Interpretation Problems in Prototype Other Transactions and Noncompetitive Follow-On Production

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Introduction

The Department of Defense's (DoD's) spending on prototype other transactions (OTs) has increased significantly in the last few years, rising from $1.7 billion in 2016 to $16.5 billion in 2020.[1] Other transactions enable the DoD greater access to state-of-the-art technology and allow the DoD and private sector to collaborate without the red tape of traditional procurements. They allow the government to interact with the private sector in ways that are more flexible, more commercial, and more accessible to companies or individuals that would otherwise not be dealing with the government. They also enable the DoD to quickly and easily transition prototype projects to production. For these reasons, other transactions are praised in many corners of government and industry and are a growing area of interest. With increased popularity and visibility, however, has come increased scrutiny.

Prototype OTs are attractive, in part, because of their relative freedom from protest and their open-ended nature. The statute that gives the DoD the authority to enter into prototype and production OTs, 10 U.S.C. § 2371b (now 10 U.S.C. § 4003), includes very few restrictions on the use of the authority. Additionally, there are no regulations that apply specifically to prototype OTs, and informal guidance from the DoD is limited. This feature of prototype and production OTs allows agencies significant flexibility and room for creativity in using the authority. This also means, however, that agencies and contracting officials are left to develop positions of statutory interpretation largely on their own. Lacking the level of guidance upon which they have come to

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rely, overly cautious DoD components or individuals may default to FAR or FAR-like procurement rules when reviewing OT awards—applying overly rigorous requirements where Congress intended the opposite. It also means that different components and individuals may have inconsistent informal definitions that can affect decisions about the application of thresholds, reporting requirements, and the authority to enter into noncompetitive follow-on production.

As the DoD looks to transition its growing number of prototype OTs to production, the Department should proactively consider and address the interpretation of key terms in the OT statute in a way that is consistent with the intent of OTs and the realities of the prototyping process. This article specifically discusses three such terms in the prototype OT statute—"participants," "transaction," and "competitive procedures."

I. Background

"Other transactions," as they are called, are transactions "other than contracts, cooperative agreements, and grants."[2] At present, the DoD has three different OT authorities: research, prototype, and production. The DoD's authority to execute these types of other transactions arises from two statutes: (1) 10 U.S.C. § 2371 (as of January 1, 2022, 10 U.S.C. § 4002) (authorizing other transactions for research) and (2) 10 U.S.C. § 2371b (as of January 1, 2022 10 U.S.C. § 4003) (authorizing the use of prototype and production transactions).[3] For purposes of this article, we will be focusing on prototype and production OTs, and we will be referring to the statutory sections as §§ 2371 and 2371(b).

Section 2371b gives the DoD the authority to enter into other transactions for the purpose of "carry[ing] 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." It also gives the DoD the authority to enter into noncompetitive follow-on production contracts upon successful completion of a prototype under the statute.

Because OTs under 10 U.S.C. § 2371b are not procurements, cooperative agreements, or grants, by definition, they are not subject to the statutes and regulations that govern such instruments, including the Competition in Contracting Act, the Contract Disputes Act, the Federal Acquisition Regulation, or the DoD Grant and Agreements Regulation, among others. The statute itself provides very few limits on the DoD's use of the authority. As such, prototype and production OTs are difficult to challenge.[4] Still, there have been some notable attempts in recent years.[5] In one particularly impactful case, *Oracle America, Inc.*, a protester successfully challenged the award of a noncompetitive follow-on production OT. There, the GAO asserted jurisdiction over whether an agency had the authority to award a noncompetitive follow-on production OT.[6] The GAO affirmed the protest, basing its decision on a restrictive interpretation of the statutory language "provided for in the transaction" and "successfully completed."[7]

This decision opened the door for future challenges to production OTs, and retroactively affected numerous transactions. Prototype projects headed for production were halted and, in some cases, already-awarded production OTs were effectively abandoned.[8] Agencies that had employed a sensible statutory interpretation for years were now at risk of having their production strategies dismantled by a single case. The decision also showed, however, that the GAO would apply the DoD's own informal interpretations relating to 10 U.S.C. § 2371b authority.[9]

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OT activities are facing more scrutiny from governmental oversight bodies as well. The 2022 National Defense Authorization Act includes new reporting requirements relating to individual transaction awards and follow-on production.[10] The DoD Inspector General (DoD IG) also recently audited the DoD's use of consortium prototype OTs. In that report, the IG found that other transactions lacked guidance and oversight; the IG cited specific concerns relating to the lack of data and reporting for consortium awards, concerns about the adequacy of competition under the consortium model, inconsistency among DoD components in applying approval thresholds, and the absence of agency level protest clauses.[11]

This report is noteworthy because two of the concerns raised in it, those surrounding competition and thresholds, directly relate to how the DoD and its components interpret the statutory terms "competitive procedures" and "transaction."[12] This report is also noteworthy in

that IG recommends that the DoD establish a process for disappointed consortium members to challenge award decisions—suggesting that the DoD voluntarily submit itself to processes from which OTs were meant to be exempt.[13] The IG's findings and recommendations demonstrate not only the need for clarity regarding some of these statutory terms but also the government's tendency to default to existing or conservative procedures in the face of uncertainty.

