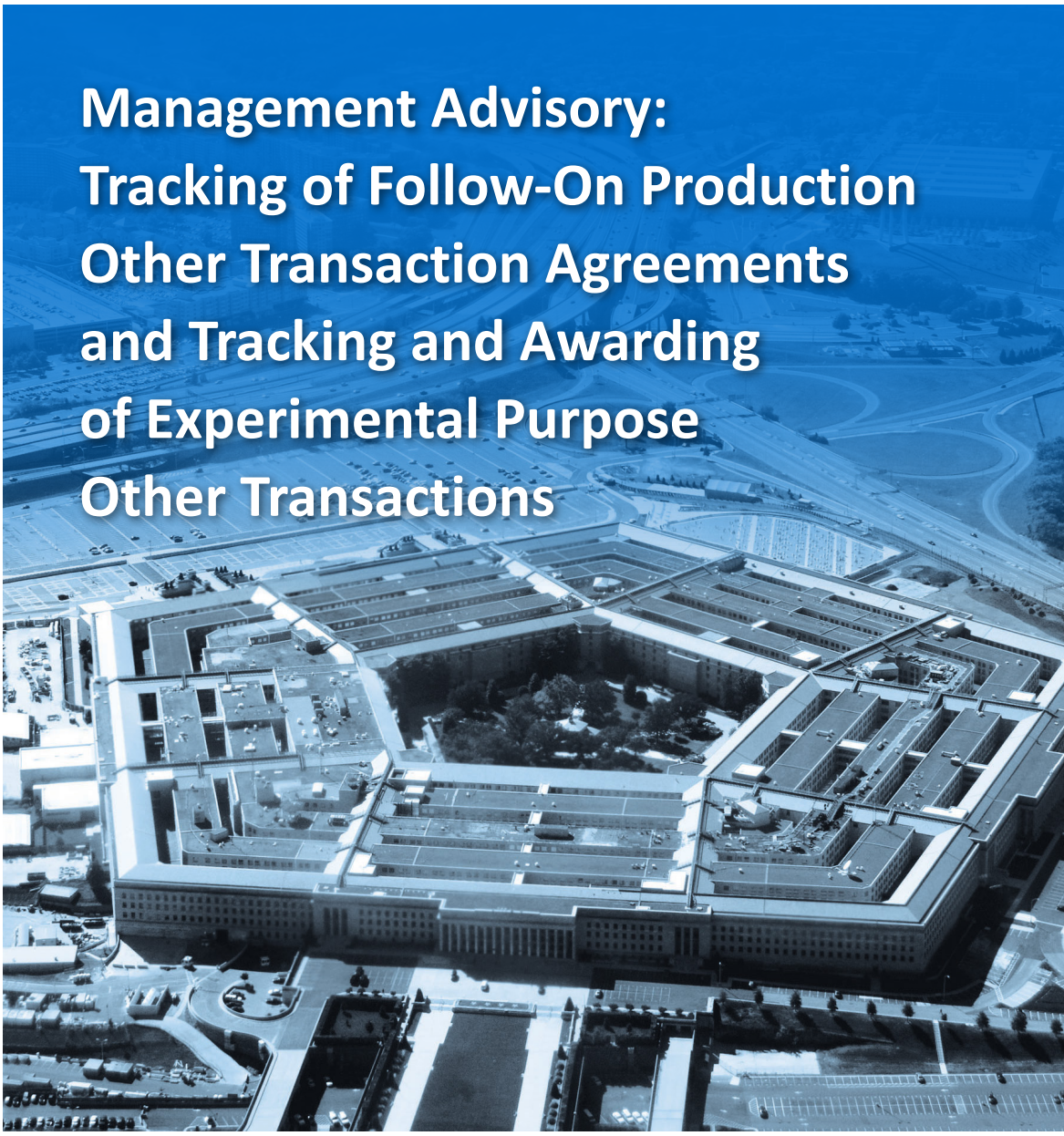
Report No. DODIG-2022-094

INSPECTOR GENERAL

U.S. Department of Defense

MAY 11, 2022

Management Advisory: Tracking of Follow-On Production Other Transaction Agreements and Tracking and Awarding of Experimental Purpose Other Transactions



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May 11, 2022

MEMORANDUM FOR PRINCIPAL DIRECTOR, DEFENSE PRICING AND CONTRACTING

SUBJECT: Management Advisory: Tracking of Follow-On Production Other Transaction Agreements and Tracking and Awarding of Experimental Purpose Other Transactions (Report No. DODIG-2022-094)

The purpose of this management advisory is to inform DoD leadership of the lack of policies and procedures for tracking Other Transaction (OT) agreements for follow-on production of a successful prototype, and for tracking and awarding OTs under section 2373, title 10, United States Code (U.S.C.), "Procurement for Experimental Purposes." We identified the lack of policy and procedures during our "Audit of DoD Other Transactions and the Use of Non-Traditional Contractors" (Project No. D2021-D000AX-0111.000). We conducted this project with integrity, objectivity, and independence, as required by the Council of the Inspectors General on Integrity and Efficiency's Quality Standards for Federal Offices of Inspector General.

