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FEATURE COMMENT: DOD Other Transactions Guide—A Breath Of Fresh Air

The Undersecretary of Defense for Acquisition and Sustainment (USD, A&S) has issued a new Guide on Other Transactions. The new Guide embodies a stark departure from the previous Other Transactions for Prototype Guide issued in January 2017, which is rescinded. The previous Guide was fundamentally flawed starting with the fact that it was issued by the Director, Defense Procurement and Acquisition Policy, an official with no authority to mandate how the secretaries of the military departments exercise their statutory other transactions (OTs) authority. Although styled a *guide,* the previous issuance contained a number of mandatory provisions. Furthermore, some organizations, such as the Department of the Army, apparently took it as a binding directive and made compliance with the Guide mandatory in their delegations of authority.

The new Guide makes it clear that it is truly a *guide* in several ways. Its lay-out and style are a complete departure from the prior Guide and cannot be mistaken for a regulation. It contains highlighted case studies, a glossary of definitions, and a collection of common misunderstandings and myths. These are often highlighted in the main text.

Main Text—The Guide starts with an introductory section containing general information. This discusses the Guide's approach and content, history of OTs and the purpose of OTs. Even the introduction contains notable content. Unlike the previous Guide, which addressed only prototype OTs, the new Guide addresses both research (10 USCA § 2371) and prototype OTs (10 USCA § 2371b) as well as follow-on production (§ 2371b(f)). The stove-piping of different authorities under different offices of primary responsibility has been abandoned. This seems to be symbolic recognition that taken together the OT authorities can constitute a complete alternative to the traditional system under the Armed Services Procurement Act and Federal Acquisition Regulation for DOD research, prototyping and follow-on production.

An interesting aspect of the Guide is that it contains only a few cryptic references to the Technology Investment Agreement (TIA) regulations, 32 CFR pt. 37 ("when using" TIA). There has been a wide-spread misunderstanding throughout DOD that the TIA regulations apply to all § 2371 agreements. The TIA regulations themselves do not make such an assertion; quite the contrary (§ 37.105). The TIA regulations apply to certain cooperative agreements and OTs used for *assistance* under very specific and limited circumstances. The Guide's few references to the TIA regulations highlight their limited scope and may result in a rejuvenation of use of § 2371 unencumbered by overly detailed and arcane regulations.

The Guide implies that OTs are neither inherently subject to or inherently exempt from DOD Instruction 5000.02, *Operation of the Defense Acquisition System.* Interestingly, one of the case studies is of Global Hawk, which dates back nearly two decades but is still operational today. This was a major program conducted outside the 5000-series regulations as a prototype OT and Advanced Concept Technology Demonstration that undertook wartime operations in its demonstration phase and eventually transitioned into a major defense program of record. Middle-tier of acquisition is mentioned as another place to use OTs. Not all programs, even large ones, need to be burdened by a one-size-fits-all set of rules.

Certain uses of OTs, such as entering into unfunded agreements, are not explicitly noted in the Guide. However, by not denominating OT prototype project agreements specifically as *acquisition*

instruments as did the rescinded Guide, the new Guide implicitly recognizes that OTs (both research and prototype) have been structured with a variety of funding arrangements including, either entirely or in one phase of a project, unfunded by the Government.

The second section of the Guide deals with the execution of OT agreements. In discussing planning, the Guide emphasizes the importance of a cross-functional team. A potentially significant change from the previous Guide is that while agreements officers need to be carefully selected and warranted, they need not be warranted FAR contracting officers. This recognizes that the skills required for OT contracting are not the same and, in some respects, fundamentally differ from the skills needed to operate in a highly regulated purchasing system such as under the FAR.

Another fundamental difference between acquisition under the FAR and OT contracting relates to the initiation of the contracting process. According to the definition of *acquisition* in FAR 2.101, the process begins at the point when agency needs are established and requirements described. The new Guide states the most important part of the team's planning activities is defining the problem. According to the Guide, the Government is "responsible for understanding and clearly articulating to offerors the problem" it is trying to solve while leaving open the "innovative trade space for a wide-range of solutions."

A key area of misunderstanding clarified in the discussion of the planning process relates to appropriate funding for OTs. The Guide makes clear that funding is not restricted to Research, Development, Test and Evaluation appropriations. The determination of fund type is independent of the choice of contracting mechanism.