Whether justified or not, other transactions have a reputation for being the wild west of government contracts, a "loophole," or an "obscure workaround" that allows government agencies to circumvent procurement rules.

And, of course, other transactions face criticism in the media. Whether justified or not, other transactions have a reputation for being the wild west of government contracts, a "loophole," or an "obscure workaround" that allows government agencies to circumvent procurement rules.[14] Given this scrutiny—from investigative bodies, from the public, from the private sector—it can be tempting for OT practitioners to interpret ambiguities too conservatively and to apply restrictions that are not and were not intended to be there. In this respect, research OTs serve as a cautionary tale.[15] Research OTs were originally used in innovative and expansive manners[16] but were hamstrung by overly restrictive regulations and onerous processes.[17] Now, research OTs are placed almost exclusively as technology investment agreements (TIAs) and carried out under the TIA regulations in the DoD's grant and agreement regulations (DoDGARS)—reduced to a rare type of financial assistance agreement[18] used in very limited circumstances.[19]

With increasing oversight, it is in DoD's interests to proactively identify interpretation issues in the OT statute and address them. Doing so protects the Department's flexibility, encourages DoD components to use more creative and innovative approaches, ensures consistent application of thresholds, and potentially provides definitions that courts will use in evaluating the DoD's actions.[20]

II. Analysis of Ambiguous Terms in 10 U.S.C. § 2371B

A. The Problem

Three terms in the prototype OT statute stand out as creating a risk for production OTs: "transactions," "participants," and "competitive procedures." Title 10 of the U.S. Code, § 2371b provides that the DoD may only proceed to noncompetitive follow-on production under paragraph (f) when "(A) *competitive procedures* were used for the selection of parties for participation in the *transaction*; and (B) the *participants* in the *transaction* successfully completed the prototype project provided for in the transaction." These terms implicate the agency's authority to award prototype and production OTs and are undefined in the statute. Because they relate to an agency's authority to enter into an other transaction, these terms and their meanings could serve as a basis to challenge specific OT awards. The absence of definitions for these terms may also lead to inconsistent interpretations throughout the DoD and unnecessary restrictions on OT authority imposed. The following sections discuss statutory interpretation of these terms and approaches to resolving these problems.

B. Statutory Interpretation

The goal of statutory interpretation, and the goal in interpreting these three terms, is to determine and give effect to the intent of the enacting legislation.[21] The starting point for any such analysis is the plain language of the statute.[22] Where a term is not given a specific meaning in the statute itself, it is interpreted in accordance with its ordinary (or dictionary) meaning.[23] As a principle, statutes are read to give meaning and significance to each clause, sentence, and word.[24] Terms appearing in multiple places in a statute are assumed to have the same meaning each time they appear.[25] Terms are read not in isolation but in the specific context in which they exist and within the broader statutory scheme.[26] The following sections apply these principles of interpretation to the statutory terms "transaction," "participant," and "competitive procedures."

1. Transaction

The term "transaction" appears frequently throughout § 2371(b). Specifically, the statute provides that the DoD may enter into "a *transaction* for a prototype project, and any follow-on production contract or *transaction*. . . ."[27] That statute further provides that the Department may enter into "a follow-on production contract or *transaction*" provided that "competitive procedures were used for the selection of parties for participation in the *transaction*" and "the participants in the *transaction* successfully completed the prototype project provided for in the transaction."[28]

Despite appearing multiple times, the term "transaction" is undefined in the statute. While this is potentially helpful in that it provides almost unlimited potential for what a transaction could look like, it creates

a practical problem for OT officials. The authority to enter into prototype OTs and noncompetitive follow-on production depends on what a transaction is and what its scope is, as do thresholds and reporting requirements. In practice, it is not always clear what the relevant transaction is or when the agency has entered into a new transaction. Prototype projects and individual transactions can take many forms and may be broken up in any number of ways. There can be prototype projects or transactions within prototype projects, in the case of consortia. An agency may enter into multiple agreements with different vendors to address the same solution. The agreements themselves and the overall projects may have multiple phases, with each phase being worth millions of dollars. There may be gaps in between phases, and an agency may want to add phases after award. Agreements and projects can also undergo near fundamental changes as requirements evolve and the participants learn more. Ultimately, an agency's understanding of the term "transaction" will affect which subdivision of these actions is relevant for purposes of noncompetitive follow-on production and will inform how much a transaction can change.

a. The Relevant Transaction

According to its common dictionary meaning, a transaction is "an instance or process of transacting something."[29] According to one dictionary definition, "to transact" means "to carry on or conduct (business, negotiations, activities, etc.) to a conclusion or settlement."[30] This could mean that a transaction is not necessarily a single event or contract but an ongoing process. The statute, though, only ever refers to "the transaction" or "a transaction," in the singular. The statute never uses "transactions" in the plural. While this decision was, presumably, intentional, the significance of the distinction, if any, is unclear.