We provided a draft copy of this advisory to the Principal Director, Defense Pricing and Contracting and requested written comments on the findings and recommendations. We considered the Principal Director's comments on the draft management advisory when preparing the final management advisory.

This management advisory contains one recommendation that is considered unresolved because the Principal Director did not fully address the recommendation. Therefore, as discussed in the Recommendations, Management Comments, and Our Response section of this advisory, the recommendation will remain unresolved until an agreement is reached on the actions to be taken to address the recommendation. Once an agreement is reached, the recommendation will be considered resolved, but open until documentation is submitted showing that the agreed-upon actions are complete. Once we verify that the actions are complete, we will close the recommendation.

This management advisory contains one recommendation that is considered resolved. Therefore as discussed in the Recommendations, Management Comments, and Our Response section of this advisory, the recommendation will remain open until documentation is submitted showing that the agreed-upon actions are complete. Once we verify that the actions are complete, we will close the recommendation.

DoD Instruction 7650.03 requires that recommendations be resolved promptly. For the unresolved recommendation, please provide us within 30 days your response concerning specific actions in process or alternative corrective actions proposed on the recommendation. For the resolved recommendation, please provide us within 90 days documentation showing that the agreed-upon action is complete. We appreciate the cooperation and assistance received during this project. Please direct questions to me at [redacted].

Timothy Wimette
Deputy Assistant Inspector General for Audit
Acquisition, Contracting, and Sustainment

Lack of Policies and Procedures for Follow-on Production and Experimental Purpose OTs

We identified the issues presented in this management advisory during our "Audit of DoD Other Transactions and the Use of Non-Traditional Contractors" (Project No. D2021-D000AX-0111.000), announced March 25, 2021. The objective of the audit is to determine whether DoD contracting officials used non-traditional contractors, a traditional contractor teaming with a non-traditional contractor to a significant extent, or resource sharing when awarding OTs in accordance with applicable Federal laws and DoD policies. Because the issues identified in this memorandum are outside the scope of our audit, they will not be included in the audit report. The issues identified relate to the lack of policies and procedures for tracking OT agreements for follow-on production of a successful prototype, and for tracking and awarding OTs under section 2373, title 10, U.S.C., "Procurement for Experimental Purposes."[1] The lack of policies and procedures resulted in Congress receiving inaccurate information regarding the number of prototype OTs. It also resulted in DoD officials and Congress having limited information regarding what technological advancements the OTs are being used for and the costs associated with those OTs.

Background

The Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD[A&S]) "Other Transactions Guide," November 2018, provides advice and lessons learned on the planning, publicizing, soliciting, evaluating, negotiating, awarding, and administering of OT agreements. The OUSD(A&S) OT Guide included three types of OTs: research, prototype, and follow-on production. Our audit focuses on prototype OTs. Prototype OTs are authorized under 10 U.S.C. § 2371b, "Authority of the Department of Defense to carry out certain prototype projects," to acquire prototype capabilities, and can transition into follow-on production OTs or contracts after the successful completion of a prototype OT.[2] If the prototype OT agreement is a competitive award, agreement personnel do not need to recompete the follow-on production award.[3]

Agreement personnel are also awarding OTs under 10 U.S.C. § 2373 for experimental purposes. Section 2373, title 10, United States Code states that the Secretary of Defense and the Secretaries of the Military Departments may each purchase ordnance, signal, chemical activity, transportation, energy, medical, space-flight, and aeronautical supplies, including parts and accessories, and designs thereof, that they consider necessary for experimental or test purposes in the development of the supplies that are needed for the national defense. The statute does

[1] Public Law 116-283, William M. Thornberry National Defense Authorization Act for FY 2021, issued January 1, 2021, renumbered 10 U.S.C. § 2373 to 10 U.S.C. § 4004.

[2] Public Law 117-81, National Defense Authorization Act for FY 2022, issued December 27, 2021, renumbered 10 U.S.C. § 2371b to 10 U.S.C. § 4022.

