



"The Way of [DoD] OTA"

Presented at MAMA-AFRL Industry Day by Ira E. Hoffman

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hoffmani@butzel.com (202) 454-2849

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Key Acronyms

- ARPA-E Advanced Research Projects Agency-Energy
- DARPA Defense Advanced Research Projects Agency
- DFARS Defense FAR Supplement
- DIUx Defense Innovation Unit (Experimental)
- DNDO Domestic Nuclear Detection Office
- FAR Federal Acquisition Regulation
- NDAA National Defense Authorization Act
- OFPP Office of Federal Procurement Policy
- OTs Other Transactions
- OTA Other Transaction Authority
- SBC Small Business Concern

Background

- USG is world's largest consumer of goods & services and the sovereign
- But USG has inherently contradictory procurement objectives:
 - **Set rules that provide "level playing field"**
 - **Protect the public fisc**
- Result: Until FAR, procurement process became "a burdensome mess and maze," with "no effective [regulatory] system"

The FAR

- 1979 – Congress directed agencies to establish “uniform policies and procedures for acquisition by all executive agencies”
- 1984 - FAR became “primary” regulation for use by USG in acquisitions of supplies & services with appropriated funds
- Agency regulations – e.g., DFARS -- may supplement the FAR

Definition of FAR Acquisition

- “Acquisition” is “the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated.”
- “Acquisition contract” = “Procurement contract”

Using “Procurement Contracts”

An agency “shall” use a “procurement contract” as the legal instrument reflecting an agreement between the USG and a State, local government or other party when

- 1) The principal purpose of the instrument is to “acquire” goods or services for the “direct benefit or use” of the USG; or
- 2) The agency decides in a specific case that the use of a procurement contract is “appropriate.”

31 USC 6303 (1982)

Using “Grant Agreements”

An agency “shall” use a “grant” as the legal instrument showing an agreement between the USG and a State, local government or other party when

- 1) The principal purpose of the instrument is to “transfer a thing of value” to the State, local government or other party to “carry out a public purpose,” instead of acquiring things; &
- 2) The agency is not expected to be “substantially involved” in carrying out the grant activity

31 USC 6304 (1982)

Using “Cooperative Agreements”

An agency “shall” use a “cooperative agreement” as the legal instrument for an agreement between the USG and a State, local gov’t or other party when

- 1) The principal purpose of the instrument is to “transfer a thing of value” to the State, local government or other party to “carry out a public purpose,” instead of acquiring things; &
- 2) The agency is expected to be “substantially involved” in carrying out the agreed activity

31 USC 6305 (1982)

Transactions Outside FAR

- Grants and Cooperative Agreements
- Contracts with third parties under grants
- Purchases or leases of real property
- Transactions where Congress authorized acquisition “notwithstanding” FAR
- Any contract or agreement with USG that is not a “procurement contract”

No Legal Definition of OTA

- An “other transaction agreement” (“OTA”) is a legal instrument used by designated Federal agencies for specified purposes
- OTAs can be used only by agencies that have express statutory authority
- There is no statutory or regulatory definition
- In practice, OTA is defined in the negative: it is a legal instrument other than a contract, grant or cooperative agreement

GAO Definition of OTAs

- OTAs are a “special type of legal instrument . . . other than contracts, grants or cooperative agreements that generally are not subject to Federal laws and regulations applicable to procurement contracts”

Benefits of OTAs

- Fewer USG-unique rules
- Can attract companies or research entities that may be unwilling to comply with FAR
- Offer greater flexibility tailored to the authorized project
- OTAs promote more collaboration than Ks
- **But** contracting officials and contractors tend to be more comfortable with FAR

History of OTAs

- 1958 NASA
- 1972 NIH
- 1989 DARPA (for science & technology)
- 1993 DoD (R&D throughout DoD)
- 1996 FAA
- 1998 DOT
- 2002 DHS, TSA
- 2005 DOE
- 2006 HHS, DNDO
- 2011 ARPA-E



OTAs are “Intentionally Broad”

- SASC is “frustrated” by ongoing “lack of awareness and education” regarding OTAs by “senior leaders, contracting professionals and lawyers.”
- OTA statutes are written “intentionally broad,” but limited knowledge leads to “overly narrow interpretation of when OTAs may be used”
- Agencies should “tolerate more risk,” as long as such risk is lesser than risks of “stymieing innovation or slowing development & fielding of critical new capabilities”

Preference for DoD OTAs

- FY18 NDAA § 867, “Preference for the Use of [OTAs] and Experimental Authority”:
 - “In the execution of science and technology and prototyping programs, the Secretary of Defense shall establish a preference, to be applied in circumstances determined appropriate by the Secretary, for using transactions other than contracts, cooperative agreements, and grants entered into pursuant to [10 USC] 2371 and 2371b ...and 2373....”