Interpretation of the term "transaction" is further complicated by the treatment of the terms "transaction" and "prototype project" in the statute and guidance relating to OTs. The terms are treated both as interchangeable on the one hand, and as distinct concepts on the other. The statute provides that the DoD has the authority to "carry out prototype projects" and that the authority may be "exercised for a transaction for a prototype project."[31] In this way, the statute treats "transaction" as a distinct subdivision within a larger prototype project. But, in other ways, the statute treats the terms as almost synonymous. To exercise prototyping authority, for instance, the government must meet one of four conditions.

> (A) There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent *in the prototype* project.
>
> (B) All significant participants in the transaction other than the Federal Government are small businesses . . . or nontraditional defense contractors.
>
> (C) At least one third of the total cost *of the prototype project* is to be paid out of funds provided by sources other than the Federal Government.
>
> (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of *a transaction*. . . .[32]

Paragraphs (A) and (C) use "prototype project" as the basis to determine whether the statute's requirements have been met, while paragraphs (B) and (D) use "transaction" as the basis to determine whether the participants meet the statute's requirements.

At the risk of quibbling, raising this distinction illustrates the problem with not knowing what agreements or groups of agreements constitute the relevant transaction for prototyping and production authority. If a prototype project is made up of multiple transactions, then, arguably, a single nontraditional defense contractor (NTDC), participating to a significant extent in one of potentially many transactions under a prototype project, could justify use of OT authority for all transactions under said project. Additionally, if an NTDC is *not* participating to a significant extent and paragraph (C) is to be used, then, in theory, one-third of the entire prototype project funding must be paid from non-government sources, not just one-third of the funding for an individual transaction under the broader prototype project.[33]

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Current guidance does not resolve this issue. The DoD OT Guide (the Guide) defines a transaction as "the entire process of interactions related to entering into an agreement, executing and transitioning a prototype project." The Guide provides a separate definition for a "prototype project," but then uses the terms at times interchangeably. The Guide, for example, refers to prototype projects transitioning to production even though the statute only ever refers to transactions or prototype *sub*-projects transitioning to production.[34] Notably, the Guide refers to an agreement, not multiple agreements in the context of a transaction.[35] It does not address instances where there might appear to be separate

agreements within a transaction, such as multiple phases not anticipated at award.

Other DoD policies also touch on the question of what constitutes a transaction but do not address the broader implications of the question. In a November 2018 memorandum, the Undersecretary of Defense for Acquisition and Sustainment addresses what the scope of a transaction is for purposes of approval thresholds set forth in section 2371b(a)(2) of the statute.[36] The memo states:

> 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 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.[37]

Even with this explanation, there remains confusion about what subdivision is the relevant transaction for purposes of thresholds. In the DoD IG's recent audit of consortium OTs, the IG stated that "DoD contracting personnel interpreted this guidance [the thresholds memo] differently and sought approval for OTs awarded through consortiums [in] multiple ways."[38] The IG recommended further clarification as to what constituted a transaction under the statute for purposes of approval thresholds for consortium OTs.[39] While the IG's recommendation was specific to approval thresholds, the same issue has implications for noncompetitive follow-on production as well.

b. Scope of a Transaction

Another relevant issue when it comes to a "transaction" is how much a transaction may change before it becomes a new transaction, or whether such a line even exists. In traditional procurements, when an agency wants to modify a contract, it must consider whether the modification deviates from the contract such that it effectively constitutes a new contract.[40] This depends on whether there is a material difference between the modified contract and the contract as originally awarded[41] and "whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes found in the modification, and thus whether the modification would have materially changed the field of competition."[42] The distinction between one contract and another is important in traditional procurements because out-of-scope modifications must independently satisfy the competition requirements of the Competition in Contracting Act (CICA).

This is not necessarily the case with other transactions. Other transactions are intended to be more like common law contracts, where parties can change the agreement however they see fit. But OTs are not exactly like common law contracts. They are subject to the limitations, intent, and demands of the authority as granted by Congress.[43] Competition is still important in OTs, as is ensuring that agencies are not taking advantage of modifications to misuse other transactions.

