companies that specialize in this practice with unique methodologies around solving difficult problems.

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

Fixed-price OT. Agreements where the primary method of payment is not based on amounts generated from the awardee'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, listed under 'Soliciting for Solutions' section of the guide, in which people work in groups on projects (generally software), with the goal of creating functioning products by the end of the event. A few interesting examples of where this has been applied in the DoD include: 'Hack the Pentagon' Bug Bounty program. Organizations like MD5 specialize in helping DoD customers execute these types of programs.

Innovation Workshops. A multi-day engagement, listed under 'Soliciting for Solutions' section of the guide, focused on defining problems in a business, process, or technology with specific attention to the overall user experience (UX).

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 prescribed pursuant to section 1502 of title 41 and the regulations implementing such section (see 10 U.S.C. 2302(9)).

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 not 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 cost accounting standards (CAS) coverage within one year prior to solicitation of the Prototype OT opportunity. The effect of this narrow definition, is that a large number of 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, amongst 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 only applies 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.

Prize Contests. A contest, listed under 'Soliciting for Solutions' section of the guide, implemented under 10 U.S.C. § 2374a that can result in advanced technology achievements for basic, applied, advanced research as well as prototype development that have the potential for application to the performance of military missions of the DoD.

Procurement contract. A contract awarded pursuant to the Federal Acquisition Regulation.

Prototype project. The definition of a "prototype project" in the context of an OT is as follows: a prototype project addresses a proof of concept, model, reverse engineering to address obsolescence, pilot, novel application of commercial technologies for defense purposes, agile development activity, creation, design, development, demonstration of technical or operational utility, or 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.

Rodeos. A forum for enthusiasts, listed under 'Soliciting for Solutions' section of the guide, 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)) has 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 2371 b. 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. (see Appendix E for recent policy)

Shark Tank-like presentations. An arrangement, listed under 'Soliciting for Solutions' section of the guide, 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. §2371b(d)(1)(A), the Agreements Officer (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 judgement as to the *significance* of expected NDC or nonprofit research institution participation.

The AO should 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 which infringe on the AO's judgment in making such determinations. Blanket policies which provide that expected NDC/nonprofit research institution participation must represent a predetermined percentage of total project value, or total labor dollars, etc., to be considered "significant," are arbitrary and infringe upon the Agreement Officers responsibility to make a reasoned, prudent and independent determination

for each individual prototype project.

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. Any Prototype OT ***shall*** contain a provision that sets forth the conditions under which that prototype agreement must be successfully completed.

Tech Demonstrations. A forum, listed under 'Soliciting for Solutions' section of the guide, 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. Technical data 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 data incidental to contract administration, such as financial and/or management information.

Transaction. The entire process of interactions related to, entering into an agreement, 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) in 10 U.S.C. 2371 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 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

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 military 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 Cost Share to the extent practicable ▪ Competition to maximum extent practicable (see DoDGARS 37.400 for TIAs) ▪ Standard contract, grant, cooperative agreement not feasible/appropriate ▪ Review DoDGARS Part 37-Technology Investment Agreements (TIA), Appendices A&B for applicability.*If TIA complies with Bayh-Dole Act, a Cooperative Agreement (CA) shall be used. If TIA patent provision varies from what is possible under Bayh-Dole Act, the TIA should be awarded as a Research OT	▪ 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 ▪ Cost share not required (if non-traditional contractor participates); fee/profit negotiable ▪ Competitive procedures to maximum extent practicable
Production OT	
▪ Follow-on contract or transaction may be awarded without the use of competitive procedures if: o Competitive procedures were used in the Prototype OT, and o The prototype project in the transaction was "successfully completed"	

***Note**: "practicable" and "maximum extent practicable." If cost sharing aids in pushing the project forward it is practicable. If it proves an obstacle, it is not.*

