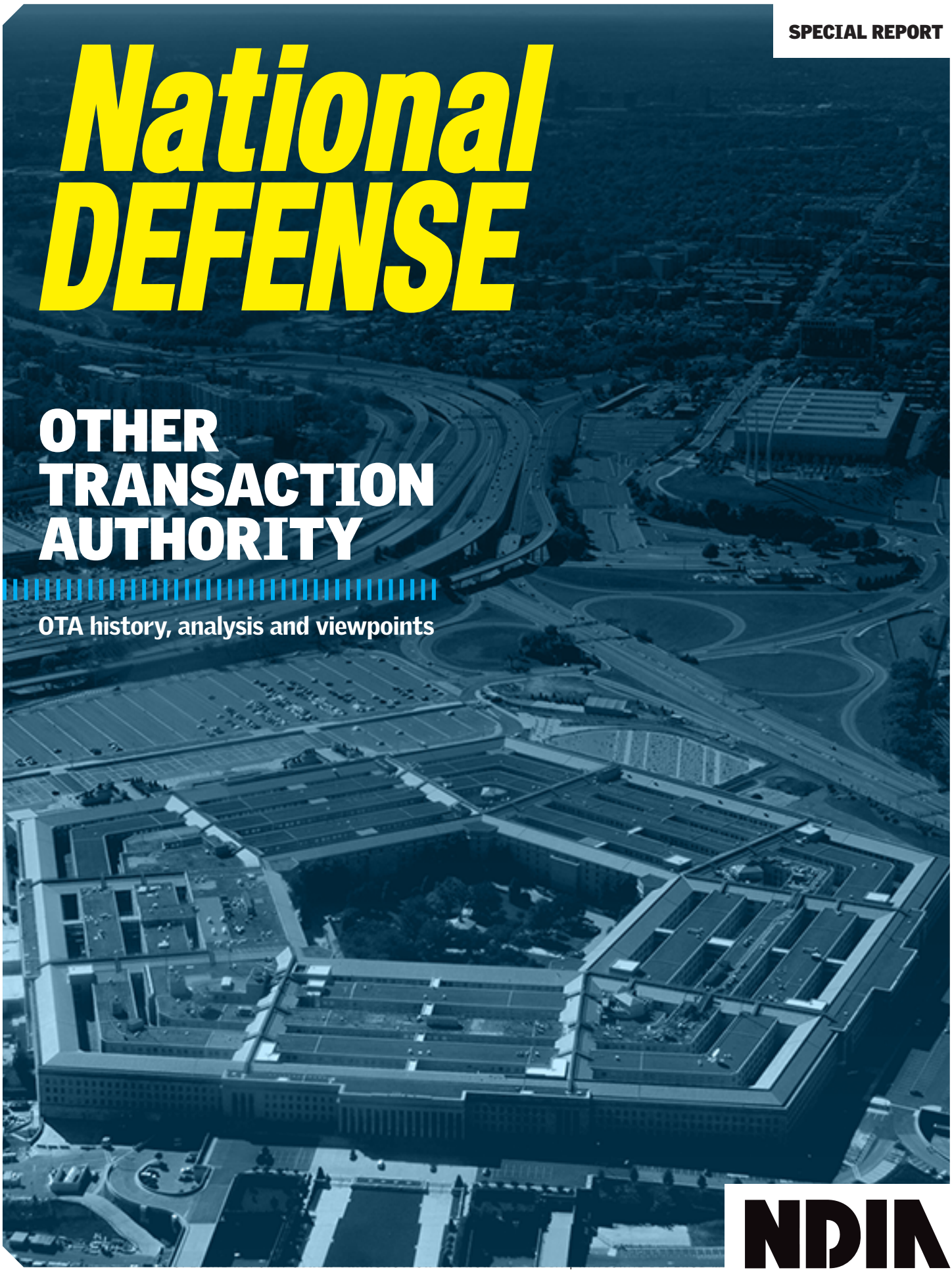
SPECIAL REPORT

National DEFENSE



OTHER TRANSACTION AUTHORITY

OTA history, analysis and viewpoints

NDIA

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OTHER TRANSACTION AUTHORITY

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INTRODUCTION

Those who attend defense industry conferences of late or read any of its trade publications have undoubtedly heard about Other Transaction Authority, or OTA.

While it may seem like the latest buzzword, in fact, the contracting vehicle was created around 1958 at the beginnings of the Advanced Research Projects Agency and NASA.

OTA through most of the past 60 years was used by government agencies to contract with universities, labs and small businesses to build prototypes. Those with good ideas had the advantage of skipping much of the red tape needed to do business with the Defense Department and other agencies. Forget requirements for cybersecurity. Forget accounting standards. Forget about a lot of the red tape that accompanies Defense Department contracts.

But something changed to turn the little used and somewhat obscure OTA into what some see as a solution to bridging the so-called "Valley of Death," where good ideas in labs and small business fail to make it past the R&D phase and into programs of record.

Section 815, Amendments to Other Transaction Authority, of the National Defense Authorization Act for Fiscal Year 2016 added a new Section 2371b to Chapter 10 of the U.S. Code that brought down several barriers for participating in the contracts.

Now anyone, not just nontraditional contractors, can compete. And perhaps the most important change, program managers have the option of moving from prototypes to production contracts as long as they demonstrate that there was a competition among vendors to see which prototype worked best.

The dollar amounts also increased with thresholds formerly at $20 million to $100 million, now at $50 million to $250 million, and perhaps more when circumstances involve "critical national security objectives," the legislation said.

And just like that, employment of OTA swelled.

While industry for the most part has welcomed the changes, government program managers are driving the upward trajectory in OTA use. Without them deciding to employ OTA to procure new goods and services, the trend would be no trend at all. The idea has spread from rapid acquisition organizations such as Defense Innovation Unit, AFWERX and SOFWERX to traditional programs of record.

The Army, for example, is using an OTA to buy 20 robotic mules, called the squad multi-purpose equipment transport, from four vendors. After a downselect, the service may move from the test and evaluation phase directly to a production contract and procure as many as 5,700 vehicles.

Big pots of money are being allocated for OTA, and a cottage industry of consortiums who seek out new technologies, vet vendors and administer the funding have popped up. The Army's Aviation and Missile Technology Consortium, the Air Force's Space Enterprise Consortium and the Navy's Information Warfare Research Project Consortium are three that have opened their doors in 2018.