It therefore makes sense for the concept of scope to exist for OTs, and to some degree, it already does. The Guide states that "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 [sic] as to the fairness of such a change to prospective interested parties."[44] The OT Guide also warns practitioners of the effect of modifications on noncompetitive follow-on production OTs. What the guide does not discuss, though, is whether a transaction can change so much that it becomes inappropriate to treat it as the same transaction for purposes of follow-on production. It also does not reassure practitioners by identifying changes that would typically be considered out of scope.

c. Suggestions

One way the DoD could alleviate this uncertainty would be to add to the definition of "transaction" in the Guide and to modify its discussion of modifications to address the practical realities of transactions. The Guide currently defines a transaction as follows:

> The entire process of interactions related to, entering into an agreement, executing and transitioning a prototype project.[45]

A potential revision could read:

> The entire process of interactions related to entering into an agreement, executing, and transitioning a prototype project. The agreement may change significantly over time, phases may be added after award, and/or there may be lapses between phases. The scope of the transaction is dictated by the continued intent to execute a particular prototype rather than the formalities traditionally associated with federal procurements.

Regarding modifications, the OT Guide states:

> 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 [sic] as to the fairness of such a change to prospective interested parties.[46]

This could be revised as:

> Individual transactions or prototype projects may change significantly during their execution. Agreements officers should embrace flexibility in changes to their transactions. Transactions, however, should not go on indefinitely and in the event a significant change occurs the Government should judge the fairness of such a change to prospective interested parties, consider the alignment of the change

to the original intent, and consider the alignment of the change with the intent of the OT statute.

The goal of these revisions would be to convey to OT practitioners the flexibility in the structure of transactions and to encourage them to deviate from conventional procurement notions of what a contract is. The DoD will also need to consider this issue as it begins fulfilling the reporting requirements of the newest NDAA. Regarding follow-on production, the NDAA requires that the DoD identify "the initial covered contract or transaction and each subsequent follow-on contract or transaction."[47] Additionally, because the definition of "transaction" is relevant to whether the DoD has authority to enter into a particular prototype or production, it could serve as a basis to challenge individual OT awards. Revisions like those proposed could build in more leeway for the Department in the event of a protest.

2. Participants

The term "participants" and its derivatives are also central to DoD's employment of its noncompetitive follow-on production authority. The statute provides that the DoD has the authority to enter into transactions if "[t]here is at least one nontraditional defense contractor or nonprofit research institution *participating* to a significant extent in the prototype project" or "[a]ll significant *participants* in the transaction other than the Federal Government are small businesses. . . ."[48] In the context of follow-on production, the statute states that follow-on production may be awarded to "the *participants* in the transaction without the use of competitive procedures" if "competitive procedures were used for the selection of *parties for participation* in the transaction; and the *participants* in the transaction successfully completed the prototype project provided for in the transaction."[49]

Interpretation of this term is a practical problem because often the use of prototype and noncompetitive follow-on production is premised on the inclusion of certain participants. Primes, subcontractors, and nontraditional participants might change during execution and completion of a prototype OT, and may do so for perfectly legitimate reasons. A participant might choose to restructure for practical reasons, such as obtaining a facility clearance, becoming a nonprofit, etc. They might fail financially or be acquired by another company (sometimes based on the technology that won them a prototype OT in the first place). Aspects of the requirement might change, necessitating involvement of different nontraditionals or other participants. Or a business may simply lack the capabilities or interest to move forward to production.

The statute does not define the term "participant" and offers minimal clues to what the term means in the specific context of the statute. The statute suggests that, at a minimum, the federal government is a participant ("all significant participants in the transaction *other than the federal government* . . ." (emphasis added)). When the statute mentions "participation," it most frequently relates to nontraditional defense contractors. The statute refers to the "participation" of nontraditionals even though nontraditionals need not be the prime vendor to meet the requirement for OT authority. This usage potentially undermines a definition where "participants" is synonymous with "parties" or "primes." Finally, the statute refers to "significant participants," implying that there are "participants" who are not significant. While it can be tempting to say that "participants" simply means "parties," and leave it at that, we must assume the term "participants" was chosen intentionally—forgoing alternatives like "parties," "contractors," or "nontraditionals." The choice of the word "participants" rather than potential alternative terms and the way the term "participate" and its variants is used throughout the statute suggests that the term encompasses a broader group than just the parties to the contract.

Lacking a specific statutory meaning, we turn to the ordinary definition of the word. "Participant" is defined as a person or group that participates (or takes part or shares in) an activity.[50] Nothing in this definition suggests that participants are only limited to prime contractors. In fact, the definition suggests that any entity involved in the prototype—the government or the agency, the prime contractor, subcontractors, suppliers, FFRDCs, etc.—could be a "participant" to the transaction for purposes of noncompetitive follow-on production.