OTA Statutes

- 10 USC 2371: applies to basic, applied and advanced research projects
- 10 USC 2371(e): use when standard K, grant or coop agreement is not feasible or proper
- 10 USC 2371b: applies to prototype projects that are “directly relevant” to enhancing mission effectiveness of military personnel
- 10 USC 2371b(f): production K or OT can be awarded after successful prototype project

Conditions for Prototypes

- DoD can award § 2371b prototype project *if*
 - 1) At least one nontraditional defense contractor or research nonprofit participates to a significant extent;
 - 2) All significant participants are either SBCs or nontraditional defense contractors
 - 3) At least 1/3 of cost paid by non-USG funds
 - 4) Sr. Procurement Exec finds exceptional circumstances justify since innovation would not be feasible under typical K

Use of Consortia

- Another notable difference between OTAs and procurement contracts is that OTAs are often awarded to a consortium
- In a typical consortium, the contract recipient manages administrative matters, and ensures participation of nontraditional contractors & small businesses, if any
- Use of consortia is encouraged to expand pool of potential innovators for DoD

NDAA FY18 OTA Provisions

- § 861: Authorizes line items for advanced development of initial or prototype units originally awarded under 10 USC 2302(2)(B)
- § 862: Amends 10 USC 2358(b) to add transactions under 10 USC 2371, 2371b, 2373
- § 863: Directs Sec'y of Defense to improve acquisition workforce training in OTAs
- § 864: Expands OT authority for larger \$\$ prototype projects

NDAA FY19 OTA Provisions

- Applies prototype approval thresholds to follow-on awards
- Clarifies that a follow-on award is authorized upon successful completion of an individual prototype project under a consortium
- Requires reports on DIUx and OTA utilization

Other Statutes that Apply

- Procurement Integrity Act (per § 2371b(h))
- Non-Discrimination in Federal Programs
- GAO audits in some cases (per § 2371b(c))
- Freedom of Information Act (most cases)
- Trade Secrets Act
- Tucker Act
- Anti-Deficiency Act
- Defense Production Act (for funding OTs)

What Laws Do Not Apply?

- Statutes (and regs) that are specific to procurements or financial assistance, e.g.:
 - Competition in Contracting Act
 - Contract Disputes Act
 - Bid Protest statutes (neither GAO nor CoFC)
 - Examination of Records
 - Rights in Patents and Technical Data
 - Truth in Negotiations
 - Service Contract Act
 - Buy American Act
 - Bayh-Dole Act

Purpose of DIUx

- Accelerate development, procurement and integration of commercially derived disruptive technologies
- Award funding to “nontraditional” & traditional defense contractors for prototype projects
- Apply competitive procedures, to maximum extent practicable

DIUx Process

- Uses “commercial solutions openings” (CSO) to solicit hardware, software and/or unique services to meet DoD partners’ needs
- If idea is good, DIUx invites pitch < 30 days
- If pitch is successful, DIUx invites full proposal to begin negotiations for pilot contracts
- Pilot contracts usually awarded < 90 days
- If pilot successful → likely follow-on contract

GAO Protests of OTAs

- MorphoTrust USA, LLC, B-412711 (5/16/2016)
 - a) RFP for multiple OTA awards for TSA “Pre√” program
 - b) Protester: TSA required to use procurement contracts
 - c) GAO: TSA statute authorized use of OTAs
 - d) Decision: Since OTAs are “not procurement contracts,” GAO lacks jurisdiction over the protest
- Oracle America, Inc., B-416061 (5/31/2018)
 - a) The Army awarded follow-on production contract for cloud migration services originally awarded as OTA
 - b) Decision: protest granted since statute authorizing DoD OTAs requires notice if follow-on production contemplated

Takeaways

- 1) Within OTA domains (R&D, prototyping, and follow-on production), OTs are just Ks
- 2) Relatively few statutes/regs apply
- 3) Closer to comm'l Ks than procurement Ks
- 4) Primary characteristics:
 - a) Seeks innovative research, rapid prototyping, fielding
 - b) Increased flexibility in contracting
 - c) Contractors can keep IP; ignore many cost rules
 - d) OTA statutes are written "intentionally broad"
 - e) With USG a party, some Gov't-unique laws still apply

Questions?

Ira E. Hoffman, Esq.

Ira E. Hoffman has been practicing law for over 30 years, focusing on government contracts law (including bid protests, claims and disputes, compliance, internal investigations, IP rights, small business issues, international contracting, FAR & OTAs, False Claims Act, supply chain); export controls (ITAR, EAR and OFAC); commercial litigation (prime-sub disputes); and, more recently, cyber law and policy. He is a founder of the Public Contracting Institute, where he teaches courses on fundamentals of government contracting; international contracting (BAA, TAA, Berry Amendment and FCPA); export controls; and small business contracting and subcontracting. He also has authored or co-authored articles on government contracts compliance; ITAR, EAR and OFAC developments, and U.S. law and cybersecurity.

Mr. Hoffman is a Shareholder in the Washington, D.C. office of Butzel Long, a 165 year-old Detroit-based law firm. He can be reached at 202-454-2849 or hoffmani@butzel.com.

