



## Other Transaction Agreements

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- In recent years, the USG's use of Other Transaction Agreements (OTAs\*) has increased as Government seeks increased access to innovative technology and products
- “Despite the government’s ongoing need to take advantage of the commercial sector’s leading edge technology and research, statutory and regulatory procurement requirements have served as a deterrent to working with the federal government.”
- Key objective is to attract companies that typically do not do business with USG
  - But traditional Gov’t contractors can also participate

\*Also refers to Other Transaction *Authority*

# Today's Topics

- Brief History and Overview of OTAs
- Agreement Nuts and Bolts
- Typical OTA Elements and Terms
- Agency Specifics
- Protests and Disputes
- Practical considerations for negotiating OTAs and OTA-related subcontracts



# Brief History and Overview of OTAs

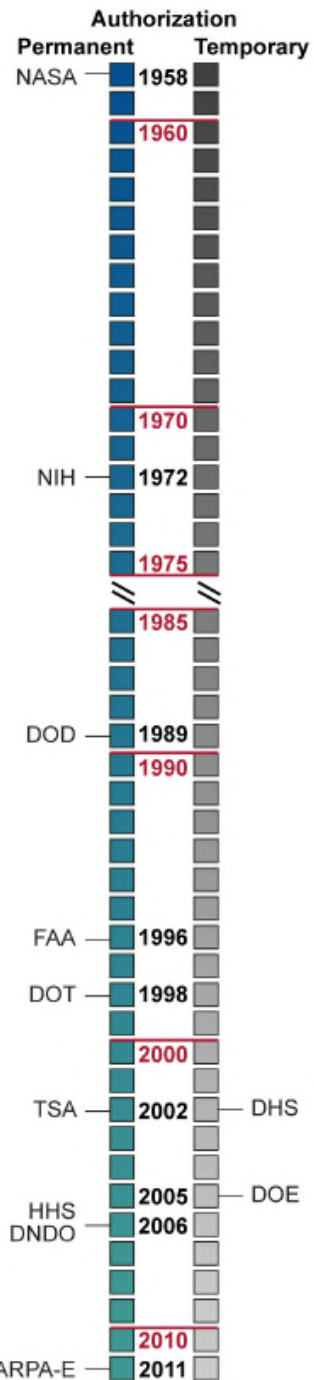
*What is this thing, anyway???*

# Other Transactions “Defined”

- No specific statutory or regulatory definition
- Primarily defined by what they are *not*:
  - Procurement contracts
  - Grants
  - Cooperative agreements

# Origins and Evolution

- NASA was the first agency to receive OT authority
  - National Aeronautics and Space Act of 1958
  - Response to Sputnik
- Congress gradually expanded to 11 federal agencies under 6 departments
  - DoD
  - DoE
  - DHS
  - DoT
  - HHS



# *Agencies with Permanent or Temporary Other Transaction Authority and Year Granted*

### Abbreviations

ARPA-E	Advanced Research Projects Agency – Energy
DHS	Department of Homeland Security
DNDO	Domestic Nuclear Detection Office
DOD	Department of Defense
DOE	Department of Energy
DOT	Department of Transportation
FAA	Federal Aviation Administration
HHS	Department of Health and Human Services
NASA	National Aeronautics and Space Administration
NIH	National Institutes of Health
TSA	Transportation Security Administration

# Scope of OT Authority

- Because they are creatures of statute, the nature of each agency's OT authority is determined by Congress
  - Temporary vs. permanent authority
  - Unlimited vs. narrower project restrictions
  - Department-wide vs. agency-specific



# Temporary vs. Permanent

- Most agencies' authorities are permanent
- Temporary authorities requiring periodic congressional reauthorization include
  - DoE\* – currently through FY2020
  - DHS\* – through FY2017, subject to conditions
  - DoD Prototype – previously temporary, now permanent

*\*But certain agencies within have separate, permanent authority (e.g., TSA, DNDO, ARPA-E)*