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Current DoD policy illustrates this apparent ambiguity. Regarding noncompetitive follow-on production, the Guide states, "Participants *include* the Government as the awarder of the OT and the company as the awardee,"[51] implying that the government and the awardee are not necessarily the only participants. Yet, at another point, the Guide suggests that there is only one vendor-side participant, suggesting a definition more like "parties."[52] The Guide also uses the term "participants" to refer to subcontractors as well as the government and prime contractors.[53] Notably, the Guide takes the position that at least one of the participants can change, stating that "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."[54]

One way to interpret "participants" is to treat the term as having a broad meaning that encompasses not just the primes but subcontractors, labs, the government, etc. The potential implication of this approach, however, is that every entity that takes part in a prototype project would have to remain the same from the beginning of the prototype through completion to allow for award of a noncompetitive follow-on production award. Latecomers to the prototype project, who began their participation after the prototype was competed or even after it was successfully completed, may not be able to receive a production OT. This would be extremely limiting to DoD's ability to fully exercise the noncompetitive production option to support the warfighter and contradicts the OT's intended purpose in maximizing flexibilities for agency innovation.

Such an interpretation conflicts with the purpose of OTs and ignores the reality of many prototype projects. OTs are built to respond to rapidly changing needs, budgets, and technological environments. An interpretation of "participants" that ties the government to every entity that took part in the prototype takes some of that flexibility away. Even FAR-based contracts allow for the changing of participants.

Alternatively, "participants" could be interpreted as being synonymous with "parties." This would be more in line with the flexible nature of OTs, but this interpretation has its own problems. The participation of certain types of entities is integral to an agency's ability to execute a prototype OT. Almost all OTs entered into by the DoD are, and will likely continue to be, premised on the involvement or participation of nontraditional defense contractors.[55] Further, a critical purpose of OTs is to "foster new relationships and practices involving traditional and NDCs, especially those that may not be interested in doing FAR based contracts with the Government" and "broaden the industrial base available to Government."[56] An interpretation that treats "participants" as synonymous with parties might mean, for example, that a traditional prime could move to production without its nontraditional subcontractor(s), without the necessary cost share, when the prototype was based on the participation of those nontraditionals. That seems contrary to the congressional intent of OTs as well.

To address this issue, the DoD could revise section 4.b.ix of the Guide, entitled "Follow-on Activities," to something like the following (revised text is italicized):

> For purposes of follow-on production, participants are the Government as the awarder of the OT and the company as the awardee, *and any subcontractors or other entities contributing significantly to the prototype project under the same transaction*. 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. *Similarly, other participants may change throughout the course of a prototype project; participants may exit the project, be replaced, join partway through execution, change in nature or structure, etc. In addressing such changes, the Government should consider the intent behind other transactions and participation of any nontraditional contractors.*

Ultimately, this term may need to be clarified statutorily, rather than addressed only in the Guide. It will, however, need to be addressed. The most recent NDAA requires that the DoD report on individual transaction awards and identify "the participants to the transaction (other than the Federal Government)."[57] Providing this guidance would also help agreement officials embrace the flexible and transient nature of innovation and rapidly changing requirements. It could also help the Department get in front of future challenges to the use of OT authority based on the participants.

3. Competitive Procedures

"Competitive procedures," the final term for discussion, is also an important element of the OT statute. Competitive procedures are required to exercise the authority of the statute for production OTs and highly encouraged in prototype OTs.[58] An agency's interpretation of this term is important because it dictates what procedures will satisfy the 10 U.S.C § 2371(b) requirement for competition or how far OT procedures may deviate from traditional procurement notions of competition before they can no longer be said to be competitive.

The prototyping statute refers to "competitive procedures" on two notable occasions. First, the statute states that "[t]o the maximum extent practicable, *competitive procedures* shall be used when entering into agreements to carry out the prototype projects. . . ." The statute goes on to state that "[a] follow-on production contract or transaction . . . may be awarded to the participants in the transaction without the use of *competitive procedures* . . . if *competitive procedures* were used for the selection of parties for participation in the transaction."[59]

The statute itself does not define "competitive procedures." The word "compete," means, generally, "to strive to outdo another for acknowledgment, a prize, supremacy, profit, etc.; engage in a contest."[60] Procedures are defined as "a series of actions that are done in a certain way or order: an established or accepted way of doing something."[61] These definitions offer little insight other than to suggest that competitive procedures must involve more than one party, and there may need to be some level of formality to the competition.

