

Prototype Other Transactions Legal Framework

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Section 845 Statutory Definition and Requirements

- Must be for “**prototype projects**” that are **directly relevant** to weapons or weapon systems proposed to be acquired or developed by the DoD
- Must be at least one **nontraditional** defense contractor “**participating to a significant extent**” **OR** mandatory one third cost sharing for traditional defense contractor
- Competition to the maximum extent practicable (CICA not applicable)

What is a Prototype Project?

- No statutory definition BUT current DoD OTA guide says:

With regard to section 845 authority, a prototype can generally be described as a physical or virtual model used to evaluate the technical or manufacturing feasibility or military utility of a particular technology or process, concept, end item, or system. The quantity developed should be limited to that needed to prove technical or manufacturing feasibility or evaluate military utility.

- In general, Research, Development, Test & Evaluation (RDT&E) appropriations will be appropriate for OT prototype projects.
- Low Rate Initial Production quantities are **not** authorized to be acquired under prototype authority.

Directly Relevant

- Not just relevant –DIRECTLY relevant
- Just about all we do is relevant
- MUST clearly identify **direct** relevance
 - Not many steps removed from a weapon system
 - Provide detailed rationale for ACC and Legal Office review/approval well in advance
 - Conservative definition subject to close scrutiny

Definition of Non-Traditional Contractor

- Is a **business unit** that has not, for a period of at least one year prior to the date of the OT agreement, entered into or performed on:
 - (1) any procurement contract that is subject to full coverage under the cost accounting standards, OR
 - (2) any FAR based procurement contract in excess of \$500,000 to carry out prototype projects or to perform basic, applied or advanced research
- Many small businesses and academia do NOT qualify as non-traditional contractors (very narrow definition)
- A unit of a traditional may qualify as a non-traditional contractor

What is Significant Participation?

- No statutory definition. DoD OTA guide says (as examples) it includes:
 - Supplying new key technology or products; or
 - Accomplishing a significant amount of the effort; or
 - Causing a material reduction in the cost or schedule or increase in performance.
- Nontraditional does not necessarily have to be a prime contractor -- can be a subcontractor , lower tier vendor, intra-company business unit or teamed with a traditional as long as participation is “significant” (as per DoD OTA guide).
 - Determination of what is significant is very debatable!
Determination is documented in the file.

Cost Sharing Defined

- Resources expended by the award recipients on the proposed project SOW and subject to the direction of the project management Costs a reasonable person would incur (necessary to) carrying out project SOW.
- Cost Sharing does NOT involve Funds Directly to USG
- Two Types of Cost Sharing
 - **Cash:** Outlays of funds to perform the OT project
 - Includes labor, materials, new equipment, subcontractor effort
 - Sources include **new IR&D funds**, profit or fee from another contract, overhead or capital equipment expense pool
 - **In-Kind:** Reasonable value of equipment, materials or other property used in performance of OT work

Cost Sharing (cont'd)

- IR&D funds can be utilized as cost sharing
 - **New** IR&D funds offered to be spent on the project SOW and subject to the direction of the project management.
 - Parallel research that might be related to the project but will not be part of the SOW or subject to the direction of the project management is **NOT** considered cost share.
 - Will not count cost of prior research as cost share.

Cost Sharing (cont'd)

- Cost share may be different among partners
- Cost share may be different milestone to milestone
- Need some financial reporting that provides appropriate visibility into expenditures of USG v. private funds
- Agreement may provide for adjustment of investments if the other party is not able to make its required investment. Trigger and procedures for adjustment is negotiable.

Cost Sharing (cont'd)

- What is NOT Acceptable Cost Share
 - Sunk costs or costs incurred prior to project
 - Foregone fees, profits, G&A.
 - Bid and Proposal costs.
 - Value claimed for existing intellectual property
 - Parallel or prior research.
 - Cash or in-kind whose availability is not clearly and convincingly demonstrated
 - Burden of proof on proposer

What Does an OT Do For You?

