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PRACTITIONER'S COMMENT: DOD Guide For Other Transactions For Prototypes—Fundamentally Flawed

The new Department of Defense Other Transactions (OT) Guide of 2017 has finally been issued a year after the statute was made permanent as 10 USCA § 2371b and incorporated important amendments and many years after the 2002 version became hopelessly outdated because of to numerous changes in the statute and superseded forms and reporting requirements.

The new Guide, which is available at *www.acq.osd.mil/dpap/cpic/cp/docs/OTA_Guide (17%20Jan 2017) DPAP signature FINAL.pdf,* purports to encourage innovation in application of the statute in several of its provisions. There is much in the Guide that is useful or at least unobjectionable. The Guide, however, contains fundamental flaws that tend to place OTs in a box that limits their flexibility and potential to contribute to addressing war fighter needs. It limits § 2371b to *acquisition*, a word not appearing in the statute. The statute authorizes DOD to "carry out prototype projects" without specifying the process.

The Federal Acquisition Regulation defines acquisition as: "the acquiring by contract with appropriated funds of supplies or services … by and for the use of the Federal Government through purchase or lease." See FAR 2.101. Prototype projects authorized by 10 USCA § 2371b are carried out under the authority of 10 USCA § 2371 except that § 2371(e)(2) does not apply. This means a § 2371b OT can be used even if a "standard contract, grant or cooperative agreement" could also be used. In addition OTs can be used for purposes that are neither procurement nor assistance (grants and cooperative agreements).

The fundamental misinterpretation of the statute and its relationship to the Federal Grant and Cooperative Agreement Act (specifying when various instruments should be used) is at the root of several flawed provisions and concepts in the new Guide. Prototype projects will often involve research and development. The Guide ignores the policy found at FAR 35.002 which states: "[u]nlike contracts for supplies and services, most R&D contracts" have work that cannot be precisely described in advance. The Guide does not provide for "carrying out a prototype project" where no Government funds are provided to the private party. For example, a private party might bring its product to a DOD test range to demonstrate its military utility and pay the Government for its expenses; or, enter into a bailment agreement to allow the Government to test its product.

The Guide emphasizes the exclusive acquisition nature of OTs in several provisions and specifically states OTs may not be used to stimulate and support R&D activities ("assistance"). The Guide mandates that agreements officers must be warranted FAR contracting officers, although as a group FAR COs are poorly trained and equipped to act as agreements officers. One provision (C2.1.1.6.2) warns against using FAR terminology, and yet numerous terms commonly used in FAR procurements such as "cost sharing," "market research," etc., terms which are not found in the statute, are prominent in the Guide. This indicates that a real attempt to understand the statute has not been made or has been burdened by too deep a background in FAR concepts and terminology.

Although styled as guidance the Guide contains a number of mandatory provisions, such as agreements officers *must* be warranted COs. Interestingly there seems to be no directive that confers authority on the director of Defense Procurement and Acquisition Policy, who issued the Guide, to impose mandatory requirements with respect to OTs on anyone.

Questionable provisions—This section identifies a sampling of questionable sections with a short description:

C1.1.2 & C1.6—OTs declared to be exclusively acquisition instruments; misapplies Federal Grant and Cooperative Agreement Act concept of direct benefit**;**

C1.3.2 & D.1.3—mandates agreements officers must be warranted FAR COs;

C2.1.3 & C2.1.1.4—baselines consideration of FAR provisions and assumes COs have skills to provide guidance on instrument selection;

C1.3.3—references "centers of excellence" in appendix 2, but three of the four website links are to general organizational websites, not offices that award OTs; only one of the organizations mentioned could actually be considered to use OTs in an innovative manner;

C1.6—rules out support/stimulus for prototype OTs;

D.1.7—treats agreements with fixed milestone payments like cost-type if milestones are subject to adjustment;

C2.1.3.1.7—fails to mention possibility of unfunded agreements;

C2.18—notes DOD need not take title to property but fails to apply that to erroneous "acquisition" rationale;

C2.22.1.2—assumes applicability of DOD Instruction 5000-series.

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This Practitioner's Comment was written for The Government Contractor by* Richard L. Dunn. *Mr. Dunn was the first general counsel of the Defense Advanced Research Projects Agency. He was instrumental in the creation of DOD's other transactions authority.