



# Other Transaction Agreements: Navigating Uncertainty to Grow Your Federal Business

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# What Is an OTA?

- Other Transaction Agreement
- Not a procurement contract, cooperative agreement, or grant
- *E.g.*, "The Secretary of Defense and the Secretary of each military department **may enter into transactions (other than contracts, cooperative agreements, and grants)** under the authority of this subsection in carrying out basic, applied, and advanced research projects."

10 USC § 4201(a)



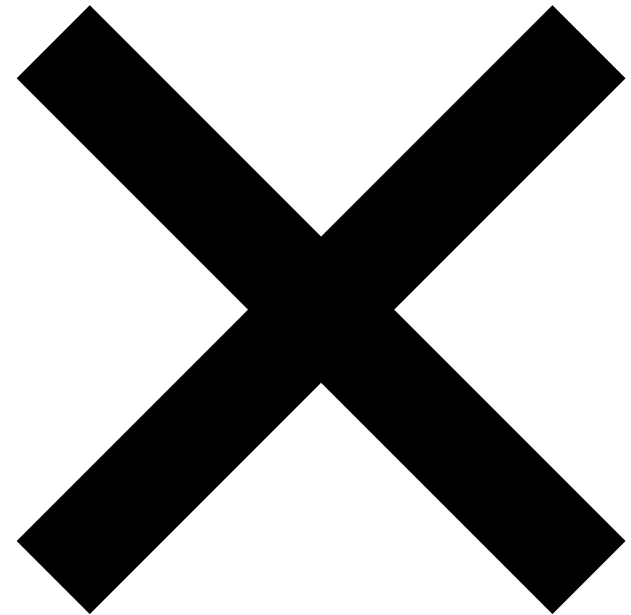
# Advantages of OTAs

- Allow faster, more flexible contracting
- Accelerate research and development of new technologies
- Expand government partnerships to companies that are not traditional government contractors
- Save taxpayer dollars through cost and resource-sharing with private industry



# Laws That Do Not Apply

- Federal Acquisition Regulation
- Contract Disputes Act
- Competition in Contracting Act
- Cost Accounting Standards
- Truth in Negotiations Act
- Bayh-Dole Act
- Rights in Technical Data
- Uniform Regulations



# Laws That Still Apply

- False Claims Act
- Procurement Integrity Act
- Freedom of Information Act
- Anti-Deficiency Act
- Civil Rights Act/Title VI
- Clean Air & Clean Water Acts



# Bid Protests

- Limited protest jurisdiction
- GAO can hear pre-award protests alleging improper use of OTA
  - *Exploration Partners, LLC*, B-298804, Dec. 19, 2006, 2006 CPD ¶ 201
- COFC can hear protests of OTAs “in connection with a procurement or a proposed procurement”
  - *Hydraulics International, Inc. v. United States*, 161 Fed. Cl. 167 (2022)



# Agencies With OT Authority

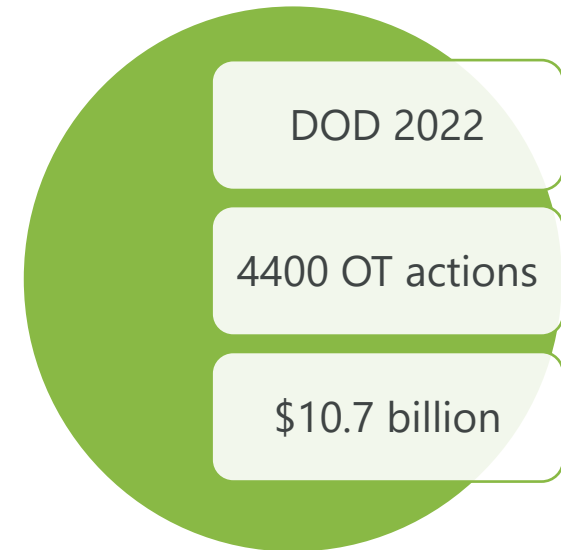
- DOD – 10 USC §§ 4021, 4022
  - Research, Prototype, and Follow-on Production OTAs
- NASA – 51 USC § 20113(e)
  - Space Act Agreements — nonreimbursable, reimbursable, funded, or unfunded
- DOE – 42 USC § 7256(g)
  - Research, Development, and Demonstration Projects
- HHS – Pandemic and All-Hazards Preparedness Act of 2006
  - Research and Prototypes
- DHS – Homeland Security Act of 2002
  - Research and Prototypes
- DOT – Department of Transportation and Related Agencies Appropriations Act of 1996
  - Research and Prototypes