Legislative history does little to clarify what Congress intended by "competitive procedures" beyond its dictionary definition. In a report accompanying the FY2018 NDAA, the Senate Armed Services Committee offered a rather circular definition of OT competitive procedures, stating that "'[c]competitive procedures' refers to a competition for award of an OTA to a consortium or a

competition for a particular project."[62] The House Armed Services Committee later broached the topic in a report on the FY2019 NDAA, emphasizing that "full and open competition should be used to the maximum extent possible to maintain a sense of integrity, fairness, and credibility in the Federal Procurement process."[63]

Probably the best or at least most relevant reference the DoD has for what competitive procedures might entail is CICA. CICA provides that, in general, agencies "shall obtain full and open competition through the use of competitive procedures" and may only use noncompetitive procedures in limited circumstances and with sufficient justification.[64] CICA's notion of "competitive procedures," therefore, is premised on a preference for full and open competition.[65] Generally, competitions need to be accessible to all responsible offerors unless some exception applies that would allow an agency to limit the pool of competitors. CICA identifies specific methodologies that are considered "competitive procedures," not all of which are truly "full and open" to any interested source—for instance, Broad Agency Announcements (BAA), Federal Supply Schedule procurements, set-asides for small businesses, task and delivery orders against IDIQs, and SBIR/STTR procurements.

The OT statute does not reference the definition of "competitive procedures" provided in CICA. Even so, OT competitions often mirror FAR competitions. OTs are frequently competed via BAA, sometimes in the same BAAs that allow award of procurement contracts under FAR Part 35.[66] The Commercial Solutions Opening (CSO) process, which is used by the Defense Innovation Unit (DIU), is also a good example of a prototype competition that mirrors FAR BAA procurements.[67] Though not required, many OT competitions are widely advertised through the System for Award Management, required for most FAR requirements, and follow traditional federal procurement evaluation schemes.

But prototype OT procedures are not meant to be constrained by the FAR's notions of what competition looks like, and the DoD should not voluntarily do so. While the competition requirements under CICA and its implementing regulations are meritorious, they are quite onerous. They allow competitors to challenge many governmental decisions, limit the government in changes it can make, and require the government to meticulously substantiate the reasoning behind sometimes common-sense decisions. While competition results in better value for the government in theory, it also brings delays, reduced flexibility, and limited participation by firms averse to burdensome government regulations.

The Guide acknowledges that competitive procedures in the OT context do not require competition to the extent CICA requires. On this point, the Guide states:

> Agencies are not required to complete the formal competition structure laid out in CICA . . . 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. . . .[68]

The Guide also states:

> 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.[69]

The Guide goes on to list potential solicitation methods like BAAs, CSOs, etc.[70] Most of the solicitation methods the Guide identifies are methods that could be and have been used in the traditional procurement context. The Guide does not discuss to what degree the agency may or may not limit the scope of competition and still be able to call it competitive, or what the minimum requirements of competition may be. It does not address, for example, approaches that limit competition based on extensive market research or that limit solicitations to members of a consortium specialized in the area of the prototype project. Such methods would not be competitive under CICA but could be very competitive in a common sense of the term.

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The issue of what constitutes competitive procedures in the OT context is not just an interesting academic question; it is also a practical one. In a recent audit, the DoD IG declared that market research, no matter how exhaustive, would not suffice to meet the competitive procedures requirement.[71] This would be the closest to a "floor" any DoD entity has established for what would or would not suffice as minimum competitive procedures under a prototype OT. Not only can the quality of competitive procedures be challenged by auditors, it can also theoretically be challenged by disappointed vendors.

The DoD could address this issue by including a definition of competitive procedures that explicitly

acknowledges competition for purposes of OTs as being different from competition as defined for FAR. Below is a suggested definition:

> "Competitive procedures" means any procedures to solicit a prototype solution that provide for genuine, consistent, transparent, fair, and meritorious consideration of solutions from at least two sources. Competitive procedures for other transactions are not limited to those procedures that would be considered competitive for FAR procurements. Full and open competition available to all or as many interested parties as possible is ideal but may not always be necessary or appropriate. Competitive procedures do not necessarily require that the prototype project be widely competed, advertised publicly, or open to all interested parties. Agreements officers should conduct thorough market research to determine the appropriate scope of competition.

Providing definitions like this could help the DoD in a couple of ways. First, it could help in the event of challenges to competitive procedures by establishing the DoD's position on what constitutes competitive procedures without unnecessarily limiting the wide berth given to DoD to develop competitive procedures most suitable to a transaction. It will also provide contracting officials further reassurance about what they *can* do in a way that encourages even more creativity.

III. Conclusion

Having concluded this discussion of the ambiguities in 10 U.S.C. § 2371b, it might be tempting to decide that Congress should define these terms explicitly or that the DoD should develop policies to address every ambiguity and every conceivable scenario. That is not necessarily the case, however. Other transactions are valuable largely because they are open-ended, enabling creativity and innovation. Ambiguity cannot and should not always be avoided. But, in this case, ambiguity has promoted an unfortunate dependence on what has been done before.

