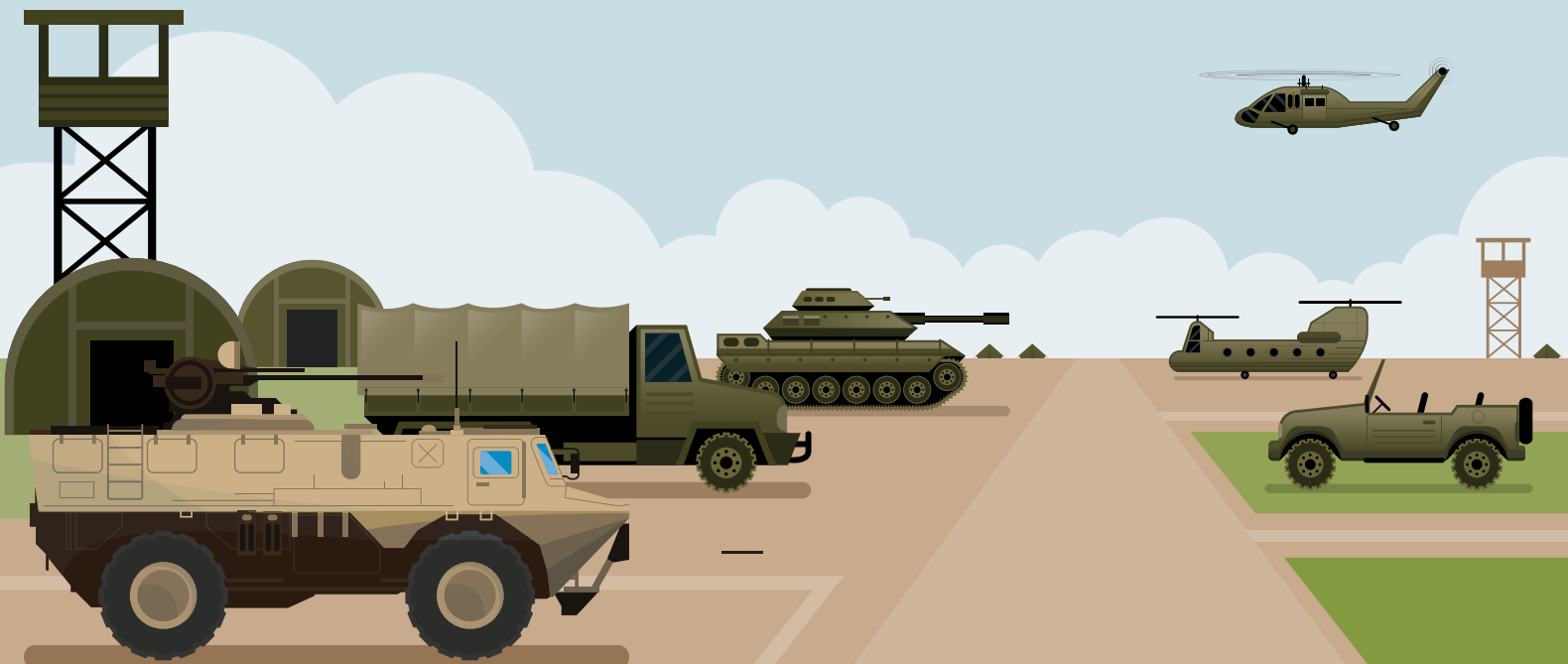


# OTHER TRANSACTION AUTHORITY:

## Acquisition Innovation for Mission-Critical Force Readiness

By John Dobriansky and Dr. Patrick O'Farrell

IN JULY 1958, President Eisenhower signed legislation that created NASA,<sup>1</sup> and with this landmark law, agreements *other than* procurement contracts, grants, or cooperative agreements—a.k.a., “other transaction agreements” (OTAs)—were born.



It may surprise you to learn that “other transaction (OT) authority” is nothing new—as of this month, NASA has been utilizing OTAs for the past 60 years.<sup>2</sup> However, with the passage of Section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year 2016,<sup>3</sup> Congress amended the OT authority of the Department of Defense (DOD) for prototype projects, which has now been permanently codified at Title 10, Section 2371b, of the U.S. Code.<sup>4</sup> With this new authority, as well as the concurrent, increasing frequency of their usage, OTAs have now been thrust back into the limelight.

Today’s DOD seems to be at the same crossroads as the U.S. Space Exploration Program was in 1957—when the Soviets successfully launched *Sputnik 1*, laid bare the United States’ misconceptions of its technological superiority, and resulted in the passage of the Space Act<sup>5</sup> a year later to bridge the gap. Today, like back then, there is a pressing need to maintain U.S. technological superiority, as well as military readiness, and find smart, quick, commercial/nondevelopmental solutions to:

- Advance DOD weapon systems;
- Ensure the cybersecurity of U.S. IT systems, weapon systems, and networks; and
- Address issues early within the acquisition process and thoughtfully integrate with systems engineering, test and evaluation, and other acquisition processes throughout DOD systems’ life cycles.