But what Congress giveth, Congress can taketh away. If the services field equipment using OTA that do not work as advertised, are unneeded and unused, or even worse, are faulty to the point of putting warfighters' lives at risk, then the newfound freedom OTA provides will surely be taken away.

Inside the pages of this eBook are some practical tips — including some possible pitfalls — for vendors who may want to take advantage of this new trend in government contracting.

– Stew Magnuson, Editor in Chief, *National Defense* magazine

Who Can Use OTAs

Table 1: Agency Use of Other Transaction Agreements for Fiscal Years 2010 through 2014

Agency	Types of activities		
	RD&D	Prototype	Other
Advanced Research Projects Agency – Energy (ARPA-E)	✓		
Department of Defense (DOD)	✓	✓	
Department of Energy (DOE)	✓		
Department of Health and Human Services (HHS)	✓		
Department of Homeland Security (DHS)	✓	✓	
Department of Transportation (DOT)	✓		
Domestic Nuclear Detection Office (DNDO)[a]			
Federal Aviation Administration (FAA)	✓		✓
National Aeronautics and Space Administration (NASA)[b]	✓		✓
National Institutes of Health (NIH)	✓		
Transportation Security Administration (TSA)			✓

Sources: GAO analysis of agencies' information. | GAO-16-209

An Alternative To Acquisition Business as Usual

BY RICHARD L. DUNN

Cries for acquisition reform can be heard in the speeches of senior Defense Department leaders and members of Congress. There is much wringing of hands over the slow pace and high cost of fielding defense systems.

There are concerns that the American defense establishment is not accessing innovations as rapidly and effectively as it should. Mixed in with the speeches, articles and internet blogs are occasional references to "other transactions." There is but slight evidence that the potential of innovative contracting techniques like "other transactions" is actually understood by those calling for reform.

All the elements needed to create a responsive alternative to the traditional system exist. They were described in "Other Transaction Contracts: Poorly Understood, Little Used" published in the June edition of *National Defense*. That article described some of the characteristics of contracting authorities found in sections 2371, 2371b and 2373 of title 10, United States Code. This article describes how authority to use other transactions is currently available to create an alternative acquisition system.

The first question is whether there is a need for an alternative to the traditional system under the Federal Acquisition Regulation and Department of Defense Instruction 5000.1, The Acquisition System. Unfortunately, asking this question is exactly where reform breaks down. Many influential practitioners of the traditional system just below the most senior levels and at mid-levels don't really believe an alternative is necessary.

Despite decades of unsuccessful attempts at tweaking or fine-tuning the system through so-called acquisition reform, many career bureaucrats and military acquisition professionals believe nothing more than selective and minor adjustments may be needed. Senior leaders rely on these seasoned acquisition professionals to carry out their calls for reform. The result is that nothing profound happens.

The fine-tuning approach has been tried repeatedly since the 1970s and even earlier. In 1986 the Packard Commission asserted that defense systems take too long and cost too much. In the 1990s, several rounds of acquisition reform legislation repealed, amended and enacted a large number of laws. This might have been considered going beyond fine-tuning, but all this activity was in the basic construct of the existing system.

Additional reforms have been implemented in the last 10 years. Defense systems still take too long and cost too much. In fact many "reforms" merely added to the complexity and arcane nature of the system. The unique business processes and related overhead required by the traditional system isolate the

defense industrial base from the much broader and often more innovative national industrial base.

The people and organizations that have a vested interest in preserving the traditional system are too numerous to simply abolish the system overnight. Moreover, such an approach could involve serious disruption and dislocation. Is an alternative system needed? Yes, but the track record of reform so far is abysmal.

The Packard Commission did not expressly call for an alternative system, but it did suggest key elements of an improved approach. These included a greater emphasis on prototyping; increased use of off-the-shelf government and commercial components; closer connection of operational testing and development; and avoiding "gold plated" requirements. Attempts to establish agile or rapid acquisition incorporating some of these suggestions have had limited success over the years.

Recommendations for new acquisition approaches including an alternative system have appeared in a number of studies; three came out in 2009. Two were documented in Defense Science Board reports — "Buying Commercial: Gaining the Cost/Schedule Benefits for Defense Systems" and "Fulfillment of Urgent Operational Needs." Both called for increased use of other transactions and the latter expressly called for an alternative system. The title of a study sponsored by the Naval Postgraduate School asked: "Injecting New Ideas and New Approaches to Defense Acquisition: Are Other Transactions an Answer?"

Despite this, other transactions went into a decline from which there has only recently been a modest recovery with no attempt to create an alternative system based on them.

"Elements of an Alternative System – (1) Science and Technology, Section 2371 of title 10, U.S. Code" applies to basic, applied and advanced research. Agreements can be awarded to profit-making companies, defense or commercial in orientation, non-profits, academic institutions, government agencies or other types of entities. Single and multi-party agreements can be negotiated. The Federal Acquisition Regulation, assistance regulations, and related instructions do not apply. This permits a flexible, goal-oriented freedom of contract method of contracting. Agreements can be fully funded by the government, jointly funded by the government and one or more private partners, or unfunded involving only an exchange of resources. Agreements can provide for the government to receive funds and those funds can be applied to conduct additional research.

This incredibly flexible and obviously highly useful contracting method was used to obligate hundreds of millions of dollars per year in the 1990s. The undersecretary of defense for acquisition, technology and logistics personally signed the 100th agreement entered into using this authority. And today? The authority is essentially moribund. It goes unused.

Top level leaders no doubt presumed that their subordinates would value the flexibility offered by other transactions and effectively implement it. However, a lack of leadership from senior career acquisition professionals has led to a dearth of knowledge at the working level, and business as usual prevails.

Additionally, the department promulgated an arcane and somewhat confusing regulation applying to a small fraction of potential section 2371 other transactions, which are called technology investment agreements. This was an attempt to stovepipe and box other transactions used for assistance when they also included a patent rights clause that varied from the standard government clause. Very little of defense science and technology is conducted as assistance; it is generally mission-oriented. Unfortunately, many lawyers and agreements officers in the department assume technology investment agreements regulations apply to all section 2371 other transactions.

Another obstacle involves the failure to understand the practicability standard in the statute. Cost-sharing and competition are both baselined but subject to a practicability proviso. Competition is standard in most Defense Department science and technology awards and should not be an issue.