[3] Agreement personnel can include Project Managers, Agreements Officers (AOs), Agreements Specialists, Systems Engineers, Small Business representatives, and Legal Counsel.

not specifically discuss the use of OTs under this authority, but does state that purchases under this authority may be made inside or outside the United States, by contract or otherwise. While personnel are awarding OTs in accordance with 10 U.S.C. § 2373, the OUSD(A&S) OT Guide only includes research, prototype, and follow-on production OTs and does not include OTs awarded under 10 U.S.C. § 2373 for experimental purposes.

Public Law 115-232, "John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019," requires the Service Acquisition Executives of the Military Departments to collect data on the use of OTs by their respective departments. Senior procurement executives, directors, and relevant commanding officers are responsible for ensuring data reported in response to Public Law 115-232 is accurate. The Office of the Secretary of Defense requires personnel to track OTs in the Federal Procurement Data System-Next Generation (FPDS-NG).[4] The OUSD(A&S) OT Guide states that agreement personnel must report prototype OTs in FPDS-NG with the ninth position of the award number as a "9," but does not include how to identify or report an OT awarded for follow-on production or experimental purposes.

Public Law 116-92, "NDAA for Fiscal Year 2020," requires the Secretary of Defense to submit a report to the congressional defense committees on the use of OT authority to carry out prototype projects during the preceding fiscal year. There is no reporting requirement for follow-on production or experimental purpose OTs.

Improper Reporting of OTs

During our "Audit of DoD Other Transactions and the Use of Non-Traditional Contractors," we identified that DoD agreements personnel improperly reported follow-on production OTs and experimental purpose OTs as prototype OTs in FPDS-NG. Defense Pricing and Contracting (DPC) personnel use the information from FPDS-NG to create the OUSD(A&S) "Report to Congress On the Use of Other Transaction Authority for Prototype Projects," to meet the DoD reporting requirement on the use of the OT Authority to carry out prototype projects during the preceding fiscal year. To obtain a universe of standalone prototype OTs, we used the data reported in the appendixes of the FY 2019 and FY 2020 reports to Congress. Our universe for the ongoing audit consisted of 889 standalone Prototype OTs awarded in FYs 2019 and 2020, valued at $23.6 billion.[5] In that universe of OTs, DoD agreements personnel inappropriately included at least 20 follow-on production OTs valued at $1.5 billion, and 62 experimental purpose OTs valued at $705.7 million, as prototype OTs awarded under 10 U.S.C. § 2371b.

[4] The FPDS-NG reports model is retired, and the contracts data bank was transferred to beta.SAM.gov. Beta.SAM.gov is the only place to create and run both standard and ad hoc reports on federal contract data. However, FPDS-NG remains the authoritative source for entering and viewing details about contract award data.

[5] We combined the numbers from FYs 2019 and 2020 to get our universe. However, the actual number of standalone OTs for the 2 years is likely lower than our universe total since each FY universe is based on active OT actions for that FY. Therefore, some OTs may show up in both the FYs 2019 and FY 2020 universe.

Follow-on Production OTs Reported as Prototype OTs

During the audit, we selected a sample of 36 stand-alone prototype OTs from the annual report to review and validate compliance with the conditions of 10 U.S.C. § 2371b. During our fieldwork, we discovered five of the sample items reported as prototype OTs were actually follow-on production agreements, valued at $1.3 billion. In response to our request to validate the accuracy of the prototype OTs in our universe from the annual report to Congress, Military Service officials identified 15 additional follow-on production OTs valued at $205.6 million. Therefore, we and Military Service officials identified at least 20 follow-on production OTs, valued at $1.5 billion, in the report. Since we identified additional follow-on production OTs, separate from what the Military Service officials identified, there could also be more follow-on production OTs in the report to Congress. This occurred because the OUSD(A&S) OT Guide, November 2018, includes guidance on how to track and report prototype OTs, but not follow-on production OTs. DPC officials stated the reporting system is not sophisticated enough to capture the follow-on production efforts separate from the prototype projects because a follow-on production OT can be made through a new award or as a modification to a prototype project. Further, according to 10 U.S.C. § 2371b, the follow-on production award could be a Federal Acquisition Regulation-based contract instead of an OT.