# Unlimited vs. Restricted Usage

## *Unlimited*

- NASA\*
- ARPA-E
- FAA
- TSA

## *Restricted*

- DoD
- DoT
- DHS
- DoE
- HHS
- NIH
- DNDO

Agency	Other transaction authority as currently enacted <sup>a</sup>	Public Law providing initial authorization
Department of Defense (DOD)		
<i>For research, development, and demonstration activities</i>	10 U.S.C. § 2371	Pub. L. No. 101-189, § 251 (1989)
<i>For prototype activities</i>	10 U.S.C. § 2371 note	Pub L. No. 103-160, § 845 (1993)
Department of Energy (DOE)	42 U.S.C. § 7256	Pub. L. No. 109-58, § 1007 (2005)
Advanced Research Projects Agency-Energy (ARPA-E)	42 U.S.C. § 16538	Pub. L. No. 111-358, § 904 (2011)
Department of Health and Human Services (HHS)	42 U.S.C. § 247d-7e	Pub. L. No. 109-417, § 401 (2006)
National Institutes of Health (NIH)		
<i>For National Heart, Blood Vessel, Lung, and Blood Diseases and Blood Resources Program</i>	42 U.S.C. § 285b-3	Pub. L. No. 92-423, § 3 (1972)
<i>For Common Fund</i>		
<i>For certain demonstration projects</i>	Consolidated Appropriations Act, 2015, Pub. L No. 113-235, div. G, title II, § 213, 128 Stat. 2487	Pub. L. No. 108-199, div. E, title II, § 221, 118 Stat. 256 (2004)
<i>For Cures Acceleration Network</i>		
	42 U.S.C. § 284n	Pub. L. No. 109-482, § 105 (2007)
	42 U.S.C. § 287a	Pub L. No. 111-148, § 10409 (2010)
Department of Homeland Security (DHS)	6 U.S.C. § 391	Pub. L. No. 107-296, § 831 (2002)
Domestic Nuclear Detection Office (DNDO)	6 U.S.C. § 596	Pub. L. No. 109-347, § 501 (2006)
Transportation Security Administration (TSA)	49 U.S.C. § 114(m)	Pub. L. No. 107-71, § 101 (2002)
Department of Transportation (DOT)	49 U.S.C. § 5312	Pub. L. No. 105-178, § 3015 (1998)
Federal Aviation Administration (FAA)	49 U.S.C. § 106(l)	Pub L. No. 104-264, § 226 (1996)
National Aeronautics and Space Administration (NASA)	51 U.S.C. § 20113(e)	Pub. L. No. 85-568, § 203(c) (1958)

Sources: GAO analysis of U.S. code and public laws. | GAO-16-209

<sup>a</sup>As of September 30, 2015.

# Agency Use of OTAs, FY10-14

Agency	Types of activities		
	RD&D	Prototype	Other
Advanced Research Projects Agency – Energy (ARPA-E)	✓		
Department of Defense (DOD)	✓	✓	
Department of Energy (DOE)	✓		
Department of Health and Human Services (HHS)	✓		
Department of Homeland Security (DHS)	✓	✓	
Department of Transportation (DOT)	✓		
Domestic Nuclear Detection Office (DNDO) <sup>a</sup>			
Federal Aviation Administration (FAA)	✓		✓
National Aeronautics and Space Administration (NASA) <sup>b</sup>	✓		✓
National Institutes of Health (NIH)	✓		
Transportation Security Administration (TSA)			✓

Sources: GAO analysis of agencies' information. | GAO-16-209

<sup>a</sup>DNDO did not enter into any other transaction agreements for fiscal years 2010 through 2014.

<sup>b</sup>According to officials, NASA does not acquire RD&D services using other transaction agreements, but it does conduct collaborative RD&D activities with outside entities.

# OTA Examples

- REAN Cloud DoD OTA
- Critical Infrastructure Protection
- Cargo Screening



# Agreement Nuts and Bolts

*What does it need to include?*

# Potential Benefits of OTAs

- *Negotiation* – greater acquisition flexibility
- *Innovation* – government business models not subject to typical acquisition regulations
- *Access* – involvement of entities who may not have previously been involved with the USG

# Inapplicable Statutes & Regulations

- FAR / Agency Supplements
- Data Rights
- Cost Accounting Standards
- Fair Labor Standards Act of 1938, 29 U.S.C. § § 201-219
- Limitation on the use of appropriated funds to influence certain federal contracting and financial transactions, 31 U.S. C. § 1352
  - But see DoD TIAs
- Competition in Contracting Act (CICA), 31 U.S.C. § 3551 et seq.



