Other Transactions Authorities

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### PAST

- Innovation fueled by Government
- Commercial sector wanted to work with the Government
- DoD was primary driver of technology innovation by making substantial investments in R&D in the defense industrial base
- DoD powered a technology advantage on the battlefield with its investments in R&D

### PRESENT

- Innovation fueled by commercial market
- Cutting edge commercial firms with large R&D investments are reluctant to work with the Government
- The focus and pace of innovation and the leading technology areas shifted from Government to commercial sector
- DoD needs to work with commercial sector to maintain a technology advantage on the battlefield
Technologies, and technological-based companies, advance so rapidly that the DoD is finding it difficult to contractually engage, collaborate, and do business with high-tech companies.

Congressional interest in accessing new sources of technical innovation
- Silicon Valley start-ups
- Small commercial firms

“Start-ups are the leading edge of commercial innovation, and right now, DoD researchers don’t have enough promising ways to transition technologies that they came up with to application.”

Secretary Ash Carter, Defense Media Activity, April 23, 2015.
The traditional procurement process is too slow

Traditional procurement contracts are based on regulation rather than negotiation

The Government’s cost-based pricing system is cumbersome and expensive
  » Requires unique accounting and auditing systems
  » Legacy of actual or perceived oversight excesses

The Government’s standard approach to intellectual property can be overreaching and inflexible
# Tool Box of Authorities

<table>
<thead>
<tr>
<th>Pathway</th>
<th>Acquisition</th>
<th>Financial Assistance</th>
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</thead>
<tbody>
<tr>
<td>Instrument</td>
<td>Contracts</td>
<td>Other Transactions for Prototype Projects</td>
</tr>
<tr>
<td>Fiscal Year Obligations</td>
<td>98%</td>
<td>&lt; 1%</td>
</tr>
<tr>
<td>Purpose</td>
<td>To acquire</td>
<td>To acquire via prototyping</td>
</tr>
<tr>
<td>Outcome</td>
<td>Direct Gov’t benefit or use</td>
<td>Carries out a public purpose authorized by U.S. law</td>
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DoD has statutory authority to award Other Transactions (OT) (as do many other agencies)

» OTs, including Technology Investment Agreements (TIAs) – 10 U.S.C. 2371

» OTs for Prototypes – 10 U.S.C. 2371b (the focus of this presentation)
Unique 2371b Requirements

- 2371b OTs for prototypes are defined by what they are not: they are not standard procurement contracts, grants, or cooperative agreements.

- Prototype Projects Must Be Directly Relevant to the:
  - Enhancement of mission effectiveness of military personnel
  - Support or improvement of platforms, systems, components or materials in use by the armed forces
  - DOD acquisition or development of proposed materials

- Use competitive procedures to the maximum extent practicable

- Must provide for Comptroller General’s access to information and review of agreements in excess of $5,000,000

- Procurement Integrity Act applies
Perceptions of OTs

Advocates find:

- Attractive to performers looking for flexibility in their agreement terms
- Attracts companies that would normally avoid DoD business
- Invokes commercial practices, such as negotiable terms and conditions.
- Removes rigidity of traditional Government procurement
- Promotes trust and a spirit of cooperation with industry
Perceptions of OTs

Contrarians find:

- Terms of agreement may foster too many unknowns creating more risk for the Government
- Removing the rigidity of traditional Government procurement also removes safeguards
- Can be more time-consuming than traditional R&D contracts, especially for inexperienced contracting personnel
- Requires greater participation on the part of the Government program manager
Approval Levels

FORMER (Pre-FY18)
- < $50M = CO approval
- $50M-$250M = SPE approval
- > $250M = USD(A&S) approval

CURRENT
- < $100M = CO approval
- $100M-$500M = SPE approval*
- > $500M = USD(A&S) approval

with 30 days advance notice to the congressional defense committees

*Approval at SPE Level:
- DARPA – Director of DARPA – statutory
- MDA – Director of MDA – statutory
- Military Departments – SPEs – statutory
- Other Defense Agencies – look to specific delegation

SPE and USD(A&S) approvals are not delegable.
Who can participate?

At least one **non-traditional** defense contractor or nonprofit research institution participating to significant extent; OR

All **significant participants** in the transaction are small businesses or non-traditional defense contractors (including SBIR participants); OR

At least 1/3 of the total cost of the prototype project is paid by sources other than the Federal Government; OR

The agency SPE determines exceptional circumstances justify the use of the authority.
Follow-on Activities

- The FY16 NDAA changed the follow-on production section of 10 U.S.C. 2371b(f)
- It now allows for follow-on production transactions under the following conditions:
  - The follow-on effort will be awarded to the participants in the OT to include sub-awards under a consortium OT
  - Competitive procedures were used for the selection of the participants in the OT for prototype phase
  - The prototype phase was successfully completed
- The follow-on effort can be awarded as an extension to the original OT, as a new OT, as a procurement contract, or under other procedures the SecDef may establish
  - You are not required to re-compete
  - It is not considered a sole source award
OT Solicitation Methods

- OTs can be awarded through several solicitation approaches
  - Broad Agency Announcements (BAAs)
    - Typically allows for the award of procurement contracts, grants, cooperative agreements, or both types of OTs
    - The solicitation process is governed by FAR Part 35
  - Research Announcements (RAs)
    - Limited to research efforts and a determination is made at the outset that only grants, cooperative agreements, or TIAs will be awarded
    - Solicitation process is governed by the document itself and can include unique terms and conditions
  - Program Solicitations (PAs)
    - This solicitation can be named whatever you choose (i.e. Commercial Solutions Opening)
    - A determination is made at the outset that only OTs for Prototypes will be awarded
    - Solicitation process is governed by the document itself and can include unique terms and conditions
Commercial Solutions Opening (CSO)

Fast, Flexible, Collaborative

**Phase I - Evaluation:** Technology and Company

**Phase II - Pitch:** Cost, Schedule, Use Case

**Phase III - Proposal:** Project Design
DIUx began the CSO process in June 2016 using non-FAR based contracts. As the end of FY17 they have awarded 61 OTs at a total value of $145M averaging only 78 days from initial contact with the company to signing an agreement.

This 78 days encompasses not only the contracting process, but also the collaborative project design between DIUx, the company, and the DoD customer.
Best Practices

- The primary goal of OTs is to attract nontraditional performers
  - Awarding more quickly may be a side effect of using OTs, but it is not the main reason to use the authority

- In fact, awarding OTs initially may not be faster
  - Unless the awarding organization fully embraces the inherent flexibility and streamlines its award processes, there may not be much of a time savings
  - It may take some time for the Government team to get used to the new paradigm and learn how to negotiate terms and conditions
  - There is a learning curve with OTs
The Uncertain

- There are no templates or checklists, so use good business judgment
- With purposely little guidance, OT practice is ever evolving
- The new follow-on production language is still in its infancy
  - Expect some failures
  - Best practices are yet to come
  - It may not be appropriate or wise to do a follow-on in every situation
- With the renewed popularity of OTs, expect some oversight to follow, both internal and external
  - Don’t be afraid of it – just make sure the decisions made are thoughtful and documented
Resources

- DPAP Website “Innovation in Contracting”
  - DFARS Case 2017-D029 implements the CSO process

- DIUx’s CSO “How-to” guide
  - https://www.diu.x.mil/CSOguide
Conclusion

- The OT authorities provide significant options to the traditional process
- It is not the appropriate option in all circumstances
- The primary goal of OTs is to encourage and engage non-traditional performers in working on defense programs, NOT to award agreements quickly
- Speed can be a side-effect of the OT flexibility but it will depend on negotiation issues and internal processes