The discussion of planning for follow-on activities is more extensive than the cryptic discussion in the old Guide. It introduces the one area where mandatory policy language is used in the Guide. The potential for follow-on production "***shall*** be identified in the solicitation and any resulting OT Agreements." This mandatory provision is in obvious reaction to the *Oracle America* protest decision. See *Oracle Am., Inc.*, Comp. Gen. Dec. B-416061, 2018 CPD ¶ 180; 60 GC ¶ 195. It is also expressed in other parts of the Guide. It reflects the policy announced in the Nov. 20, 2018 memorandum "Definitions and Requirements for Other Transactions…", signed by the UnderSecretaries for A&S, and Research and Engineering. See 60 GC ¶ 365, in this issue.

A discussion of Senior Procurement Executive (SPE) exceptional circumstances determinations addressed in § 2371b(d)(1)(D) misses an opportunity to flesh out that provision, which has hardly ever been used. Part 16 of the FAR describes approved contract structures for procurement contracts. Contract structures that are not described in that Part require formal deviation if used in a FAR contract. Any contract structure requiring formal FAR deviation can be equated with exceptional circumstances, not feasible or appropriate for a procurement contract, thus meeting (d)(1)(D) criteria. Some OT agreements are structured with fixed milestone payments based on achievement of defined technical or programmatic results. This is not a contract structure described in FAR pt. 16. It should justify an SPE determination to award an OT to a traditional defense contractor without reference to other conditions in subsection (d).

The Guide suggests there are a variety of ways of publicizing a problem set and soliciting solutions. Methods used should "maximize exposure of the problem to relevant technology providers," both traditional and non-traditional. This is a reminder that "competitive procedures" for OTs are not defined by and need not meet Competition in Contracting Act standards. Additionally, limiting exposure to "relevant technology providers" lessens the operational security risk inherent in broadcasts of needs (technology gaps) in Federal Business Opportunities. Prize competitions are mentioned as one of many approaches to providing competition for OTs. Different innovative statutory authorities can be coordinated or "stacked."

The Guide addresses solicitation, source selection and negotiation of terms and conditions. Except for follow-on production, the discussion of terms and conditions is informational rather than prescriptive.

The third major section of the Guide addresses OT agreement administration covering subjects such as reporting, closeout, allowable costs, audit, resource sharing, payments and various legal considerations. Reporting of information concerning OTs has proved inadequate (and incidentally resulted in many ill-informed news reports). Section 873 of the Fiscal Year 2019 National Defense Authorization Act established a new OT reporting regime. USD, A&S memorandum, "Authority for Use of Other Transactions for Prototype Projects…", Nov. 20, 2018, requires data collected in accordance with § 873 to be reported via the Federal Procurement Data Systems-Next Generation.

The section on resource sharing correctly adopts the language of a recent statutory amendment that addresses "funds provided by sources other than the Federal Government" rather than merely funds provided by a *participant* in an agreement. This is a recognition that not only traditional cost sharing, but also third-party financing of Government projects is permitted and encouraged. Pre-agreement costs are treated in much the same way as FAR pre-contract costs. Various other aspects of resource sharing are also addressed.

The section on payments addresses payable milestones, advance payments (authorized), as well as details when an OT agreement is structured with reimbursable costs. Legal considerations address the issue of identifying a legally responsible party or parties especially in the case of multi-party agreements. Teaming, security requirements, and protection of proprietary information are also addressed. There is a brief discussion of protests, as well as a Transportation Command case study including the *Oracle* protest.

Case studies—Each case study illustrates how OTs have been used, and lessons learned provide commentary on OT potential. The case studies are concise and informative. Quoted here are the lessons learned sections from three of the case studies:

Defense Advanced Research Projects Agency Robotics Servicing of Geosynchronous Satellites (RSGS):

> *Collaboration and Risk-sharing:* This is vital, as RSGS involves technological disruption and the creation of a new marketplace for space-based satellite servicing. Executing a Prototype OT allowed DARPA to team with a commercial partner that shares the vision of transforming space robotics and satellite servicing and is willing to share in the investment by providing significant funding with qualified and creative talent.
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> *Cost sharing and recoupment:* The flexibility of Prototype OTs allowed unique cost sharing and special business arrangements to include $15 million in incentive-based payments and recoupment of Government payload costs which would not have been possible with traditional Government contracting.