Appendix D – Common OT Myths and Facts

- Myth 1: There is only one type of OT available to DoD.
    - **FALSE**. There are two different OT statutory authorities that can result in three different types of OTs. The first is for basic, applied, and advanced research projects at 10 U.S.C. §2371. The second is for prototype projects at 10 U.S.C. §2371b. There are differences between the two authorities and 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)? Are we entering this program to push the state-of-the-art in a particular technology area? Do we need to create items to test out the approach to determine how far we have pushed the technology but 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. §2371.
        - 2. Is the application of the technology for primarily military uses? 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. §2371b.
        - 3. Once a prototype agreement is awarded and it satisfies the requirements of 10 U.S.C. 2371b (f), it can be followed by an award for the production phase of the program without recompetition. The follow-on agreement for the production phase can take many forms, including a new OT for Production agreement.
- Myth 2: The OT authorities are new and are rarely used.
    - **FALSE**. The underlying concept of OTs have 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 do either one or both types of OTs. While the use of these authorities have ebbed and flowed in these organizations as a whole 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 "Federal Acquisition Regulation (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 Agreements Officer). The terms and conditions can be enforced by and against either party. The organizations within DoD routinely using OTs have called them agreements to ensure that there would be no confusion between these arrangements and FAR based procurement contracts.
- Myth 4: Since Competition in Contracting Act (CICA) does not apply to OTs, competition and fairness are not a consideration.
    - **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, quality high, and 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 re-competing**, the solicitation documents and the original OT award ***must*** have been competitive and provide for the award of either type of follow-on award.
- Myth 5: OTs cannot be protested.
    - **FALSE**. While bid protests are rare for OTs, agencies should be mindful of the possibility. Agency-level protests are possible if the agency choses to include language in its solicitation describing the procedures. While not required, agencies may want to include such language to encourage any issues to be handled internally and quickly. GAO has limited jurisdiction to review OT decisions and protests to GAO regarding OT awards are rare. Protests to the U.S. Court of Federal Claims are also possible but are a rare occurrence.
- Myth 6: 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 these 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 7: OTs can only be awarded through a consortium.
  - **FALSE**. There are many teaming arrangements permitted, to include award to a single company, joint venture, partnership, consortium (through its members or authorized agent), or a prime contractor 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 8: The OT authorities can only use RDT&E appropriations.
  - **FALSE.** While the majority of OT efforts are focused 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 appropriate for the activity of the project. This determination ultimately rests with the funding agency comptroller, but leveraging OT's does not automatically preclude use of non-RDT&E appropriations

- Myth 9: 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 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 2371 b. 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. (see Appendix E for recent policy).

- Myth 10: 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 many 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, is prepared, and the process remains as streamlined as possible.

Appendix E – Additional Information, Resources, and recent Policy

These sites provide additional information on OTs:

- Defense Acquisition University (DAU) Contracting Community of Practice (CoP): https://www.dau.mil/cop/contracting/Pages/Default.aspx
- Defense Advanced Research Projects Agency (DARPA): http://www.darpa.mil/
- USA: http://acc.army.mil/contractingcenters/acc-nj/index.html
- USA: https://tardec.army.mil/
- USAF: Transformational Innovation web page: http://www.transform.af.mil/
- USAF Contracting Central, Knowledge Center, Other Transactions for Prototype Projects (accessible to Air Force CAC holders only): https://cs2.eis.af.mil/sites/10059/afcc/knowledge_center/Pages/Other-Transactions.aspx
- USAF Commercial Solutions Opening Page (accessible to Air Force CAC holders only): https://cs2.eis.af.mil/sites/10059/afcc/knowledge_center/Pages/cso.aspx

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

- See the "Innovation in Contracting" site: http://www.acq.osd.mil/dpap/cpic/cp/innovation_in_contracting.html
- See the "Specific Policy Areas" site for a list of recent policies: https://www.acq.osd.mil/dpap/cpic/cp/specific_policy_areas.html

Recent OT-related memos follow:

THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

ACQUISITION
AND SUSTAINMENT

NOV 2 0 2018

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
(ATTN: SERVICE ACQUISITION EXECUTIVES)
COMMANDERS OF THE COMBATANT COMMANDS
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES
DIRECTOR OF THE DEFENSE INNOVATION UNIT

SUBJECT: Authority for Use of Other Transactions for Prototype Projects Under 10, United States Code, Section 2371b