Cost-sharing is another matter. Not knowing the history of other transactions, bureaucrats see this as a major hurdle. In fact the very first section 2371 other transaction involved neither cost-sharing nor competition. The deputy secretary of defense testified in support of the agreement before the Senate Armed Services Committee. Practicability means if cost-sharing helps the project, do it. If cost-sharing precludes or inhibits the project, waive it or reduce it. Consider factors such as commercial potential, primarily defense market, start up or well-funded company and so forth. Even the department's rather restrictive "Other Transactions for Prototypes Guide" says "the government should not generally mandate cost-sharing for defense-unique items."

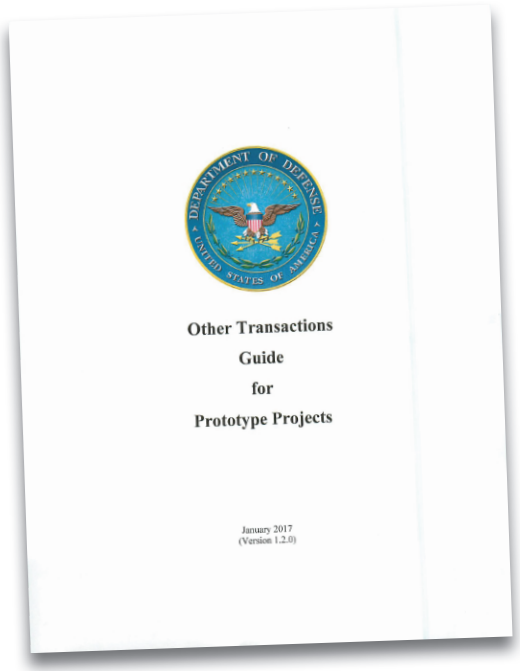
> "Cost-sharing is another matter. Not knowing the history of other transactions, bureaucrats see this as a major hurdle."

Section 2371 other transactions should be the default method for conducting basic, applied and advanced research. There is obvious overlap between the authority of section 2371 to carry out basic, applied and advanced research and the authority of section 2371b to engage in prototype projects. However, guidance attempts to limit section 2371b to a box called acquisition, a word not appearing in the statute. This is contrary to the flexibility of section 2371b where, for example, under its predecessor statute, a contractor not passing a down-select in the advanced short take off/vertical landing F-35 lead-in project was allowed to proceed to the next phase via an unfunded agreement; the agreement in other respects being similar to a funded agreement.

Section 2371b authorizes the secretaries of military departments, director of the Defense Advanced Research Projects

Agency and other officials designated by the secretary of defense to "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."

This authority is expressly related to section 2371, and therefore the Federal Acquisition Regulation and related procurement statutes and regulations do not apply. The broad scope of the authority means that it applies to many of the capabilities the Defense Department needs. The original other-transaction prototyping authority — section 845, Public Law 103-160 — was expressly aimed at defense contractors. This was confused in 2000 when an amendment required significant participation by a non-traditional contractor, cost-sharing or the existence of special circumstances.



The special circumstances proviso has seldom been invoked. It applies generally to business arrangements that vary from normal cost reimbursement contracting for a defense contractor. This could include structuring a series of payments based on achievement of observable milestones rather than reimbursing incurred costs; or, reimbursable arrangements where reimbursement for one or more phases of a project is based on lower rates applicable to independent research-and-development efforts rather than fully reimbursable under standard rates. These should be formally recognized as special circumstances.

A variety of other arrangements that vary from standard contract types described in Part 16 of FAR or have other unique characteristics would also qualify as special circumstances.

A corollary authority is found in section 2373 of title 10. It authorizes the office of the secretary of defense and the services to purchase a variety of key technologies and products for experimental purposes. The Armed Services Procurement Act and Federal Acquisition Regulation do not apply if quantities are limited to those necessary for experimentation, technical evaluation, to assess operational capability or safety, or to maintain a residual operational capability.

As in the case of section 2371, there is considerable overlap between this authority and section 2371b. It contains no proviso for significant non-traditional participation, cost-sharing or a finding of special circumstances.

Given an enlightened interpretation of the statutes, projects conducted under these authorities should be attractive to both traditional and non-traditional firms. Currently, these authorities are typically used in consortia arrangements or as niche authorities in special circumstances. They have, however, been successfully used in major programs such as evolved expendable launch vehicles, Global Hawk and joint unmanned combat air systems. When conducted as technology demonstrations, they have allowed technologies to mature before being transitioned into a formal major acquisition program of record.

The National Defense Authorization Act of 2017 added a section to 10 U.S.C. 2371b, "which provides that a follow-on production effort may be awarded to performers who successfully complete a prototype project that has been competitively awarded. Award instruments may be a new or modified other-transaction agreement, a FAR contract awarded without competition, or a contract awarded under a system to be created by the secretary of defense."

The lack of interest and lack of leadership in other transactions by senior procurement bureaucrats is palpable. The revised "Defense Department Guide for Other Transaction Prototype Projects" was not issued until more than a year after follow-on production was authorized by statute. It carries one brief reference to this powerful new provision buried in a section called "Follow-On Activities." Clearly new wine in old bottles is not a good plan. Despite this, elements within the department are in the process of utilizing this authority.

All the legal authorities necessary to create an alternative to the slow, bloated, unresponsive and expensive traditional system for acquiring defense capabilities are in place.

What is lacking to implement that alternative is leadership. Leaders must not merely say to the usual suspects on their staffs "go do it." The acquisition bureaucrats have shown they are incapable of effectively reforming the system. Top leadership must create empowered organizations filled with intelligent, educated and motivated individuals who realize that acquisition risk is not missing some procurement metric but failing to get needed capabilities into the hands of war-fighters when and in the quantities needed. ND

Richard L. Dunn is an independent consultant providing advice on the implementation of technology in the military and civil sectors through innovative means. He is also the founder of the Strategic Institute for Innovation in Government Contracting.

Other Transaction Contracts: Poorly Understood, Little Used

BY RICHARD L. DUNN

First, the good news. Congress has provided the Defense Department with a cluster of legal authorities to conduct experimentation, research, development, prototyping and production that can lead to the fielding of critical defense capabilities in better, quicker and less expensive ways.