The DoD could benefit from guidance on these terms, specifically, guidance on when agreements officers may be reaching the outer limits of what the DoD is willing to support and on what changes are anticipated and permissible. As adjudicative bodies look to the Guide more like regulation rather than guidance, simply acknowledging the scenarios where these and other ambiguities arise at least announces to stakeholders the paths that may be taken. By doing so, agencies can prepare for potential challenges and maximize the use of noncompetitive follow-on production to the extent allowed and intended by Congress. With further clarification and guidance on what these and other terms mean in the context of other transactions, agencies and their agreements officers may be empowered to take full advantage of other transactions and the flexibilities they offer. PL

Endnotes

1. U.S. Gov't Accountability Off., A Snapshot of Government-wide Contracting for FY 2020 (infographic) (June 2021); U.S. Gov't Accountability Off., GAO-20-84, DoD's Use of Other Transactions for Prototype Projects Has Increased (2019); Rhys McCormick, *Department of Defense Other Transaction Authority Trends: A New R&D Funding Paradigm?*, CSIS Briefs, Dec. 2020.
2. *See* 10 U.S.C. § 2371(a) (2018).
3. The 2021 NDAA moved 10 U.S.C. § 2371 and § 2371b to 10 U.S.C. § 4002 and 10 U.S.C. § 4003, respectively, effective January 1, 2022. National Defense Authorization Act for Fiscal Year 2021, P.L. 116-283, 116th Cong. § 1841(b)(2)(C) (2021).
4. *See* Oracle Am., Inc., B-416061, 2018 CPD ¶ 180, at 7 (Comp. Gen. May 31, 2018). *See, e.g.*, MD Helicopters, Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020); Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019).
5. *See, e.g.*, *MD Helicopters*, 435 F. Supp. 3d 1003; *Space Expl. Techns. Corp.*, 144 Fed. Cl. 433; *Oracle Am., Inc.*, 2018 CPD ¶ 180.
6. *Oracle Am., Inc.*, 2018 CPD ¶ 180.
7. *Id.*
8. Chris Hetz, Dir. of Acquisition/Senior Contracting Official, Defense Innovation Unit (May 26, 2020) (on his experience at DIU following the *Oracle* decision). Mr. Hetz's views and opinions are his own and do not necessarily state or reflect those of the U.S. Government, the Department of Defense, or any component thereof.
9. *Oracle Am., Inc.*, 2018 CPD ¶ 180, at 10 (applying the OT Guide definition of prototype rather than the dictionary definition). *See* Dep't of Def., Off. of Under Sec'y of Def. for Acquisition & Sustainment, Other Transactions (OT) Guide, Version 1.0 (Nov. 2018), https://www.dau.edu/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf [hereinafter DoD OT Guide].
10. National Defense Authorization Act for Fiscal Year 2022, S. 1605, 117th Cong. §§ 824, 825 (2021) [hereinafter 2022 NDAA].
11. Dep't of Def., Inspector Gen., Report No. DODIG2021077, Audit of Other Transactions Awarded Through Consortiums, at 18 (Apr. 21, 2021) [hereinafter DoD IG Report].
12. *Id.* at ii.
13. Dep't of Def., Inspector Gen., Report No. DODIG2021077, Audit of Other Transactions Awarded Through Consortiums, at 18 (Apr. 21, 2021) [hereinafter DoD IG Report].
14. *See, e.g.*, Aaron Gregg, *Space Force Delays Deal to "Further Evaluate" Contractor Found to Have Acted Fraudulently*, Wash. Post, Dec. 30, 2020 ("It is also likely to bring new scrutiny to an emerging business ecosystem built around a common procurement loophole called Other Transaction Authority."); Scott Maucione, *Peering into the Black Box of OTA Awards*, Fed. News Network, July 24, 2018.
15. 10 U.S.C. § 2371(a).
16. Rick Dunn, *10 U.S.C. 2371 "Other Transactions": Beyond TIA's*, Strategic Inst., July 31, 2017 ("In recent years section 2371 has hardly ever been used despite the fact that DARPA used it vigorously in hundreds of agreements and billions of dollars in obligations in the early 1990's before the TIA regulations were issued.").
17. Rick Dunn, *Other Transactions Contracts: Poorly Understood, Little Used*, Strategic Inst., May 11, 2017.
18. 32 C.F.R. § 37.105.
19. 10 U.S.C. § 2371(e); DoD OT Guide, *supra* note 9, at 36.
20. *Oracle America, Inc.*, B-416061, 2018 CPD ¶ 180, at 10 (Comp. Gen. May 31, 2018).
21. *See* Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).
22. Jimenez v. Quaterman, 555 U.S. 113, 118 (2009) ("As with

any question of statutory interpretation, our analysis begins with the plain language of the statute") (citing Lamie v. United States Tr., 540 U.S. 526, 534 (2004)); *Oracle Am., Inc.*, 2018 CPD ¶ 180.