# Inapplicable Statutes & Regulations (cont'd)

- Bayh-Dole Act, 35 U.S.C. § § 200-212
  - But see Space Act Agreements (NASA)
- Buy American Act, 41 U.S.C. § § 10a-d
- Walsh Healey Act, 41 U.S.C. § § 35-45
- Anti-Kickback Act of 1986, 41 U.S.C. § § 51-58
- Service Contract Act, 41 U.S.C. § 351 et seq.
- Procurement Integrity Act, 41 U.S.C. § 423 (but see DoD prototype OTs)
- Contract Disputes Act (CDA), 41 U.S.C. § 601 et seq.
- Drug-Free Workplace Act of 1988, 41 U.S.C. § § 701-707 (but see DoD TIAs)
- Truthful Cost or Pricing Data, 10 U.S.C. 2306a; 41 U.S.C. § 3501 et seq.

# How Much is Negotiable?

- *Nearly everything!*
  - Definitions
  - Changes
  - Disputes
  - Invoicing/Payments
  - Title, risk of loss to property
  - IP (title and license rights, duration, scope)
  - ...

# Potential Drawbacks of OTAs

- More flexibility = more negotiation = more up front work required!
- Fewer rules is a double edged-sword
  - Definitions/ interpretations can't be assumed to match the FAR
  - What you don't think of (and include in the agreement) up front *can* hurt you

# Applicable Laws

- Federal fiscal law
- Export control laws and regulations (e.g., ITAR / EAR)
- No apparent authority to bind the USG
- IP laws (patent, trademark, copyright, trade secrets)
- Venue and Governing law
- Comptroller General Access to Records
- Freedom of Information Act, 5 U.S.C. § 552
- Anti-Deficiency Act, 31 U.S.C. § 1341
- Anti-Assignment Acts
  - Assignment of Claims Act, 31 U.S.C. § 3727
  - Assignment of Contracts Act, 41 U.S.C. § 6305
- False Claims Act, 31 U.S.C. § 3729 et seq.



# Agency Specific Applications

*You mean they're not all the same?*

# Department of Defense

- OT Authority: 10 U.S.C. § 2731 and 2731b
- 3 authorized categories of OTA
  - Research, Development, and Demonstration (RD&D)
  - Prototype
  - Production
- Only available if traditional vehicles are not feasible or appropriate

# Department of Defense – Timeline

- 1989 – First temporary OT authority granted to DARPA for advanced research projects
- 1991 – Permanent OT authority for advanced research projects and expanded to all of DoD
- 1994 – DARPA temporary OT authority for prototypes relevant to weapons or weapon systems
- 1996 – Prototype authority expanded to all of DoD
- 2003 – OT research authority expanded to include carrying out basic, applied, and advanced research projects
- 2015 – permanent authority for prototype and follow-on production (2016 NDAA)
- 2017 – established a preference to use OTAs “in the execution of science and technology and prototyping programs” (2018 NDAA)
- 2018 – collect & report data on OTA usage (see BP) (2019 NDAA)

# RD&D OTs – Technology Investment Agreements

- 10 U.S.C. § 2371
- RD&D OTs allowed for basic, applied, and advanced research
- 3 conditions:
  - to the maximum extent practicable, no research duplicates research being conducted under existing DoD programs;
  - to the extent practicable, the non-government entity contributes at least 50% of the amount; and
  - An OT may be used “when the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate”
- Greater USG involvement in the research execution than the usual oversight of a grant or procurement contract



# Technology Investment Agreements (TIAs)

- Governed by 32 CFR Parts 21 and 37 (DoDGARs)
- Nomenclature can be confusing – 2 kinds of TIAs:
  - “TIAs are assistance instruments used to stimulate or support research. ...[A] TIA may be *either* a kind of cooperative agreement *or* a type of assistance transaction other than a grant or cooperative agreement.” 32 CFR § 37.110.
- DoDGARS applies to both types, but not 100% (see 32 CFR § 21.205, § 21.300)