The bad news is that the department is unorganized and uneducated in the use of these authorities. They are unknown or poorly understood by most organizations that could greatly benefit from their effective use. This results in their underutilization and a failure to leverage their full potential.

They are generally referred to as "other transactions," that is, contractual actions that are not standard procurement contracts, grants or cooperative agreements and therefore not subject to procurement or assistance law and regulations. Key authorities include those in sections 2371, 2371b and 2373 of Title 10 United States Code.

Section 2373 permits purchase "by contract or otherwise" of certain essential technologies or supplies without being subject to the Armed Services Procurement Act and its implementing regulations when purchased in quantities no greater than those needed for experimentation, technical evaluation, assessment of operational utility, or to maintain a residual operational capability.

These authorities were widely used in the 1990s and early 2000s within the department for science and technology and prototype projects, ranging from small single company transactions, to research joint ventures and consortia, to the development of major air, ground, naval and space systems. After several years of decline, the Pentagon only recently has seen a partial resurgence in their use as renewed emphasis is put on speed and innovation in fielding new capabilities.

Section 2371 was originally enacted in 1989 and Section 2371b prototype authority in 1993. Like 2371, with which it is closely related, it was originally specific to the Defense Advanced Research Projects Agency but later extended to all of the Defense Department. The origins of Section 2373 go back to the Air Corps Act of 1926. Its scope was expanded several times — most recently and importantly in 2015.

"It may be necessary to establish entirely new offices to execute innovative contracting…"

The intent behind the enactment of Section 2371 was to spur dual-use research and development. The idea was to create an attractive way for companies to do business with the department while retaining the characteristics of innovative commercial companies. This would grant the Pentagon access to cutting edge technology and allow it to take advantage of economies of scale without burdening the companies with government regulatory overhead, which would make them non-competitive in the commercial sector.

Defense firms were also encouraged to participate especially if they sought to adopt commercial practices, diversify into the commercial sector or partner with commercial firms. Given the emphasis on dual-use, joint funding of projects was baselined, if

practicable, but not mandated. Competition in awarding agreements was also baselined but not absolutely mandated. The mode of competition was not specified but could be adapted to whatever technology domain or industry segment was most relevant to a project.

There are other nuances in the statutes that seem challenging to those whose thinking is immersed in a business-as-usual culture, but properly understood do not inhibit broad use of this authority.

Section 2371b states it is "under the authority of" Section 2371. As originally enacted, Section 2371b was exempted from the cost sharing feature of 2371. It was aimed specifically at defense contractors. Both dual-use and defense specific projects were encouraged under Section 2371b. Defense firms could utilize this authority to streamline acquisition processes in a variety of ways.

They could execute projects with unique business arrangements such as structuring government-funded projects under independent research-and-development rules rather than charging fully burdened rates. They could create business segments without defense acquisition overhead to pursue prototype projects or recruit innovative commercial firms as subcontractors without imposing regulatory overhead through the flow down of otherwise mandatory contract clauses.

They could also ignore practices, which while associated with the regulatory system, were actually not mandated by either law or binding regulation.

Section 2373 as originally enacted was an attempt to inject flexibility into the process of acquiring and assessing the utility of aircraft. Additional domains such as ordnance, chemical warfare and others were added over the years. Like the other-transactions statutes, nothing in the section indicates it is a niche authority. However, it has only been utilized in a niche manner in recent years. In the 2016 National Defense Authorization Act, Congress endorsed 2373 by greatly expanding its scope. It is now applicable to many critical defense needs.

It should be noted that there have been a number of amendments to the statutes over the years — some positive and some negative. The conditional requirement for cost sharing in 2371b was a negative but the 2016 amendment that added a simplified method of follow-on production was a big plus.

A few insights may be helpful for those who ask, "Why not business as usual?"

As far back as the Commission on Government Procurement in 1972 the acquisition system was described as a "mass and maze of regulation." A decade later, the Packard Commission asserted that defense systems cost too much and take too long. The department's own study of defense-unique cost drivers shows it pays nearly a 20 percent premium for processes that do not show up as goods or services contributing to defense capabilities. Avoidance of that cost premium applied across the entire acquisition budget would cover the burden of sequestration. Despite numerous reform efforts the situation has not improved but only grown worse over the decades.

After the first other-transactions agreement in April 1990, they were a growth industry. DARPA used them initially for dual-use science and technology projects, then as prototype projects. They then went department-wide, gaining acceptance both by senior leadership and at the execution level. In just a few years hundreds of them obligating billions of dollars were executed.

By the early years of the current century, other transactions still appeared to be thriving but anti-bodies were at work. Resistant to the new way of doing things, officials schooled in and committed to the traditional system had simmered as the other transactions grew and gained acceptance. Other transactions were unencumbered by socio-economic policies and some officials seemed to think driving socio-economic policies was an inherent part of contracting.

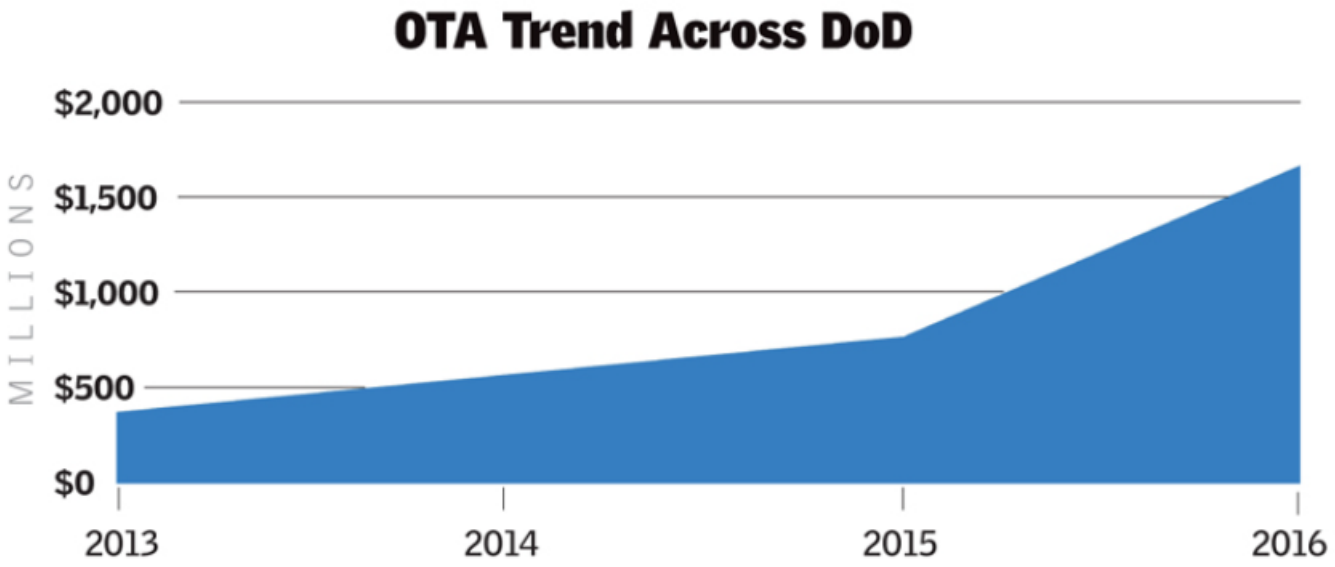
For others, a resistance to learning new things or those "not invented here" might have been the issue. The limited use of cost-reimbursement contracting and emphasis on milestone payments based on achievement seemed heretical to others.