## Sub-agencies with OTA authority:

- FAA
- TSA
- NIH
- DNDO
- ARPA-E

# Solicitation and Negotiation Process

- Some OTA authorizing statutes, including DOD prototype statute, require using competitive procedures to “the maximum extent practicable”
- Consortium Management Firm Model vs. Direct Solicitation Model
- Can be solicited through Request for Project Proposals, Request for White Papers, other solicitations
- Negotiation and award process depends on agency, solicitation method, and AO



# Key Terms for Negotiations

- Intellectual property rights
- Flow-down requirements
- Changes and modifications
- Terminations and accompanying remedies for Government and contractors
- Dispute resolution, including ADR



# Cost Allowability Considerations for OTAs

- Cost allowability rules can vary significantly depending on the OT award.
- Cost allowability may be predicated on, one end of spectrum, the reasonableness of costs incurred or, on the other end of the spectrum, compliance with Federal Acquisition Regulation ("FAR") Part 31 and potentially supplemental FAR.
- Whether an entity is servicing contracts subject to the Cost Accounting Standards ("CAS") may dictate applicable cost allowability standards.
- The Government could require validation of allowable costs through an Incurred Cost Proposal to be developed in accordance with the requirements of FAR 52.216-7.
- Cost allowability standards will drive, in part, the types of records an entity must maintain to support payments under an OT award.

# Business System Considerations for OTAs

- For cost reimbursement awards, some level of project-based accounting and cost allocation capabilities in the accounting system will almost certainly be required.
- Accounting system requirements will be influenced by cost allowability requirements. Does the accounting system need to be configured to facilitate compliance with, for example, FAR Part 31?
- Does the accounting system need to be configured so that data is readily available to determine when funding thresholds (e.g., 75%) are forecast to be exceeded so that timely notification can be given to the customer requesting additional funding?
- If a contractor changes its cost accounting practices, are there provisions akin to those under FAR Part 30 that would require a cost impact analysis to determine if the customer is paying more or less because of the accounting practice change?

# Business System Considerations for OTAs

- There may be billing terms for OT awards that are either infrequently used or not used at all on procurement contracts issued under the FAR. For example:
  - Milestone-based payments where milestones need to be achieved, and a contractor is then reimbursed only for allowable costs incurred to achieve the milestone (as opposed to an agreed to price).
  - Cost sharing billings which are more akin to billings under cost-share agreements issued under 2 CFR 200.
- If fee is billable, what are terms governing fee retainage? (They may be less favorable than comparable FAR based provisions)
- Special provisional billing rates may need to be negotiated with the customer (there may not be an assumption that provisional billing rates used on FAR based on contracts are to be used for OT award billings).

# Other OT Award Considerations

- How great is a contractor's negotiating power if it seeks to change terms or conditions? May be limited if there is a base agreement with multiple potential awardees.
- For contractors servicing contracts with heavy compliance burdens (e.g., large cost-reimbursement contracts issued under the FAR), are established practices overkill to compliantly administer an OT award?
- In the circumstance cost allowability is predicated on reasonableness alone, what level of support is required to determine the allowability of costs (especially subcontractor costs)?
- How are terminations and/or requests for equitable adjustments to be handled? (These may not be governed by FAR provisions covering these issues and therefore, processes may be somewhat undefined)
- Are there cybersecurity requirements applicable to the OT award (e.g., NIST 800-171)?
- What types of data rights does the customer seek? Do they go beyond comparable provisions in the FAR or Supplemental FAR?

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