# TIAAs (cont'd)

- Additional parts of the DoDGARs apply to TIAs:
  - 2 CFR Part 1125: nonprocurement debarment and suspension;
  - 32 CFR part 26: *drug-free workplace requirements*, which applies because it covers financial assistance in general; and
  - 32 CFR part 28: on *lobbying restrictions*, which applies by law (31 U.S.C. 1352) to TIAs that are cooperative agreements and *as a matter of DoD policy to all other TIAs*.
  - Portions of four other DoDGARs parts as cited by reference in this part (32 CFR parts 22, 32, 33, and 34)

# Authorized TIA Recipients

- OT TIA appropriate when one or more for-profit firms are to be involved either in the:
  - performance of the research project; or
  - commercial application of the research results
- Agreements Officers (AOs) encouraged to make awards to consortia but not mandatory
  - Consortium may include one or more for-profit firms, State or local government agencies, institutions of higher education, or other nonprofit organizations
- For awards to single firms or multiple performers in prime award-subaward relationships, AO should consider greater involvement of the program official or a way to increase self-governance

# TIA Types

- 2 Types of TIA: expenditure-based and fixed-support
- *Fixed-support*
  - Amount of assistance established at the time of award is not meant to be adjusted later if the research project is carried out to completion
    - Analogous to fixed-price procurement contract (w/o profit)
  - AO may use a fixed-support TIA if:
    - TIA is to support or stimulate research with outcomes that are well defined, observable, and verifiable;
    - Can reasonably estimate the resources required to achieve those outcomes well enough to ensure the desired level of cost sharing; and
    - TIA does not require a specific amount or percentage of recipient cost sharing

# TIA Types

- *Expenditure-based*
  - Total amount ultimately paid to the recipient based on the amounts the recipient expends on project costs
    - Analogous to cost-reimbursement contract
  - AO *must* use an expenditure-based TIA if
    - Non-waivable requirement (e.g., in statute) for a specific amount or percentage of recipient cost sharing; or
    - DoD has elected to include in the TIA a requirement for a specific amount or percentage of cost sharing
  - AO *should* use an expenditure-based TIA if conditions for fixed-support TIA are not otherwise met

# DoDGARS Requirements – Patent and Data Rights

- The “patent provision is what distinguishes a TIA that is a cooperative agreement from a TIA that is an assistance transaction other than a grant or cooperative agreement” (32 CFR § 37.205(d)(1))
  - Bayh-Dole applies to cooperative agreement, but not OT TIAs
  - TIA is categorized based on patent clause *upon negotiation completion*
- “TIAs are more flexible than traditional Government funding instruments and that provisions are negotiable in areas such as audits and intellectual property rights that may cause concern for commercial firms.” (32 CFR § 37.410)

# DoDGARS Requirements – Patent and Data Rights (cont'd)

- AO's goal is to craft an appropriate balance between DoD's interests in:
  - Gaining access to the best technologies for defense needs, and promoting commercialization of technologies resulting from the research
    - ***Either of these interests may be impeded if you negotiate excessive rights for the Government***
  - Providing adequate protection of the Government's investment, which may be weakened if the Government's rights are inadequate

# DoDGARS Requirements – Rights in Inventions

- Bayh-Dole is the starting point
  - When an invention is conceived or first actually reduced to practice under a TIA
  - USG obtains a nonexclusive, nontransferrable, irrevocable, paid-up license
  - to practice the invention, or to have it practiced, for or on behalf of the United States throughout the world
  - for Governmental purposes, and does not include the right to practice the invention for commercial purposes.
  - “March-in” rights if the recipient fails to take effective steps to achieve practical application of the subject inventions within a reasonable time
- *But* flexibility to negotiate different rights, timelines, etc.



# DoDGARS Requirements – Data Rights

- Government purpose license is the *starting point*
  - Irrevocable, world-wide license to use, modify, reproduce, release, or disclose for Governmental purposes data *generated* under TIAs
  - Governmental purpose: any USG activity, excluding commercial
- AO may negotiate other than a GP license when necessary to accomplish program objectives or to protect the Government's interests
- If a recipient intends to protect any invention as a trade secret, AO should consult with IP counsel before deciding what information related to the invention the award should require the recipient to report.