Reference: (a) "Authority for Use of Other Transactions for Prototype Projects Under 10 U.S.C. 2371b," dated March 10, 2016
(b) Section 873 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232)
(c) Joint Explanatory Statement accompanying the Department of Defense Appropriations Act, 2019 (Public Law 115-245), pages 153-154

The purposes of this memorandum are to (1) designate Components authorized to execute Other Transaction (OT) agreements as provided for in title 10, United States Code, section 2371b; (2) rescind reference (a) and replace it to expand approval authority and increase the dollar thresholds for use of OTs; and (3) establish additional data collection and reporting requirements.

I hereby designate 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 2371b. All previous designations to Defense Agencies and Field Activities are rescinded. The designation portion of this memorandum 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.

Approval authorities and dollar thresholds for Prototype and Production OTs are set forth below. These authorities are non-delegable above $100 million.

Organization	Transaction Value		
	Up to $100M	$100M to $500M	Over $500M
CCMDs with contracting authority	Commanding Officer	USD(R&E) or USD(A&S)	USD(R&E) or USD(A&S)*
DAs/FAs with contracting authority/DIU	Director	USD(R&E) or USD(A&S)	USD(R&E) or USD(A&S)*
Military Departments	Senior Procurement Executive	Senior Procurement Executive	USD(R&E) or USD(A&S)*
DARPA MDA	Director	Director	USD(R&E) or USD(A&S)*

** An Under Secretary must also make a written determination in accordance with section 2371b. Additionally, the Congress shall be notified at least 30 days before this authority is exercised. The Office of the Under Secretary making the written determination is responsible for Congressional notification.*

In determining the value of OTs for the purposes of assessing compliance with the authority levels set forth above, OTs will be measured based on the value of each transaction, rather than the total value of all OTs that might be executed in a prototype project or for follow-on production. That is, a prototype project may consist of multiple transactions to the same or different parties, each of which shall be considered separately when considering dollar thresholds. Transaction value shall include all options with prices established in the OT as awarded, as well as the amount associated with any cost-sharing borne by the contractor where the basis for the OT is subsection 2371b(d)(1)(C). Regardless of value, a separate OT approval will be required for each phase—prototype or follow-on production—and separately within a phase for each transaction.

It is essential that organizations with OT authority ensure Agreements Officers (AOs) are appropriately designated by the cognizant Head of the Contracting Activity and receive training needed to be successful. These organizations shall provide appropriate oversight and have processes in place to ensure that AOs do not bind the Government in OT agreements that exceed their warrant authority.

The Assistant Secretary of Defense for Acquisition (ASD(A)) shall establish standard reporting formats, consolidate component inputs, and transmit reports to Congress to implement data collection and reporting obligations in accordance with references (b) and (c). In the interim, components are cautioned to be mindful of the obligations set forth and take steps toward compliance with reference to any OTs executed before ASD(A) procedures are issued. Senior Procurement Executives, Directors, and the relevant Commanding Officers are responsible for ensuring data required under references (b) and (c) are accurately collected and reported in the Federal Procurement Data System-Next Generation (FPDS-NG) located at https://www.fpds.gov.

My point of contact for this memorandum is Ms. Jill Stiglich, Office of the Assistant Secretary of Defense for Acquisition, at 703-571-9013 or jill.e.stiglich.civ@mail.mil.

Ellen M. Lord

OFFICE OF THE SECRETARY OF DEFENSE
1500 DEFENSE PENTAGON
WASHINGTON, DC 20301-1500

NOV 2 0 2018

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
(ATTN: SERVICE ACQUISITION EXECUTIVES)
COMMANDERS OF THE COMBATANT COMMANDS
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Definitions and Requirements for Other Transactions Under Title 10, United States Code, Section 2371b

The purpose of this memorandum is to establish direction for the transition of prototype Other Transactions (OTs) to follow-on Production OTs. Accordingly, this memorandum does three things: (1) provides a definition of "prototype project" in the context of OTs; (2) addresses the requirement that the prototype project phase provide for the award of a follow-on production transaction; and (3) provides a definition of "successful completion," before follow-on Production OTs may be awarded under the authority of section 2371b.