The first setback was an amendment to section 845, currently 2371b, in 2000 that added a requirement for significant involvement of nontraditional companies, which was defined in a narrow and arcane fashion, in projects of one-third private sector cost share. This substantially reduced the attractiveness of other transactions to defense contractors. Moreover, injecting any arbitrary conditions into the statutes is contrary to the spirit and philosophy of their contracting and will ultimately destroy the flexibility and utility associated with their non-regulatory freedom of contract approach.

> "Next in 2005 came trouble with the Army's largest acquisition program, the Future Combat Systems, which was being conducted under an other-transactions agreement."

Next in 2005 came trouble with the Army's largest acquisition program, the Future Combat Systems, which was being conducted under an other-transactions agreement. In hearings before the Senate Armed Service Committee, selected witnesses insinuated the other-transactions agreement was a primary problem as it lacked the "protections" of a traditional government procurement contract.

Their testimony was profoundly misleading and even suggests they had never actually read the agreement. Not only was their testimony a matter of record, but misinformation about the FCS other-transactions agreement contributing to the problems of the program was spread widely through the Defense Department to the delight of the business-as-usual bureaucrats.



SOURCE: FEDERAL PROCUREMENT DATA SYSTEM

Little known is the fact that an Institute for Defense Analyses study found that the other-transactions agreement was a positive factor in the FCS program.

The early phase FCS agreement, when jointly managed by DARPA and the Army, was less than 30 pages. However, when the Army took sole control in later phases the other-transactions agreement ballooned to well in excess of 100 pages, looking almost identical to a procurement contract and contained the so-called "protections" of such an instrument.

Only a few innovative subcontractors had commercial-style agreements without the flow down of mandatory clauses. Interestingly, when a Government Accountability Office witness offered a critique of the FCS program no mention was made of the other-transactions agreement as contributing to program's problems.

The fact that the FCS other-transactions agreement had been criticized and that the program was later reorganized as a procurement contract resulted in much uninformed commentary on the role of the agreement in the FCS program. It was widely believed in parts of the procurement community that something was wrong with other transactions and they should not be used for large programs or perhaps not used at all. The policy leader for prototype other transactions, the director of the office of procurement and acquisition policy, propagated the misinformation rather than correcting it — including in a conversation with the author.

The pall of misinformation seemed to affect some government agreement officers, administrators and lawyers that were involved in other-transactions agreements. New processes were added, delays, renewal of discussion on issues long decided and other impedimenta arose in what had been satisfactory relationships.

There have been numerous studies of other transactions over the years. They have been almost universally positive in finding that a number of benefits flow from their use with few disadvantages.

One drawback noted in the most disciplined study by the Logistic Management Institute in 2007 has been inadequate training of personnel involved in executing such projects. As already noted, other transactions have critics. In addition to those mentioned, the Defense Department inspector general has made skeptical comments in a number of reports. In general the gist of these comments are that other transactions are not business as usual and the traditional system "has served us well." The inspector general fails to note the cost premium and opportunity costs associated with the traditional system.

While the 2000 amendment and misinformation related to the 2005 Future Combat Systems hearing were seminal events, other developments adversely impacted other transactions. Highly successful programs like the Dual-Use Applications Program and Commercial Operations and Support Savings Initiative, which had highlighted the advantages of other transactions, were allowed to fade away when they transferred from central management under the office of the secretary of

defense to the military services where they became victims of other budget priorities.

After years in the doldrums, obligations under these authorities have seen a slight rise recently but remain a miniscule fraction of the Pentagon's R&D budget, much less its total acquisition budget. A residual pocket of other-transactions expertise is maintained at DARPA and a few other contracting offices. They have been used by some offices primarily to form consortia. A single contracting office currently is responsible for the vast majority of other-transactions agreements and obligations. In many instances, however, process-oriented regulatory thinking has found its way into projects where it is unnecessary and counterproductive.

It is certainly possible to revitalize the use of the key innovative contracting authorities within the Defense Department. The essential ingredients include personnel who are willing and want to accomplish mission goals and are unafraid to step outside business as usual to do so. Program managers, contracting personnel, fiscal experts and lawyers need to be equipped with the knowledge that enables them to make maximum use of business judgment and common sense; and envision ways of doing things that have seldom or never been done before.

It may be necessary to establish entirely new offices to execute innovative contracting in order to insulate practitioners from business-as-usual thinking. Selecting good personnel and educating them will not work in the long run absent positive leadership from the top, from intermediate levels and at the working level. Leaders themselves need to be educated on what might be possible, using other transactions and other available authorities. Nothing short of culture change is required.

Many elements of the department thrive on standardization. However, in the world of innovative contracting standardization of policies, procedures, prescriptive guidance, forms, templates and the like can do more harm than good. Education rather than regulation should be the by-word. Other transactions allow freedom of contract and freedom to think. Current Defense Department guidance on other transactions pay lip service to use of common sense and business judgment, but revert to prescriptive concepts or terminology in areas where flexibility and judgment should be used. Revised guidance is needed.

The term "culture change" has been mentioned. Most of the emphasis has been on contracting in a narrow sense but use of flexible and innovative contracting approaches will affect what might be deemed possible — perceived needs or requirements — as well as how projects are managed. Currently few program managers are rewarded for "failing early," but failing early and changing course are inherent in getting the best results when cutting edge technologies are being investigated and deployed. Thus the culture change involves more than just the technique of contracting.