- Relief from FAR and supplemental regulations
 - FAR, DFAR, AFAR, DoDGARS not applicable
- Flexibility to use “best practices”
 - Costs reasonable
 - Schedule & requirements enforceable
 - Payment arrangement promote on time performance
- Competition only to maximum extent practicable (CICA not applicable)

What Does an OT Do For You?

- Negotiable/Flexible
 - Don't feel constrained by previous USG contract practices and conventions.
 - May use tailored FAR provisions or not
 - No automatic unilateral changes or equitable adjustment
 - No automatic Termination for Convenience or Default
 - Intellectual property negotiable

What Does an OT Do For You?

- Flexible Payment Provisions
 - No mandatory cost accounting standards/reporting
 - No certified cost and pricing data
 - Commercial standards
 - Use payable milestones

What Does an OT Do For You?

- Payable Milestones
 - Proposed by you to fit your approach
 - Observable technical achievements or events
 - Recognition of completion by USG Tech/PM
 - Cost share may be different milestone to milestone
- Two Types
 - Firm Fixed Price
 - Not adjusted for actual costs
 - Cost Reimbursable
 - Adjusted for actual costs
 - Need accounting system that accumulates and reports costs consistently within the appropriate business unit.

What does not apply?

- Competition in Contracting Act
- Bayh-Dole & Rights in Technical Data
- Truth in Negotiations Act
- Contract Disputes Act
- Procurement Protest System
- Procurement Integrity Act
- Grants and Agreements Regs (DODGARS)
- See DOD Prototype Guide, January 2001, Appendix 1
 - <http://www.acq.osd.mil/dpap/Docs/otguide.doc>

OT LIMITATIONS

- Criminal Law (False claims/statements) applies
- Federal Fiscal Law applies
- Comp Gen access to records required
- Laws of general applicability
- No supporting regime of commercial law
 - no UCC to fill in gaps
 - freedom of contract/ no regulatory framework

Concept of Operations

- Companion OTA and Consortium Member Agreement (CMA)
 - Fully executed CMA first
 - Sole source OTA executed with consortium
- CMA governs dealings among industry/academia
 - USG is not a party to the CMA
 - CMA mirrors OTA but is separate instrument that also includes non-OTA terms and conditions

Concept of Operations

CMA (cont'd)

- Allocates risks, responsibilities, rewards
- Someone Firmly in charge/ focus for USG
- Establish Membership Process
 - Procedures to admit new members/terminate membership
 - Revolving admission
 - Low barriers to entry
 - Significant Nontraditional membership
- Dispute resolution process
- Handling of proprietary information
- Guidelines for publication of data

Concept of Operations

- OTA has omnibus type broad SOW that describes type of prototype efforts to be pursued but no defined projects.
- Place specific prototype projects with individual members or teams of members through issuance of a competitive announcement (mirrors an RFP)
 - Includes evaluation factors for selection of winner/placement of project.
 - Every project is governed by the terms and conditions of the basic OTA but special T&Cs may be negotiated on a project by project basis.
- Selection made by USG based upon published evaluation factors.
 - Generate written technical evaluations and Agreements Officer (AO) is source selection authority.
 - AO documents selection. Process mirrors FAR type source selection process.

QUESTIONS??

BACK-UP SLIDES

OTHER TRANSACTIONS (OT's)

OT's FOR RESEARCH

- Authority: 10 USC 2371
- Definition: A legally binding instrument other than a procurement contract, grant or cooperative agreement for performing basic, applied and advanced research and development.
- Grants and Agreement Officer may sign

RESEARCH OT'S - Conditions

- SECDEF shall insure that:
 - To the maximum extent practicable, no OT for research duplicates research conducted under existing programs.
 - To the extent that the Secretary deems practicable, the funds provided by the USG do not exceed the total amount provided by the other parties to the OT (desired 50/50 cost share)

RESEARCH OT'S - Conditions

(continued)

- **SECDEF shall ensure** that (no qualifiers):
 - An Other Transaction is used for a research project when the use of a standard contract, grant or cooperative agreement for such project is not feasible or appropriate.
 - Determination subject to Protest.