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

Subsection 2371b(f) provides that a "transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction." This statute requires that advanced consideration be given and notice be made of the potential for a follow-on OT; this is a necessary precondition for a follow-on Production OT. As such, solicitation documents and the Prototype OT agreement shall include notice that a follow-on Production OT is possible.

Those organizations seeking to use the follow-on production authority provided for in subsection 2371b(f) shall apply the following definition for "successful completion." 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. Any Prototype OT shall contain a provision that sets forth the conditions under which that prototype agreement must be successfully completed.

Finally, as amended in the John S. McCain National Defense Authorization Act for FY 2019, section 2371b now expressly requires higher level approval before use of section 2371b authority for a Prototype OT or a Production OT. Regardless of value, this approval is required separately for each phase—prototype or follow-on production—and separately within a phase for each transaction.

My point of contact for this memorandum is Ms. Jill Stiglich, Office of the Assistant Secretary of Defense for Acquisition, at 703-571-9013 or jill.e.stiglich.civ@mail.mil and Ms. Ellen Purdy, Office of the Under Secretary of Defense for Research and Engineering, 571-372-7545 or ellen.m.purdy.civ@mail.mil.

Ellen M. Lord
Under Secretary of Defense
for Acquisition and Sustainment

Michael D. Griffin
Under Secretary of Defense
for Research and Engineering

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

JUN 2 6 2018

In reply refer to
DARS Tracking Number: 2018-O0016

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Defense Commercial Solutions Opening Pilot Program

Effective immediately, contracting officers may acquire innovative commercial items, technologies, or services using a competitive procedure called a commercial solutions opening (CSO) by following the procedures provided in this class deviation. Use of a CSO is authorized by section 879 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). Under a CSO, DoD may competitively select proposals received in response to a general solicitation, similar to a broad agency announcement, based on a review of proposals by scientific, technological, or other subject-matter expert peers.

Use of a CSO in accordance with this class deviation is considered to be a competitive procedure for the purposes of 10 U.S.C. chapter 127 and FAR 6.102.

Contracting officers shall treat items, technologies, and services acquired using a CSO as commercial items. Notwithstanding the limitation in DFARS 235.006-71, a CSO may be used to fulfill requirements for research and development, ranging from advanced component development through operational systems development. When using a CSO in acquisitions for research and development, contracting officers shall use the procedures in this class deviation in conjunction with FAR part 35.

Contracting officers may use a CSO only—

- To obtain solutions or potential new capabilities that fulfill requirements, close capability gaps, or provide potential technological advancements;

- When meaningful proposals with varying technical or scientific approaches can be reasonably anticipated; and
- When the contract entered into under the pilot program will be fixed-price, including fixed-price incentive contracts.

When using a CSO, contracting officers shall ensure the CSO—

- Describes the agency's interest, either for an individual program requirement or for broadly defined areas of interest covering the full range of the agency's requirements;
- Describes the criteria for selecting proposals, their relative importance, and the method of evaluation, including, where applicable, the potential type of data rights that may be determined necessary to meet DoD's minimum needs;
- Specifies the period of time during which proposals submitted in response to the CSO will be accepted;
- Contains instructions for the preparation and submission of proposals; and
- Uses "S" in position 9 and "C" in position 10 of the procurement instrument identifier to identify the solicitation as a CSO.

Contracting officers shall publicize a notice of availability of a CSO through the Governmentwide point of entry at least annually, and, if authorized pursuant to FAR subpart 5.5, may also publish a notice in noted scientific, technical, or engineering periodicals. Synopsis under FAR subpart 5.2 of individual contract actions under the CSO is not required. The notice published pursuant to this paragraph fulfills the synopsis requirement.

The primary evaluation factors for selecting proposals for award shall be technical, importance to agency programs, and funds availability. Price shall be considered to the extent appropriate, but at a minimum, to determine that the price is fair and reasonable.