# DoDGARS Requirements – Foreign Access to Technology

- *AO must* include a provision addressing foreign access to technology developed under the TIA, providing (as a minimum) that any transfer of the:
  - Technology must be consistent with
    - U.S. export laws, regulations and policies
    - DoD Industrial Security Regulation in DoD 5220.22-R; and
    - Department of Commerce Export Regulation, as applicable
  - *Exclusive* right to use or sell the technology in the US must require that products embodying the technology will be manufactured substantially in the US.
    - Unless waived

# DoDGARS Requirements – Commitment and Cost Sharing

- AO must determine that the recipient has a strong commitment to and self-interest in project success
  - Evidenced in the proposal, management plan, or through other means
- AO must seek cost sharing
  - Purpose is to ensure the recipient “incurs real risk that gives it a vested interest” in the project's success
  - To the maximum extent practicable, the non-Federal party(ies) must provide at least half of the costs of the project, per statute
  - Cost sharing must come from non-Federal resources that are available to them unless there is specific authority otherwise
- Cash *or in kind* contribution, subject to requirements (37

# DoDGARS Requirements – Payments and Profit

- Advanced payments allowed
- DoD may *not* use a TIA if *any participant* is to receive fee or profit
  - Extends to all performers of the research project, including subawards for substantive program performance
  - Does not preclude participants' or subrecipients' payment of reasonable fee or profit when making purchases from suppliers of goods (*e.g.*, supplies and equipment) or services needed to carry out the research

# DoDGARS Requirements – Cost Accounting, Business Systems, Audits

- General policy is to avoid requirements that would force participants to use different systems than they currently use for:
  - Expenditure-based Federal procurement contracts and assistance awards in general, if they receive them; or
  - Commercial business, if they have no expenditure-based Federal procurement contracts and assistance awards.
  
- AO is tasked with *balancing* DoD's need for
  - Audit provisions (frequency, scope, remedies)
  - Property management
  - Financial management
  - Purchasing systems

# Solicitation and Award Process

- CICA does not apply, BUT...
- TIAs awarded using merit-based, competitive procedures, as described in 32 CFR 22.315:
  - in every case where required by statute; *and*
  - to the maximum extent practicable in all other cases

# Department of Defense Prototype OTAs

- 10 U.S.C. § 2371b
- Purpose is 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 carried out by the DoD, or
  - *improvement of platforms, systems, components, or materials* in use by the armed forces
- Procurement Integrity Act, 41 U.S.C. § 423 *does* apply to prototype and production OTs per 10 U.S.C. § 2371b(h)
- DoD Other Transactions Guide for Prototype Projects, January 2017, is the guiding document

# Prototype Project, Defined

- “[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.”



# Prototype & TIA OTs – Compared

- **Primary Differences**
  - Scope (research vs. prototype)
  - Authorized recipients
  - Cost-sharing/contribution requirement

# Prototype OTAs – Authorized Recipients

- 4 Options:
  - at least one “nontraditional defense contractor” or nonprofit research institution participating to a significant extent in the project;
  - all significant participants (other than the USG) are small businesses or nontraditional defense contractors;
  - at least 1/3 of the total cost of the project is to be provided by sources other than the USG; or
  - the senior procurement executive for the agency determines in writing that exceptional circumstances exist

# “Nontraditional Defense Contractor”

- Based on full CAS coverage for current and 1-year preceding DoD’s solicitation
  - “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...” 10 U.S.C. § 2302(9)
- Effective automatic exclusion for small businesses and many commercial companies
  - Full CAS coverage triggered at \$50M

# “Significant” Contribution

- Definition of “significant” is a case-by-case determination depending on the context
- Examples
  - Supplying new key technology or products
  - Contributing a significant amount of the overall effort
  - Causing a material reduction in the cost or schedule

# Prototype OTAs – Authorized Recipients

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  - the senior procurement executive for the agency determines in writing that exceptional circumstances exist
  - Traditional contractors w/ significant participation

# Cost Sharing for Traditional Contractors

- What is cost sharing?
- Similar to TIAs
  - Outlay of funds to perform the project
  - In-kind (equipment, materials, etc.)
  - Generally *not* a contribution of IP
  - May be waived by senior procurement executive if exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a procurement contract