Awards for Experimental Purposes Reported as Prototype OTs

We identified two Air Force OT sample items, valued at $332.9 million, awarded under the 10 U.S.C. § 2373 authority for experimental purposes. DoD agreement personnel stated that they did not intend to report the OTs as prototype awards under 10 U.S.C. § 2371b, and the agreements were for experimental purposes, in accordance with 10 U.S.C. § 2373. This occurred because the guidance provided by the Air Force stated to enter the procurement instrument identification "9" in the ninth position when numbering OTs for experimental purposes; however, the OUSD(A&S) OT Guide stated that if the ninth position of the award number is "9," the award is identified as a prototype OT. The OUSD(A&S) OT Guide does not include how to identify an OT awarded for experimental purposes. Therefore, based on the Air Force guidance, DoD agreements personnel are numbering these as prototype OTs, even though they are awarded under a different authority. The other Military Services also reported OTs awarded under 10 U.S.C. § 2373 as prototype OTs. Military Service officials identified 60 other OTs, valued at $372.8 million, in our universe of standalone prototype OTs that were OTs awarded for experimental purposes under 10 U.S.C. § 2373. There could also be additional OTs for experimental purposes in the report to Congress that the Military Service officials did not identify. Furthermore, the OTs we identified were only those in the standalone prototype OT universe for FYs 2019 and 2020. Since the authority allows for awards by contract or other, there could be more 10 U.S.C. § 2373 awards that we did not identify in the report to Congress, depending on how the contracting offices choose to award them and how they are input in the system.

Additional DoD Guidance Needed for Follow-On Production OTs and Experimental Purpose Awards

DoD agreements personnel reported OTs for follow-on production and OTs for experimental purposes as prototype OTs in FPDS-NG because there is no DoD-level guidance on how DoD agreements personnel should number and report an OT award for follow-on production or experimental purposes. Therefore, there was no way to differentiate these OTs from prototype OTs in FPDS-NG, which was the data source used to populate the annual OUSD(A&S) "Report to Congress On the Use of Other Transaction Authority for Prototype Projects." As a result, the number of prototype OTs reported to Congress is not accurate, and DPC officials and Congress have limited assurance regarding how the different authorities are used, how often each authority is used, and the costs associated with the respective OTs. Further, by not separately tracking follow-on production OTs, DPC and Congress do not know how many prototype OTs are successfully completed and transition into production. Therefore, we recommend that the Principal Director, DPC develop policies for tracking OTs for follow-on production and OTs for experimental purposes, and work with the General Services Administration to implement any additional system changes in FPDS-NG needed to properly account for each type of OT.

These issues add to the tracking problems we identified in a prior DoD OIG audit report, "The Audit of Other Transactions Awarded through Consortiums."[6] Specifically, the DoD OIG determined that DoD contracting personnel did not properly track OTs awarded through consortiums, and did not have an accurate count of OTs or the associated dollar values. This occurred because the setup for the FPDS-NG could not properly account for OTs awarded through a consortium or track the individual projects awarded through the consortiums, and contracting personnel received no guidance on how to award or report the individual projects awarded through a consortium. Therefore, we recommended that the Principal Director, DPC develop policies outlining how the Military Services should award and track OT projects when using a consortium, and work with the General Services Administration to update the FPDS-NG database to more accurately capture data related to OTs awarded through consortiums. The Principal Director, DPC concurred with the recommendations.

In addition to the tracking issues, 10 U.S.C. § 2373 states the authority could be used by contract or otherwise, but does not specifically provide for the use of OTs. Some contracting officials are using the OT as a means to award work under this statute. However, the OUSD(A&S) OT Guide does not mention 10 U.S.C. § 2373 and there is no other DoD guidance related to the use of an OT for this authority. DPC officials stated the use of 10 U.S.C. § 2373 is rare and the Military Services are expected to follow their own guidance and best practices. However, based on the number of OTs for experimental purposes that we identified in our universe, the Military Services may be using this statute more than DPC officials are aware of.

[6] Report No. DODIG-2021-077, April 21, 2021.

Therefore, we recommend that the Principal Director, DPC, in coordination with the Services, review the statute and the use of 10 U.S.C. § 2373 to determine whether additional DoD-level guidance is needed on the use of the authority for OTs. If additional guidance is needed, then DPC should develop DoD-level guidance on the use of OTs in accordance with 10 U.S.C. § 2373.

Recommendations, Management Comments, and Our Response

Recommendation 1

We recommend that the Principal Director, Defense Pricing and Contracting develop policies for tracking Other Transactions for follow-on production and Other Transactions for experimental purposes, and work with the General Services Administration to implement any additional system changes in the Federal Procurement Data System-Next Generation needed to properly account for each type of Other Transaction.

Defense Pricing and Contracting Response

The DPC Principal Director partially agreed with the recommendation, stating that the ability to distinguish a production OT from a prototype OT in the "Type of Agreement" data element was deployed in FPDS-NG on June 28, 2019. He stated that since that update, the AOs are required to identify whether an OT awarded under the authority of 10 U.S.C. § 2371b was awarded for a prototype project or follow-on production. The Principal Director added that the DPC is exploring potential methods for better identifying the awards made under the authority of 10 U.S.C. § 2373.