Proposals received as a result of a CSO shall be evaluated in accordance with evaluation criteria specified therein through the review of such proposals by scientific, technological, or other subject-matter expert peers. Written evaluation reports on individual proposals are required, but proposals need not be evaluated against each other since they are not submitted in response to a common performance work statement or statement of work.

The requirements of DFARS 215.371-2 do not apply to acquisitions of innovative commercial items, technologies, or services under a CSO pursuant to this class deviation.

Contracting officers shall not award contracts in excess of $100 million pursuant to a CSO without a written determination from the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) or the cognizant service acquisition executive of a military department of the efficacy of the effort to meet mission needs of DoD or the relevant military department. In order to secure USD(A&S) approval, send the written determination, along with a request for USD(A&S) review and approval, via email to the Defense Procurement and Acquisition Policy (DPAP) Contract Policy and International Contracting Directorate (CPIC) at osd.pentagon.ousd-

atl.mbx.cpic@mail.mil. Requests for approval of the written determination by the cognizant service acquisition executive shall follow military department policy and procedures.

Not later than 45 days after the award of a contract under a CSO for an amount exceeding $100 million, the USD(A&S) will notify the congressional defense committees of such award. To facilitate reporting, not later than 1 day after the award of a contract exceeding $100 million under the pilot program authority, the contracting officer shall—

- Prepare a notice of award for the congressional defense committees that includes—
  - A description of the innovative commercial item, technology, or service acquired;
  - A description of the requirement, capability gap, or potential technological advancement with respect to which the innovative commercial item, technology, or service acquired provides a solution or a potential new capability;
  - The contract award amount; and
  - Identification of the contractor awarded the contract; and
- Submit the notice of award to USD(A&S) via the cognizant service acquisition executive of a military department for signature, if applicable.
  - In order to secure USD(A&S) signature, send the notice of award, along with a request for USD(A&S) signature, via email to DPAP/CPIC at osd.pentagon.ousd-atl.mbx.cpic@mail.mil.
  - Requests for approval of a notice of award by the cognizant service acquisition executive shall follow military department policy and procedures.

Contracting officers shall ensure that contract files fully and adequately document the market research and rationale supporting a conclusion that the requirements of this class deviation have been satisfied.

The authority to enter into a contract under the pilot program expires on September 30, 2022. The expiration of this authority will not affect the validity of any contract awarded under the pilot program before the expiration date.

As used in this class deviation, "innovative" means any technology, process, or method, including research and development, that is new as of the date of submission of a proposal, or any application that is new as of the date of submission of a proposal of a technology, process, or method existing as of such date.

This class deviation remains in effect until September 30, 2022, or otherwise rescinded. My point of contact is Mr. Larry McLaury, DPAP/CPIC, who may be reached at 703-697-6710.

Shay D. Assad,
Director, Defense Pricing/Defense
Procurement and Acquisition Policy

Appendix F – Intellectual Property (IP) Considerations

1. Negotiation.

In negotiating IP under an OT, it is a best practice for the Government and solution provider to identify business plans for the subject technology at 1-year, 3-years, 5-years, and beyond. By establishing the short-term and long-term needs of the parties, a tailored IP scheme can more easily be determined and factored into the Government's IP negotiation strategy.

Tailored IP terms may include, but are not limited to: royalty provisions, limited licenses (scope, duration, manner), options, conditions, right-of-first refusal, and exclusive dealing terms, amongst others.

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

Where the project goals call for reliance on the commercial marketplace to produce, maintain, modify, or upgrade the technology, there may be a reduced need for rights in IP for those purposes. *However, since the Government tends to use technology well past the norm in the commercial marketplace, the Government team should plan for maintenance and support of fielded prototype technology when the technology is no longer supported by the commercial market and consider obtaining at no additional cost a license sufficient to address the Government's long-term needs to the technology*.

