

The “Other Transaction” Authority

Basic Legal Principles*

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Overview

- It is the DoD's interest to tap into the research and development being accomplished by nontraditional defense contractors, and to pursue commercial solutions to defense requirements.
- In 2016, Congress amended and codified the “Other Transaction” authority, creating 10 USC 2371b, and establishing the “Section 815 OTA”.
- The Section 815 OTA provides for aggressive, streamlined acquisition between DOD and Industry, allowing for rapid prototyping and production.
- This acquisition authority, when used selectively, is a vital tool that will help the Department achieve the civil and military integration that is critical to reducing the cost of defense weapon systems.

Agenda

- ▶ Purpose / Scope of Section 815
- ▶ Prototype Project Defined
- ▶ Limitation of Authority
- ▶ Non-Traditional Defense Contractor Defined
- ▶ Significant Participation Defined
- ▶ Comptroller Access / Audit
- ▶ Cost Sharing
- ▶ Competition
- ▶ Intellectual Property
- ▶ Production
- ▶ Applicability of Regulation / Guidance
- ▶ What Could Be Next?

What is an “Other Transaction”?

- ▶ "Other Transactions" for prototype projects are acquisition instruments that are **not subject to the Federal Acquisition Regulation (FAR)**, its supplements, or laws that are limited in applicability to procurement contracts. Similarly, OTs for prototype projects are generally not subject to those laws and regulations that are limited in applicability to grants and cooperative agreements

Purpose / Scope of Authority

- ▶ **Purpose – Code Section 10 USC 2371b (approved through Section 815 of FY16 NDAA) authorizes the DoD 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.*

Prototype Project Defined

▶ **Prototype Project – No Statutory Definition of “Prototype Project”, however:**

- ▶ Pursuant to the Other Transactions Guide for Prototype Projects, (DPAP, January 2017), A prototype project can generally be described as:
 - ▶ *“[a] preliminary pilot, test, evaluation, demonstration, or agile development activity used to evaluate the technical or manufacturing feasibility or military utility of a particular technology, process, concept, end item, effect, or other discrete feature. Prototype projects may include systems, subsystems, components, materials, methodology, technology, or processes.”*
 - ▶ *“By way of illustration, a prototype project may involve: a proof of concept; a pilot; a novel application of commercial technologies for defense purposes; a creation, design, development, demonstration of technical or operational utility; or combinations of the foregoing, related to a prototype. The quantity should generally be limited to that needed to prove technical or manufacturing feasibility or evaluate military utility.”*

Limitation of Authority

▶ Pursuant to 10 USC 2371b(d), Agencies are prohibited from entering into an OT for Prototype unless:

- (A) There is at least one nontraditional defense contractor 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 parties to the transaction other than the Federal Government;
or
- (D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction.....

Nontraditional Defense Contractor Defined

- ▶ **Pursuant to 10 USC 2302(9), a Nontraditional Defense Contractor is 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 the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section.

Significant Participation Defined

- ▶ **Significant Participation – No Statutory Definition of Significant Participation, however:**

Pursuant to the “Other Transactions” (OT) Guide for Prototype Projects, (DPAP, January 2017):

- ▶ *“Examples of what might be considered a significant contribution include, but are not limited to, supplying new key technology or products, accomplishing a significant amount of the effort, or in some other way causing a material reduction in the cost or schedule or increase in the performance.”*

Comptroller General Access

- ▶ **Prototype Project Agreements entered into under 10 USC 2371b, which provide for total payments in excess of \$5,000,000, shall provide for Comptroller General access to examine the records of any party to the Project Agreement.**
- ▶ But – the access requirement does not apply where an entity has not entered into any other contract, grant, cooperative agreement, or “other transaction” agreement that provides for audit access by a Government entity in the year prior to the date of the Project Agreement.
- ▶ If an entity participating in the performance of the Project Agreement, has only performed under cooperative agreements or transactions that were entered into under 10 USC 2371 and/or 10 USC 2371b in the year prior to the date of the Project Agreement, then the only records the Comptroller General may examine are records of the same type as the records that the Government has had the right to examine under the audit access clauses of the previous agreements or transactions performed within the prior year.