Air Force Air Operations Center (AOC) Pathfinder program:

> *Allow Industry to be Innovative*: The initial problem statement did not outline a detailed specification. This provided commercial companies an opportunity to propose their own unique and/or innovative solution sets. The competitively selected prototype OT was ultimately predicated on leveraging a methodology, whereas other vendors focused on prototyping through other means.
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> *Follow-on Production Award without competition*: Although [the Army Contracting Command-New Jersey] awarded the prototype, the Air Force chose to award its own sole-source, follow-on Production OT, which allowed requirements owners to have full situational awareness as the program moved into execution.
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> *Teaming and collaboration*: AOC Pathfinder was leveraged throughout DoD to accomplish critical aspects of the initial prototype OT, resulting in schedule efficiencies. For example, it leveraged a separate Services contract to hire software developers. They also performed a data call to users to enable face-to-face collaboration. Additionally, the program office transformed its structure to accommodate this new paradigm wherein the Government was responsible along with its contractors for software development in lieu of a more traditional outsourcing business model.

DARPA Global Hawk:

> *Allow Industry to be Innovative:* DARPA's usage of Prototype OTs allowed industry innovation through creative flexibility in [unmanned ariel vehicle] development while remaining within budget and meeting DARPA's performance goals. The contractor was given wide latitude to select and defend tradeoffs of performance parameters as long as the "flyaway" price tag of $10 million was achieved.
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> *Acquisition Strategies should balance Innovation and Budget*: "Design-to-price" was a distinct departure from traditional acquisition programs, which typically focus on achieving the highest possible performance, which can result in cost increases.
>
> *Collaboration*: Giving the Contractor freedom to design and run the program was also a departure from the normal process of extensive government control. DARPA allowed Government and Industry to collaboratively and successfully test the limits of technology within the constraint of a price point of $10 million.

Appendices—The Guide has six appendices. These include a glossary, a timeline of OT legislative history, a comparison of the salient features of the types of OTs, common myths and facts about OTs,

OT assistance and policy information, and intellectual property considerations. The glossary includes a notably broad definition of prototype project.

In general, the appendices provide useful information. The appendix on OT assistance and policy is interesting. It contains a link to the Defense Acquisition University website. Notably there is no reference to the Office of Defense Procurement and Acquisition Policy. These organizations have been tepid in support of OTs in the past. They seem to see OTs only as a niche authority, not their potential to provide a viable alternative to the highly regulated purchasing system under the FAR for research, systems acquisition and sustainment. The same appendix lists sites from the Air Force and Army as potential OT resources. The Navy is not cited as providing any resource on OTs.

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While not perfect, the new Guide is a huge improvement over its rescinded predecessor. It is a breath of fresh air. Stovepipes separating research OTs and prototype OTs have been removed. Research may result in a prototype. A prototype project may involve the kind of research specified in § 2371. OTs are not limited to only one kind of funding. OT authorities and other innovative approaches such as prize competitions (10 USCA § 2374a) can be combined. Cost sharing and third-party financing are permitted but not absolutely required. The SPE exceptional circumstances determination is embraced as a viable way to engage traditional defense contractors.

One lapse in the Guide is that it fails to mention § 867 of the FY 2018 National Defense Authorization Act directing DOD to create a preference for using OTs. Despite this, the Guide sets the stage for a broader more comprehensive use of OTs. Top-level leadership has been advocating this. At the working level, many earnest military and civilian personnel want to help field new capabilities at the speed of relevance and address urgent needs in an innovative and cost-effective manner. Resistance usually comes in the multiple mid-levels of bureaucracy that seem to believe that somehow fine-tuning the traditional system will get more than marginal results or that no improvement is needed. The new Guide is a step in the right direction. When armed with *proper education and training,* DOD's acquisition workforce now has the guidance to use OTs more effectively. *Thinking* about problems, potential solutions and win/win scenarios is permitted and encouraged by this Guide. The new OT Guide is available at *https://aaf.dau.mil/ot-guide*.

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