The need to field technology and innovation to our Armed Forces ahead of the technology fielding rate of our adversaries is essential to create battlefield advantages. This need drives DOD to look to all that is available in the marketplace for rapid acquisition that is quick and can be accomplished without encumbrance.

## OTA Defined

No statutes or regulations specifically define the term *other transaction agreement*; however, suffice it to say that OTAs are legally binding agreements utilizing



President Eisenhower commissions Dr. T. Keith Glennan (r) as the first administrator for NASA and Dr. Hugh L. Dryden (l) as deputy administrator. The National Aeronautics and Space Act (*Pub. L. 85-568*), the U.S. federal statute that created NASA, was signed on July 29, 1958. Image credit: NASA.

statutory authorities that permit federal agencies to enter into transactions *other than* procurement contracts, grants, or cooperative agreements. As such, they are not subject to the federal laws and regulations governing procurement contracts—meaning they are not required to comply with the *Federal Acquisition Regulation (FAR)*, its supplements, or most laws that apply to procurement contracts.<sup>6</sup>

As the name implies, OTAs govern “other transactions” (OTs)—a term that is also not specifically defined by statute or regulation, but which generally refers to the business arrangements carried out under an OTA vehicle. OTAs are legal instruments for prototype projects that create a legally binding agreement between the authorized government entity and the participant(s) of the transaction.<sup>7</sup> Authorization to enter into OTAs is specifically granted for advancing research and development (R&D) and obtaining prototypes.

OTAs specifically target *nontraditional defense contractors*—defined as:

[A]n 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 DOD that is subject to full coverage under the Cost Accounting Standards [(CAS)] prescribed pursuant to 41 USC §1502 and the regulations implementing such section.<sup>8</sup>

It is in DOD’s interest to tap into the R&D being accomplished by nontraditional

FIGURE 1.

### Why Use OTAs?

- The federal government needed another method to further the U.S. mission of creating and promoting new technologies, especially from “nontraditional” sources.
- OTAs were created as a method of reaching nontraditional defense contractors that cannot or do not want to do business with the federal government.

FIGURE 2.

### When to Use OTAs

There are Two Types of OTAs:

- Research and Development, and
- Prototypes

OTAs are not suited for advisory and assistance services, engineering services, training alone, or maintenance.

defense contractors, and to pursue commercial solutions to defense requirements.<sup>9</sup>

### OTAs in Action

OTAs can be used by any DOD services—Army, Navy, and Air Force<sup>10</sup>—up to \$250 million before requiring review by the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.<sup>11</sup> Today's global threat environment demands that the U.S. Armed Forces have an extremely high state of readiness, and the traditional FAR Part 15-based competitions for major weapon systems, platforms, and services—with procurement administrative lead times counted in years—are boosting the popularity of OTAs.

The successful application of OT authority provides for the quick development and acquisition of solutions for force readiness—i.e., R&D, prototype development, and transition through initial production. One strong example of the successful use of OT authority is the development of the Mine-Resistant Ambush Protected (MRAP) vehicle. In the early years of the Iraq and Afghanistan campaigns, the U.S. Army suffered numerous losses caused by improvised explosive devices (IEDs). At that time, standard Army ground troop transport vehicles—including Humvees and Bradley vehicles, originally designed and armored to protect soldiers from direct assault by enemy munitions—were not designed to protect against IED damage. This threat demanded quick and innovative solutions. The development and fielding of the MRAP—from R&D into production—only took 90 days, versus the typical 18- to

24-month FAR/Defense FAR Supplement (DFARS) acquisition life cycle, thus saving thousands of U.S. soldiers lives from the ravages of IEDs. The threat was urgent; the solution could not wait.

Another example is DOD's award of a complex \$950 million (ceiling) OTA agreement to nontraditional defense contractor REAN for IT production services moving to the cloud. The production award was preceded by prototype development, testing, and evaluation into production. The OTA award was accomplished in 60% of the time it would have taken using traditional FAR/DFARS-based acquisition methodologies.<sup>12</sup>

A third example might be the current use of an OTA in the Fixed-Wing Utility Aircraft (FUA) Program, where U.S. Army Contracting Command, Redstone Arsenal (ACC-Redstone), in concert with the contracting professionals in Picatinny, New Jersey, have mapped out a way forward to solicit for prototypes of commercial off-the-shelf aircraft with military modifications and then select through the evaluation of a fly off. ACC-Redstone is one of the select centers of excellence in the application of OT authority, and has thoroughly investigated

the statutory history and NDAs that have expanded the use of OTAs and best practices in the use of OTAs to achieve force readiness and mission success.