2. Agreements Officer Responsibilities

It is important that the AO be familiar with IP rights under the Bayh-Dole Act (35 U.S.C. §201-204) for patents and 10 U.S.C. §2320-21 for technical data; however, these statutes do not apply to OTs and ***negotiation of rights of a different scope is permissible and encouraged***. At a minimum, the AO should ensure that the agreement addresses the following:

a. **Disputes:** Disputes clauses included in the agreement can accommodate specialized disputes arising under the IP clauses, such as the exercise of IP march-in rights or the validation of restrictions on technical data or computer software.

b. **Flow-down:** Determine whether it is necessary that the IP clauses applicable to the awardee flow down to subawardees, including whether to allow other subawardees to submit any applicable IP licenses directly to the Government.

c. **Licensing:** Consider restricting awardees from licensing technology developed under the OT to domestic or foreign firms under circumstances that would hinder potential domestic manufacture or use of the technology.

d. **Export:** Be aware that export restrictions prohibit awardees from disclosing or licensing certain technology to foreign firms.

e. **Additional rights:** Consider including in the IP clauses any additional rights available to the Government in the case of inability or refusal of the private party or team to continue to perform.

f. **Time based:** It may also be appropriate to consider negotiating time periods after which the Government will automatically obtain greater rights (for example, if the original negotiated rights limited Government's rights for a specified period of time to permit commercialization of the technology).

g. **Patents:** Negotiate a patents rights clause necessary to accomplish program objectives and foster the Government's interest while balancing the needs of the performer. In determining what represents a reasonable arrangement under the circumstances, the AO should consider the Government's needs for patents and patent rights to use the developed technology, or what other IP rights will be needed should the agreement provide for trade secret protection instead of patent protection.

h. **Trade Secret Protection:** Consider allowing subject inventions to remain trade secrets as long as the Government's interest in the continued use of the technology is protected. In making this evaluation, the AO should consider whether allowing the technology to remain a trade secret creates an unacceptable risk of a third party patenting the same technology, the Government's right to utilize this technology with third parties, and whether there are available means to mitigate these risks outside of requiring patent protection.

i. **Software data rights:** Refers to a combined copyright, know-how, and/or trade secret license that defines the Government's ability to use, reproduce, modify, release, and disclose technical data and computer software. The focus of license negotiations often centers on the Government's ability to release or disclose outside the Government. In addition, computer software licenses require additional consideration because restrictions may impact the Government's use, maintenance, and upgrade of computer software used as an operational element of the prototype technology. The OT should typically address definitions, allocation of rights, delivery requirements, and restrictive legends. The OT should account for certain emergency or special circumstances in which the Government may need additional rights, such as the need to disclose technical data or computer software for emergency repair or overhaul.

j. **Commercial data:** The AO should consider commercial technical data and commercial computer software. The government typically does not need extensive

rights in commercial technical data and software. However, depending on the project scope and goals, the Government may need to negotiate for greater rights in order to utilize the developed technology.

k. **Cyber Incident Reporting:** Ensure the company is properly protecting data and compliant with specific Government reporting procedures in the event Government data is compromised.

l. **Authorization and Consent:** Authorization and consent policies provide that work by an awardee under an agreement may not be enjoined by reason of patent infringement and shifts liability for such infringement to the government (see 28 U.S.C. 1498). The Government's liability for damages in any such suit may, however, ultimately be borne by the awardee in accordance with the terms of a patent indemnity clause. The agreement should not include an authorization and consent clause when both complete performance and delivery are outside the United States, its possessions, and Puerto Rico.

m. **Notice and Assistance:** Notice policy requires the awardee to notify the AO of all claims of infringement that come to the awardee's attention in connection with performing the agreement. Assistance policy requires the Awardee, when requested, to assist the Government with any evidence and information in its possession in connection with any suit against the government, or any claims against the Government made before suit has been instituted that alleges patent or copyright infringement arising out of performance under the agreement.

n. **Indemnity:** Indemnity clauses mitigate the Government's risk of cost increases caused by infringement of a third-party owned patent. Such a clause may be appropriate if the supplies or services used in the prototype technology developed under the agreement normally are or have been sold or offered for sale to the public in the commercial open market, either with or without modifications. In addition, where trade secret protection is allowed in lieu of patent protection for patentable subject inventions, a perpetual patent indemnity clause might be considered as a mechanism for mitigating risks. The agreement should not include a clause whereby the Government expressly agrees to indemnify the awardee against liability for infringement.