The resistance to widespread adoption of innovative contracting methods has been so intransigent in recent years that leadership from the very top is needed to get defense acquisition on track. The department is poorly positioned to execute using the authorities Congress has provided. Expertise has atrophied through attrition of knowledgeable personnel, lack of use and generally uninspired employment when it has taken place. The mandate for improvement must be clear.

The president of the United States should challenge Defense Department leadership to create the environment for quantifiable improvement in defense acquisition practices. Congress should create a fiscal environment that permits flexibility in program execution as well as further improve and simplify flexible contracting laws.

The secretary of defense should issue new guidance on innovative contracting and consider the creation of an organization responsible for promoting innovation within the department.

The military departments and selected defense agencies and components should be directed to take the following actions:

- Designate a lead contracting activity to become fully capable of using alternative contracting authorities in an effective manner and acting as a lead center for alternative contracting;
- Conduct a review of policy guidance at all levels, including delegations of authority, to identify impediments to effective use of alternative contracting authorities;
- Plan and implement training at all contracting activities with the potential to use alternative contracting authorities;
- Encourage the flexible and innovative implementation of these authorities, rather than prescribing exact use; and
- Request any delegation of authority needed to implement the innovative contracting authorities if not previously granted.

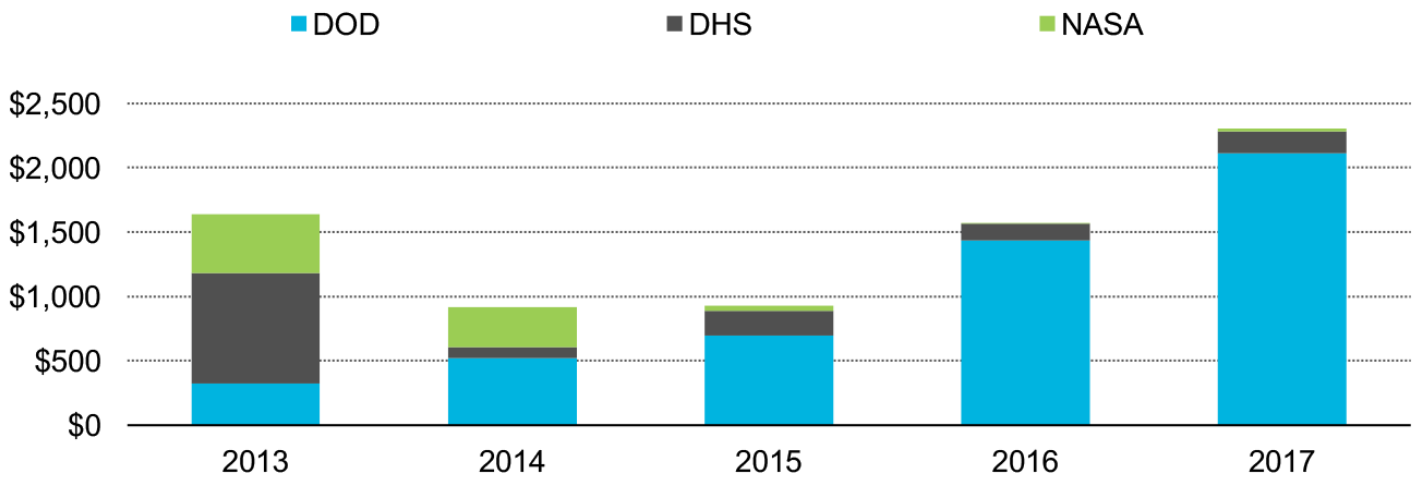
> "The president of the United States should challenge Defense Department leadership to create the environment for quantifiable improvement in defense acquisition practices."

The prospect for substantial improvements in defense acquisition awaits the leadership and commitment to exploit the untapped potential of other transactions. These types of authorities that permit innovations in contracting and business arrangements can lead to rethinking on a range of related issues. They can be a catalyst for critical changes and innovation throughout the Defense Department. ND

Richard L. Dunn is an independent consultant providing advice on the implementation of technology in the military and civil sectors through innovative means. He is also the founder of the Strategic Institute for Innovation in Government Contracting. A longer version of this article can be found at: http://www.strategicinstitute.org/

DOD Driving Increase in OTA Contracting

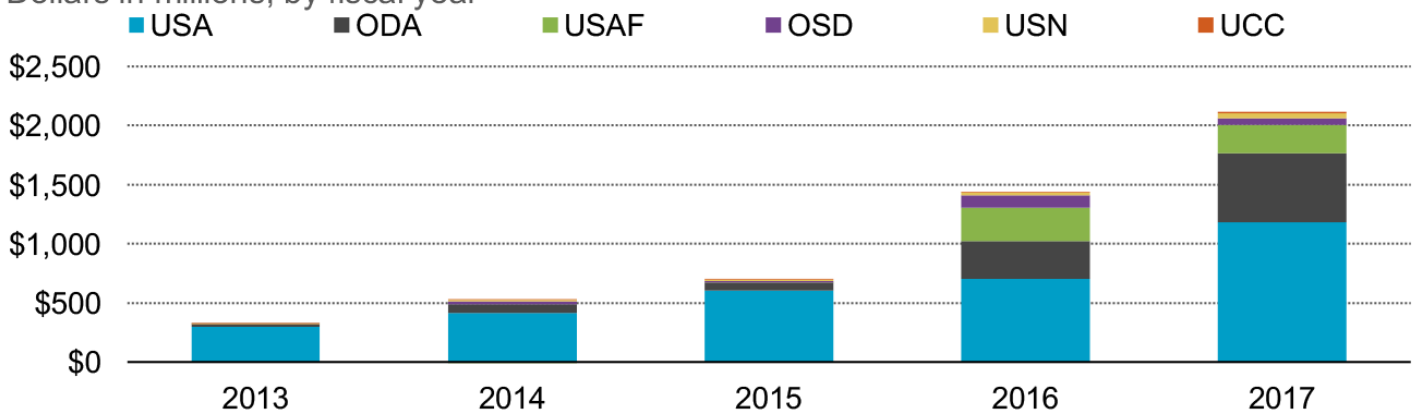
Dollars in millions, by fiscal year



Notes: DOD – Department of Defense, DHS –Department of Homeland Security, NASA – National Aeronautics and Space Administration
Source: Bloomberg Government