# DoD Approval Levels for Prototype OTAs

- Up to \$100 Million – Contracting Officer
- \$100 Million to \$500 Million – Senior Procurement Executive
- Over \$500 Million – Under Secretary of Defense for ATL with notice to Congress

# Prototype & TIA OTs – Compared

- Very similar in many ways
  - Agency-imposed competition requirements
    - “To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out prototype projects under this authority” (OT Guide, C2.1.3.1.6.)
  - Negotiable patent and data rights
    - Bayh-Dole does not apply
  - Mandatory Foreign Access to Technology provision
  - “Expenditure-based” (cost-reimbursement) and “Fixed amount” (fixed price) agreement types



# Production OTAs

- Expanded authority for follow-on production transactions granted to DoD in the 2016 NDAA
  - Codified at 10 U.S.C. § 2371b(f)
- Prototype OTAs “may provide for award of a follow-on production contract or transaction to the participants in the transaction”
- Competitive procedures are not required for the follow-on if both
  - competitive procedures were used for the underlying transaction; and
  - the participants in the transaction successfully completed the prototype project provided for in the transaction

# NASA – Space Act Agreements

- National Aeronautics and Space Act of 1958 (51 U.S.C. § § 20101–20164)
- Unrestricted statutory authority
  - Compared to other agencies, NASA’s authority is very broad
  - Does not restrict the types of projects and research for which OTAs may be used
  - By policy, NASA restricts to projects for which traditional vehicles are not appropriate (similar to DoD standard)
- No governing regulations
  - NASA Policy Directive 105.1I (SAA Policy Directive)
  - NASA Advisory Implementing Instruction, NAI 1050-1D (Space Act Agreement Guide)

# NASA – Space Act Agreements

- 3 types of SAAs:
  - Reimbursable – NASA’s costs are reimbursed by the partner, in full or part
  - Nonreimbursable – mutually beneficial activity, where each party bears its own costs
  - Funded – appropriate funds are transferred to a domestic partner to accomplish an agency mission
- SAA Guide contains sample clauses
  - Type of agreement will dictate the starting point for negotiations

# Space Act Agreements – IP Provisions

- SAA Guide addresses four categories of IP rights, with sample clause for each based on agreement type
  - Data rights
  - Rights in “raw data”
  - Invention and patent rights
  - Patent and copyright use (third party)
- Sub-performer flowdown
  - Title-taking provisions are required flowdowns to subs
  - Allows ‘prime’ to negotiate broader rights in subcontractor inventions and data (in contrast to FAR/DFARS)

# Space Act Agreements – IP Provisions

- NASA starts from the position that USG takes title to inventions by large businesses
  - Does not apply to small or nonprofit businesses because of Bayh-Dole prohibition
  - Waivable but subject to broad mandatory license right granted to NASA
  - If title is taken, performer retains broad, non-exclusive license right
- NASA interprets the title taking provisions only apply if work is being performed *for* NASA and not for a party's own benefit
  - *I.e.*, certainly expect inclusion in funded agreements, but unlikely in reimbursable or nonreimbursable agreements



# The Role of Consortia

# Consortia

- Collection of interested performers, band together to form a non-profit consortium
  - Typically include traditional and non-traditional contractors
  - Often formed in collaboration/consultation with a specific agency
- Consortium establishes admission requirements, rules applicable to members
  - Typically requires a small annual fee

# Consortia

- Agency issues an umbrella OTA to the consortium, subject to a stated ceiling
  - Analogous to an IDIQ/BPA structure
- Government issues solicitation for specific project types or consortium forwards unsolicited white papers
  - Consortium acts as the ‘prime’ interface to the agency and coordinates/competes within the membership to determine which performer(s) are best able to support the Government’s needs
- Agency negotiates and issues OT ‘orders’ directly to the performer
  - Similar to task orders under an IDIQ contract
  - Some terms may be pre-negotiated between consortium and agency and non-negotiable per membership agreement