Cost Sharing

- ▶ Pursuant to 10 USC 2371b(d), Agencies are prohibited from entering into an OT for Prototype unless:

(A) There is at least one nontraditional defense contractor 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 parties to the transaction other than the Federal Government; or

(D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction.....

Cost Sharing

- ▶ Pursuant to Statute, cost share amounts do not include costs that were incurred before the date on which the transaction becomes effective.

However, where costs were incurred for a prototype project after the beginning of negotiations, but prior to award of the transaction; in anticipation of entering into the transaction; and where it was appropriate for the party to incur the costs before the transaction became effective in order to ensure the successful implementation of the transaction, such costs may be allowed.

Competition

- ▶ **The Competition in Contracting Act (CICA), Pub. L. No. 98-369 (1984), as amended (Including truth in negotiations) does not apply to Section 815 OTAs**

Statute - The Statute authorizing DoD use of OTs for Prototype Projects require that competitive procedures be used “**to the maximum extent practicable**” (10 USC 2371b(b)(2))

- ▶ Guidance – “Competitions for OTs should be structured in a common sense manner that treats offerors fairly and, when applicable, be consistent with industry practice for that market segment. The multi-functional acquisition team is responsible for maximizing competition.”
- ▶ While there is tremendous flexibility in how a competition is conducted, opportunities for OT awards must be handled in a manner that is fair, transparent, and ethical

Intellectual Property

- ▶ **The Bayh-Dole Act, prescribing Government's rights in patentable inventions; along with 10 USC 2320 "Rights in Technical Data", and 10 USC 2321 "Validation of proprietary data restrictions", prescribing Government and Contractor rights to technical data do not apply to Section 815 OTAs**

Intellectual Property rights under a Section 815 OTA are negotiated on a project by project basis.

In a consortium based blanket agreement (where projects are subsequently issued), there may be general IP provisions at the overarching Agreement level as a starting point for negotiation.

Generally, the Government does not seek ownership of IP, only a license for Government use.

Production

- ▶ **Sole-Source Production Follow-On: Pursuant to 10 USC 2371b(f) a “transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction” provided:**

(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.

Applicability of Regulation / Guidance

Applicable

- 10 USC 2371b
- Procurement Integrity (41 USC 21)
- DPAP OT Guide, January 2017 (Per Delegation of Authority)
- Federal Fiscal Law
- Arms Export Control Act (AECA)
- International Traffic in Arms Regulation (ITAR)
- Export Administration Regulations (EAR)
- Laws of General Applicability

It Depends...

- Buy American Act
- Berry Amendment

Not Applicable

- Bayh-Dole Act / IP Statutes
- Competition in Contracting Act (CICA)
- Truth in Negotiations Act
- Contract Disputes Act
- Procurement Protest System
- Grants and Agreements Reg. (DODGARS)
- Federal Acquisition Regulation (FAR)
- Defense Federal Acquisition Regulation Supplement (DFARS)
- Service Contract Act
- Fair Labor Standards Act
- Walsh Healey Act

What Could Be Next?

- ▶ Potential expansion of the use of OTAs for funding agreements under the Small Business Innovation Research program and Small Business Technology Transfer program.
- ▶ Potential removal the requirement for the specific approval by senior acquisition officials for the use of such agreements for large projects.
- ▶ Possible establishment of a preference for using Other Transactions for science and technology, prototyping, and experimental purposes.
- ▶ Potential amendment of section 2358 of title 10, United States Code, to explicitly authorize the use of Other Transactions Authority and Experimental Procurement Authority as methods for entering into research agreements with industry, academia, and other researchers and technology developers.

Questions/Discussion



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