OTA Use in Last Five Fiscal Years

Dollars in millions, by fiscal year



Notes: USA - Department of the Army, ODA - Other Defense Agencies, USAF - Department of the Air Force, OSD - Office of the Secretary of Defense, USN - Department of the Navy, UCC - Unified Combatant Commands, DARPA – Defense Advanced Research Projects Agency, DTRA – Defense Threat Reduction Agency, WHS – Washington Headquarters Services.
Source: Bloomberg Government

The Magic of Other Transaction Authority

BY STEW MAGNUSON

Space and Missile Systems Center's Maj. Steven Pugh arrived at an industry conference held at the National Geospatial-Intelligence Agency recently to talk about the big pot of money he has to spend — $100 million over the next five years to be precise — on anything that could help the Air Force improve its spacecraft, launch or ground systems.

And the best thing about it is that contractors, academics, or whoever comes forth to compete for this money can ignore the Federal Acquisition Regulation, the dreaded FAR, and do an end run around its notorious red tape.

Those with good ideas can take the Air Force money — as long as there is a one-third cost share — and build prototypes without having to use Defense Department-approved accounting standards, adhere to the new cybersecurity rules, or comply with innumerable edicts that add to overhead.

This is all made possible by a once out-of-fashion contracting vehicle known as the "other transaction authority," or OTA. The OTA has been around for decades. It was intended to allow nontraditional contractors or small businesses to build prototypes for the Defense Department, NASA and other agencies.

As Richard L. Dunn, an authority on OTAs, wrote in the June 2017 issue of *National Defense*, they were popular back in the 1990s, but fell out of favor.

"After several years of decline, the Pentagon only recently has seen a partial resurgence in their use as renewed emphasis is put on speed and innovation in fielding new capabilities," he wrote in the article, "Other Transactions Contracts: Poorly Understood, Little Used."

But in less than a year, that partial resurgence has turned into a full resurgence.

"What has changed is that the transition mechanism provided in 10 USC 2371b (f), added by the 2016 NDAA, provides a greatly simplified way of transitioning the contracting. The follow-on production effort after a successful prototype OT can be executed as a production OT or awarded as a non-competitive procurement contract," Dunn said more recently.

In other words, the addendum to the law allowed a bridge over the so-called Valley of Death, where prototypes or other new technologies don't make the transition from the workbench to real products used by the military.

"It's exciting that we can make things that last — that become programs of record," Pugh said.

The Space and Missile Systems Center is doing all this through a consortium. It communicates its requirements through the consortium's administrator, who goes out and looks for possible candidates.

The Air Force Research Laboratory has kicked off a similar effort using SOSSEC — The System of Systems Consortium — to administer some $99 million in other transaction authority contracts through 2021 for its battlefield management systems.

Pugh said the space consortium was kicked off in December and by January had 115 members. It released its first two requirements at the beginning of the year and expected its first contract awards in March.

Maj. Gen. John George, director for force development, Army G-8, recently gushed in front of reporters about the newfound authority the 2016 NDAA gave him.

For a decade, the Army said it needed a robotic mule to help troops lighten their loads. It worked on all the requirement documents, put contractors' prototypes through the paces in multiple field tests, and at one point sent a few of the robots to war in Afghanistan, where they reportedly performed well. Still, like most Army programs of late, the idea was going nowhere fast.

Now, using the magical OTA, the Army is running a competition and expects to award a contract for up to 5,700 squad mission support vehicles by next year.

"That is the beauty of the new OTA process. If you have a competition though OTA, you can go to procurement and turn it into a program of record," George said.

> "Traditional defense contractors are reportedly not excited about the OTA trend."

The joint program executive office for chemical and biological defense is also using an OTA to speed development of medical countermeasures.

One gray area that is helping spread the use of OTAs is that there is no statutory definition for the word "prototype," Pugh said. It may be software. It may be an existing product, but used in a new way or a new environment such as space. It could be a concept or a new process.

The squishy definition for prototype may have factored into the controversial $950 million award to a nontraditional contractor to provide cloud-based services to U.S. Transportation Command.

REAN Cloud, a partner with Amazon Web Services, won the massive award through an OTA contract. It first won a $2.5 million proof of concept contract in May 2017 by submitting only a five-page white paper, according to NextGov. In February, it won the nearly $1 billion contract, much to the chagrin of its competitors, who are vying for an even larger cloud contract. The outcry caused Pentagon officials to scale back the award to $65 million.

As this award illustrates, traditional defense contractors are reportedly not excited about the OTA trend.

Pugh noted that there is a role for them. First, many of these nontraditional contractors don't have security clearances, and there is no easy way around that. They also don't have much experience with transitioning to programs of record. They can partner with big primes to help them in both cases.

There are entrenched interests opposing the contracting vehicle. However, if OTA agreements can ultimately put the best technology in the hands of warfighters quicker, then they should be allowed to work their magic. ND

OTA: Preserving the Authority

BY HAWK CARLISLE

Other Transaction Authority is the latest buzzword in federal contracting, and for good reason.

It has become critical to rapid prototyping in the defense realm, in some cases cutting off years from the time warfighters wait for new systems and capabilities.

OTA agreements are a business tool that let the government buy products and services using means other than those governed by the Federal Acquisition Regulations. These authorities, initially conceived by NASA in the 1950s and later expanded to the Defense Department in 1994, have recently surged in use and popularity -- and praise. However, they also elicit a fair amount of criticism and debate about their future.

Fairness during the award process, soundness of proposals and lack of public information throughout the course of the award are among issues detractors highlight on OTAs. If their supporters want to preserve this acquisition instrument, they must address these concerns.

They're not small concerns.

Various OTA forms now constitute a class of contract vehicles important to procuring cutting-edge technologies necessary to fill gaps in mission effectiveness across the services. They have been important in allowing the Defense Department to develop new solutions at an often-quicker rate than traditional systems.

OTAs not only help to accelerate innovation, they also help expand the defense industrial base by engaging small business innovators, Silicon Valley startups and other non-traditional defense suppliers. These advantages make OTAs important in the acquisition toolbox.

Over the past two decades, the Defense Department's use of OTAs has grown exponentially. From 2013 to 2017 alone, procurements through OTAs increased in value from less than $500 million to more than $2 billion.