Our Response

Comments from the Principal Director partially addressed the specifics of the recommendation; therefore, the recommendation is unresolved. While the AOs now have the ability to distinguish prototype OTs from production OTs in FPDS-NG, the Military Service AOs were not using or were not aware of that capability. In addition, although the Principal Director stated that the DPC will explore potential methods to better identify awards under 10 U.S.C. § 2373, he did not provide details or a timeframe for that effort. Therefore, we request that the Principal Director provide comments to the final management advisory on DPC's plans to develop policy requiring AOs to identify and track prototype and production OTs in FPDS-NG and to provide details and a timeframe for better identifying awards made under 10 U.S.C. § 2373.

Recommendation 2

We recommend that the Principal Director, Defense Pricing and Contracting, in coordination with the Services, review the statute and the use of 10 U.S.C. § 2373 to determine whether additional DoD-level guidance is needed on the use of the authority for Other Transactions. If additional guidance is needed, Defense Pricing and Contracting should develop DoD-level guidance on the use of Other Transactions in accordance with 10 U.S.C. § 2373.

Defense Pricing and Contracting Response

The DPC Principal Director agreed with the recommendation stating that executing activities are expected to follow the regulations or guidance for whatever type of instrument is being used. The Principal Director also stated that the DPC will coordinate with the Military Services to provide additional guidance.

Our Response

Comments from the Principal Director addressed the specifics of the recommendation; therefore, the recommendation is resolved but open. We will close the recommendation once we verify that additional guidance is established on the use of OTs in accordance with 10 U.S.C. § 2373 and provided to the Military Services.

Management Comments

Defense Pricing and Contracting

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ACQUISITION
AND SUSTAINMENT

MEMORANDUM FOR PROGRAM DIRECTOR, ACQUISTION, CONTRACTING, AND SUSTAINMENT, OFFICE OF THE INSPECTOR GENERAL

SUBJECT: Response to the Department of Defense Inspector General's Discussion Draft of Proposed Management Advisory Memorandum, Project No. D2021-D000AX-0111.000: Tracking of Follow-On Production Other Transaction Agreements and Tracking and Awarding of Experimental Purposes Other Transactions

As requested, I am providing responses to the general content and recommendations contained in the subject report.

Recommendation 1: The Principal Director, Defense Pricing and Contracting (DPC) develop policies for tracking Other Transactions (OTs) for follow-on production and OTs for experimental purposes, and work with the General Services Administration to implement any additional system changes in the Federal Procurement Data System-Next Generation (FPDS-NG) needed to properly account for each type of OT.

Response: Partially Concur. The ability to identify an OT as one issued for "production," as distinct from a "prototype" OT in the 'Type of Agreement' data element, was deployed in FPDS-NG on June 28, 2019. Prior to that, there was no capability to identify OTs other than for "prototypes." OTs are all numbered with a "9" in the ninth position of the Procurement Instrument Identifier in FPDS-NG. Department of Defense (DoD) did not have the ability to further distinguish what the OT is for (i.e., prototype or production) until the FPDS-NG update in 2019. However, by making the distinction in the 'Type of Agreement' data element separate from the ninth-position entry mentioned above, agreements officers are now required to identify whether an OT awarded under the authority of 10 U.S.C. § 4003 (formerly § 2371b) was awarded for a prototype project or follow-on production. We are exploring potential methods for better identifying awards made under the authority of 10 USC § 4004 (formerly10 USC § 2373).

Recommendation 2: The Principal Director, DPC, in coordination with the Services, review the statute and the use of 10 USC § 2373 to determine whether additional DoD-level guidance is needed on the use of the authority for OTs. If additional guidance is needed, DPC should develop DoD-level guidance on the use of OTs in accordance with 10 USC § 2373.

Response: Concur. Although section 4004 itself does not specifically use the term "OT authority," purchases under this authority may be made "by contract or otherwise." It may be the case a section 4004 buy is also an OT under section 4003, but this is not always true. Business conducted for experimental purposes under section 4004 may be made under any one of a number of transactional authorities. Executing activities are expected to follow the regulations/guidance for whatever type of instrument is being used (e.g., Federal Acquisition

Defense Pricing and Contracting (cont'd)

Regulations, OT Guide, or DoD Grant and Agreement Regulations). DPC will coordinate with the military services to provide additional guidance.

My point of contact for this matter is [redacted], who may be reached at [redacted].

Sincerely,

TENAGLIA.JOHN.M.[redacted]

John M. Tenaglia
Principal Director,
Defense Pricing and Contracting

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