23. Sebelius v. Cloer, 569 U.S. 369, 369 (2013), citing BP America Production Co. v. Burton, 549 U.S. 84, 91 (2006); Oracle America, Inc., B-416061, 2018 CPD ¶ 180 (Comp. Gen. May 31, 2018).

24. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (citing Duncan v. Walker, 533 U.S. 167, 174 (2001) (internal quotation marks omitted)).

25. Ratzlaf v. United States, 510 U.S. 135, 143 (1994). *See also* Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995); Wis. Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 225 (1992).

26. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321 (2014) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

27. 10 U.S.C. § 2371b(a)(2)(A), (B) (emphasis added).

28. 10 U.S.C. § 2371b(f) (emphasis added).

29. *Transaction*, Dictionary.com, https://www.dictionary.com/browse/transaction (last visited Mar. 6, 2022).

30. *Transact*, Dictionary.com, https://www.dictionary.com/browse/transact (last visited Dec. 17, 2021).

31. 10 U.S.C. § 2371b(a)(1), (2).

32. 10 U.S.C. § 2371b(d)(1) (emphasis added).

33. 10 U.S.C. § 2371b(d)(1)(c).

34. DoD OT Guide, *supra* note 9, at 33.

35. *Id.*

36. The value of a transaction determines the necessary level of approval. 10 U.S.C. § 2371b(a)(2).

37. Memorandum from Ellen M. Lord, Undersec'y of Def. for Acquisition & Sustainment, Authority for Use of Other Transactions for Prototype Projects Under 10, United States Code, Section 2371b (Nov. 20, 2018).

38. DoD IG Report, *supra* note 11, at 15. (DoD components interpreted the memo several ways. The Air Force sought approval for only the base consortium OT, based on the ceiling for the base OT. The Army took multiple approaches, seeking approval based on the value of individual awards under a base consortium OT agreement, by the value of each phase of a project rather than the overall value of the project, and by the value of individual transactions under one prototype project, rather than the total value of the prototype project.)

39. *Id.* at 17.

40. Leupold Stevens, Inc., B-417796, 2019 WL 6464239 4 (Comp. Gen. Oct. 30, 2019).

41. *Id.*

42. Emergent BiolSolutions, B-402576, 2010 CPD ¶ 136, at 7 (Comp. Gen. June 8, 2010).

43. DoD OT Guide, *supra* note 9, at 27.

44. *Id.* at 19.

45. *Id.* at 33.

46. *Id.* at 19.

47. 2022 NDAA, *supra* note 10, § 825.

48. 10 U.S.C. § 2371b(d)(1)(A), (B) (emphasis added).

49. *Id.* § 2371b(f)(2) (emphasis added).

50. *Participate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/procedure (last visited Dec. 17, 2021).

51. DoD OT Guide, *supra* note 9, at 20 (emphasis added).

52. *Id.* at 17 (referring to a single participant in the context of negotiation of an award).

53. *See, e.g.*, *id.* at 21 (referring to participants in the context of flowdown to sub-awardees).

54. *Id.* at 20.

55. *See* U.S. Gov't Accountability Off., GAO-20-84, DoD's Use of Other Transactions for Prototype Projects has Increased 12 (2019).

56. DoD OT Guide, *supra* note 9, at 4–5.

57. 2022 NDAA, *supra* note 10, § 825(b)(1).

58. 10 U.S.C. § 2371b(b), (f)(2)(a).

59. *Id.* § 2371b(f)(2)(A) (emphasis added).

60. *Compete*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/compete (last visited Dec. 16, 2021).

61. *Procedures*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/procedure (last visited Dec. 16, 2021).

62. S. Rep. No. 115-125, at 191 (2017).

63. H.R. Rep. No. 115-676, at 75–76 (2018).

64. 41 U.S.C. § 253.

65. 10 U.S.C. § 2302(2).

66. FAR pt. 35.

67. *Work With Us*, Def. Innovation Unit, https://www.diu.mil/work-with-us (last visited Mar. 28, 2021); *see, e.g.*, Def. Innovation Unit & Wash. Headquarters Servs., Commercial Solutions Opening (CSO), HQ0845-20-S-C001 & HQ0034-20-9-DIU, https://diux.app.box.com/s/61as8wwl1cylf4i05062l2mj8swk6iy2 (last visited Mar. 28, 2021).

68. DoD OT Guide, *supra* note 9, at 38.

69. *Id.* at 16.

70. *Id.*

71. DoD IG Report, *supra* note 11.