### Conclusion

The recent saber-rattling of rogue states or other new or old threats posed by adversaries abroad may demand a quick solution to maintain the highest levels of readiness needed for the U.S. Armed Forces. OT authority is another tool in the contracting officer's toolkit to meet the demands that might come from the credible threats.

Further, OTAs also reduce impediments to entry into the defense market by commercial firms and nontraditional defense contractors. For example, several appealing aspects of OTAs that may prove to be of great advantage to both nonfederal entities and the U.S. government include:

- No "Changes" clause,
- No disputes/claims,
- No terminations for default or convenience,
- No mandatory accounting systems,

FIGURE 3.

### The OTA Process at ACC-Redstone


- ACC-Redstone uses an existing OTA with a consortium of companies, universities, and nonprofits.
- The ACC is a Center of Excellence for OTA Strategic Planning and Tactical Execution.
- The goal is to develop a new OTA with a wide scope of work and a large dollar value for engagement (expected to be in place by July 2018).
- More informal requests for proposals (RFPs) are provided to members of the consortium for R&D and prototype needs (this takes less time than traditional FAR-based RFPs).
- Proposals are received and evaluated by the procurement executive officers and requiring activities.
- Multiple OTA agreements can be made with consortium and nonconsortium companies for prototype developments.
- A fly-off between the competing company prototypes can be conducted.
- A winner can be picked.
- The OTA agreement award to the winner will count toward the U.S. Army's competition goals.



- No requirements to be CAS-compliant,
- No audit requirements,
- Advance payments are allowed, and
- No requirements to flow down FAR clauses/provisions to subcontractors.

However, OT authority is not a one-size-fits-all approach to all DOD acquisitions. There are some limitations where the requirements package and acquisition strategy must be structured properly so OTAs may be used legally and effectively.

That being said, there are many benefits. For example:

- OTAs can facilitate rapid acquisition and deployment of complex, leading-edge technology;
- Effectively used OTAs can cut major systems acquisition life cycle times by 40%, and beat our adversaries system deployment timelines;
- OTAs give both the U.S. government and industry relief from barriers to entry, as well as other restrictions, of the FAR, DFARS, and other supplemental regulations; and
- OTAs offer the opportunity to use best practices and create speed to award. 

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## ENDNOTES

1. I.e., the National Aeronautics and Space Act of 1958 (Pub. L. 85-568, 72 Stat. 426-2; codified at 51 USC 20101, et seq.) (hereinafter, the "Space Act").
2. NASA refers to these arrangements as "Space Act Agreements" (SAAs), which utilize the authority granted to NASA under the Space Act, signed into law in July 1958 (see *ibid.*). (Note: the acronym "OTA" is often used interchangeably to abbreviate both "other transaction authority" and "other transaction agreement." To avoid confusion, this article abbreviates "other transaction agreement" as "OTA" and "other transaction authority" as "OT authority.")
3. Pub. L. 114-92.
4. Previously, DOD was only granted temporary OT authority (by Section 845 of the 1994 NDAA (Pub. L. 103-160, as amended)), but Section 2371b permanently replaced and modified this authority. (U.S. Department of Defense (DOD), "Other Transactions Guide for Prototype Projects," Version 1.2.0 (Washington, DC: DOD, January 2017) (hereinafter, "OT Guide").)
5. See note 1.
6. "OT Guide," *op. cit.*, at i.
7. *Ibid.*
8. 10 USC 2302(9).
9. "OT Guide," see note 4, at 3.
10. Authorized by 10 USC 2371b(a)(2)(A).
11. OTAs with a cost (including options) over \$250 million must be reviewed and approved by the Under Secretary of Defense (Acquisition, Technology, and Logistics) (as per 10 USC 2371b(a)(2)(B)(1)).
12. It should be noted that on May 31, 2018, the Government Accountability Office (GAO) sustained a protest filed by Oracle America Inc. concerning this OTA. Oracle argued that the Army did not properly exercise its OT authority to enter into this type of OTA, and GAO agreed—recommending that the Army terminate the OTA and either use competitive procurement procedures in accordance with statutory and regulatory requirements, prepare the appropriate justification required by the Competition in Contracting Act to award a contract without competition, or review its OT authority to determine whether it is possible to comply with the statutory preconditions for entering into this type of OTA. As of this writing, the Army has yet to terminate this OTA.

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In November 2007, the first shipments of MRAP vehicles arrived at Camp Liberty in western Baghdad. (U.S. Army photo by Sgt. Mark B. Matthews, 27th Public Affairs Detachment.)