# DoD Consortia\*

- Aviation Propulsion Consortium
- Consortium for Command, Control, and Communications in Cyberspace (C5)
- Consortium for Energy, Environment and Demilitarization (CEED)
- **Countering Weapons of Mass Destruction**
- Defense Mobility Enterprise (i.e., Ground Vehicle Systems OTA)
- Medical CBRN Defense Consortium
- Medical Technology Enterprise Consortium
- National Armaments Consortium
- National Geospatial-Intelligence Agency (NSA) Enterprise Innovation Consortium
- National Security Technology Accelerator (NSTXL)
- National Spectrum Consortium
- Open Systems Acquisition Initiative Consortium
- **Sensors, Communications & Electronics Consortium (Coming Soon)**
- Space Enterprise Consortium
- Vertical Lift Consortium



# Protests and Disputes

*What are my rights?*

# OTA Protests


- GAO generally does not have jurisdiction to review protests of OTAs
  - *E.g.*, agency’s evaluation of proposals and selection of awardee(s)
- Exception for protests challenging whether the agency acted within its statutory authority when using the OTA
  - Recent *Oracle* decision
- *Oracle America, Inc.*, B-416061, May 31, 2018
  - USTRANSCOM awarded sole source production follow-on OTA
  - GAO sustained protest because underlying OTA did not “provide for” follow-on and sole source OTA was issued before prototype was complete

# OTA Protests

- COFC
  - No precedent yet
  - Jurisdiction established under Administrative Disputes Resolution Act, 28 U.S.C. § 1491(b)
    - OTAs not procurement contracts and so not subject to CDA
    - Tucker Act jurisdiction?
  
- District Courts
  - COFC's exclusive jurisdiction under ADRA (above) only applies to procurement contracts
  - OTAs are not procurement contracts, jurisdiction is arguable

# Dispute Resolution

- Without the FAR, negotiation of a substantive and sufficient disputes provision is critical
- Federal Circuit has broadly interpreted the meaning of the term “contract” under the COFC’s Tucker Act jurisdiction
  - Allegations would likely need to be carefully tailored so as not to venture into the realm of procurement contract-specific claims



# Practical Tips for Negotiating OTAs

*How does it really work?*

# Sub-performers

- Can still potentially utilize traditional prime and subcontractor relationship
  - Standard rules of privity apply (*i.e.*, can't bring suit directly against the USG)
  - But broader right to leverage prime position for IP rights
- Not subject to the FAR or its supplements, so no mandatory FAR or FAR supplement flow-downs
  - Will still want to largely mirror the terms and conditions negotiated with the USG, but greater flexibility
- Lack of FAR applicability is a double edged-sword
- Keep in mind any requirements to utilize competition to the maximum extent possible down the supply chain.

# Final Thoughts

- Don't be surprised your AO uses the FAR as the starting point
  - Push back – OTs are not procurement contracts!
  - Negotiate with the agency to remove nonmandatory provisions
- Disputes provision must address/encompass IP disputes
- Negotiation strategy and understanding your actual leverage position is key – think commercial negotiation
- Focus on definitions – don't rely on the FAR or assume everyone is on the same page
  - Use this opportunity to negotiate *better* definitions (narrower, more specific, tailored to your product/circumstance)
- Be creative! This agreement is a clean slate to address the parties' reasonable concerns



# Questions



# Additional Resources

- DoD Other Transactions Guide for Prototype Projects, January 2017  
[https://www.acq.osd.mil/dpap/cpic/cp/docs/OTA\\_Guide%20\(17%20Jan%202017\)%20ODPAP%20signature%20FINAL.pdf](https://www.acq.osd.mil/dpap/cpic/cp/docs/OTA_Guide%20(17%20Jan%202017)%20ODPAP%20signature%20FINAL.pdf)
- GAO Report, “Use of ‘Other Transaction’ Agreements Limited and Mostly for Research and Development Activities,” January 2016  
<https://www.gao.gov/products/GAO-16-209>
- NASA Policy Directive 105.1I, December 2008  
<https://nodis3.gsfc.nasa.gov/displayDir.cfm?t=NPD&c=1050&s=1I>
- NASA Advisory Implementing Instruction, NAI 1050-1D, September 2017  
[https://nodis3.gsfc.nasa.gov/NPD\\_attachments/N\\_All\\_1050\\_001D.pdf](https://nodis3.gsfc.nasa.gov/NPD_attachments/N_All_1050_001D.pdf)

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