But the Defense Department has not issued guidelines for their use, so each service uses the authorities differently. In 2017, the Army accounted for more than half of OTA dollars spent while the Navy accounted for less than 5 percent. The non-uniform deployment of OTAs is evidence of their adaptability to defense agencies' acquisition needs and strategies.

But as OTAs continue to grow as a percentage of defense contract dollars, they are not a replacement for the traditional acquisition process. Using them as such would not only demonstrate a fundamental misunderstanding of their purpose but also endanger their existence.

Traditional acquisitions based on FAR have provided our armed services with the most lethal and effective tools deployed on the battlefield. Ongoing efforts at reforming federal acquisition regulations continually seek to accelerate and improve government's ability to purchase the goods and services for our warfighters. Stakeholders in government and industry alike have deep experience in this system, and many acquisition programs are best suited to use it.

Presenting OTAs as a wholesale replacement, not a complement to this system, will both create unintended consequences and a potential backlash that could minimize or eliminate them altogether.

Issues of fairness, transparency and predictability have already emboldened OTAs' naysayers. In a recent challenge to a high-value award by the Army Contracting Command, Oracle America successfully argued to the Government Accountability Office that a follow-on OTA was made without adequate notice, competition or consideration.

Setting important precedent, GAO's ruling should be a wake-up call to those who support the continued use of these authorities. The case raised important questions of how OTA awards are perceived and confirmed the high level of responsibility expected from those presiding over the awards and the recipients.

Charlie McBride, president of the Consortium Management Group, recalled at a recent NDIA event the admonition of a senior Army acquisition official: OTA is a gift from the Congress to the warfighter, and our job is not to screw it up with stupid human tricks.

This is a tool that represents progress in the pursuit of greater flexibility and innovation in the acquisition system. Its continued existence is vital to our battlefield superiority. It's up to OTA proponents to guard against its misuse. ND

Other Transaction Authority: Big Rewards, Risks

BY ANGELA STYLES

For decades, the Department of Defense has struggled to keep pace with modern technology. As legacy infrastructure falls further behind and puts our warfighters at greater risk every day, the Pentagon's unwieldy and inefficient procurement system bears a proportional share of the blame.

Recognizing the department's urgent need to access modern solutions, Congress ditched the federal procurement system and opened billions of dollars in production contracts to an obscure statutory mechanism called "Other Transaction Authority."

Unlike Federal Acquisition Regulation-based contracts, OTA agreements have limited constraints — no certifications, no cyber requirements, no termination for convenience, no Truth in Negotiations Act requirements, no cost accounting standards and no intellectual property clauses.

Recognizing the ease and potential benefit, the Defense Department's use of other transaction authority has increased 100-fold, attracting both traditional and nontraditional contractors to the table. These agreements will be used for billions of dollars in purchases as fiscal 2018 closes and 2019 begins.

However, many risks loom.

Companies signing OTAs, participating in OTA consortiums or subcontracting on OTAs, should keep compliance and ethics top of mind to protect against problems that run the spectrum from fraud to loss of intellectual property.

There are requirements for competition. Other transaction authorities have traditionally been restricted to research and development or prototyping, but new statutory authority allows the department to use them for follow-on production. Critically important, follow-on production OTAs can only be used if the original one for a prototype: stated that a follow-on production contract could result, used "competitive procedures" for the selection of participants and was successfully completed.

Earlier this year, the Pentagon stumbled into problems by attempting to award a $1 billion follow-on production OTA to REAN Contracting for cloud migration and operations services. With a protest filed at the Government Accountability Office, Oracle America Inc. successfully overturned the award. According to GAO, the Defense Department failed to state in the original REAN prototype OTA that a follow-on production contract was contemplated and REAN had not yet successfully completed the prototype work.

Keep in mind that fraud is still fraud. Rumors abound that "fake" competitions occur with the OTA winner already selected before the "competition" occurs. If these rumors are true, don't be a willing participant. With billions of federal dollars at stake, oversight authorities will be watching. Make sure the company's ethical compass and compliance programs are in the right place and employees are well versed in the proper use of federal dollars.

Protect your intellectual property. Don't let the Defense Department, another company or a consortium lead take more of the company's IP than is absolutely necessary to perform the OTA. There are no statutory requirements for the department, a prime or a consortium lead to take intellectual property in these agreements.

Ensure the company's lawyers review each OTA-related agreement and treat it like the company would treat any other commercial agreement. Enhanced IP protection is the most significant benefit of OTAs, so make sure to use it.

Be aware that there is no process under an OTA for resolving disputes. Realize that if something goes wrong, there will be little recourse against the federal government. While the Defense Department won't be able to indemnify the company for losses, make sure the company's potential losses and liability are limited in the agreement.

Additionally, many other transaction authority agreements require cost sharing, but there aren't rules for how participants should account for costs. If the company doesn't already have a compliant cost accounting system, think about establishing one. At the very least, ensure the company accounts for its share and that the accounting is consistent, fair and supportable should the cost share be questioned.

Be on the lookout for OTAs that require accounting for costs in accordance with Federal Acquisition Regulation cost allowability rules or cost accounting standards. If the company's accounting or contracting system does not comply with these rules, don't accept those terms.

> "Remember that OTAs do not remove requirements to comply with other laws."

When participating in an OTA through a consortium or as a subcontractor, remember the sub-agreement is a commercial contract, just like a contract with any other commercial entity. There are usually no required flowdowns unless the consortium or the prime has agreed to them. Be sure the company knows how the consortium lead and/or the prime contractor is set up to interact with the Defense Department. Ask for a copy of the OTA and be sure the company knows how the consortium lead is accounting for costs, cost shares and intellectual property.

Remember that OTAs do not remove requirements to comply with other laws. Export laws must be followed, and all the gift and gratuity rules still apply when socializing with government officials.

By keeping these key principles in mind and ensuring the company has a process to review OTAs, a robust compliance program and a strong ethics foundation, traditional and nontraditional contractors should take advantage of an easier and more efficient mechanism to provide products and services to the Defense Department. ND

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Accelerating Delivery of Technologies to the Warfighter

CMG is a leader in the use of Other Transaction Agreements (OTAs), offering the Government access to cutting-edge technologies using a rapid, efficient and collaborative acquisition process.

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