

THE GOVERNMENT CONTRACTOR[®]



THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 63, No. 18

May 5, 2021

Developments

¶ 131

DOD Needs To Improve Guidance, Oversight Of Consortium OTs

The Department of Defense should improve tracking, oversight, guidance, competition, and security of other transaction (OT) agreements awarded to consortia and OT projects awarded to individual consortium members, the DOD inspector general has recommended. DOD “can implement additional guidance, best practices, and training to ensure the Government obtains the benefits of using OTs, while still allowing the intended flexibility,” the IG noted. Richard Dunn provided THE GOVERNMENT CONTRACTOR with a Practitioner’s Comment on the IG’s report.

OTs are generally not subject to the Federal Acquisition Regulation, the IG said. DOD can award OTs through a consortium, which is “an association of two or more individuals, companies, or organizations participating in a common action or pooling resources to achieve a common goal and can range from a handful to as many as 1,000 members.” Typically, a consortium management organization (CMO) acts as point of contact and manages its membership. DOD “awards a base OT agreement to a CMO, selects a member to perform a project, and awards the project to the CMO,” and the CMO enters a separate agreement with the member performing the project. The IG reviewed 13 base OT awards, worth \$24.6 billion, from fiscal years 2018–2019.

Tracking and Oversight—The IG reported that DOD contracting officials failed to properly track OTs awarded through consortia and could not track the number and value of OTs because the Federal Procurement Data System (FPDS) was not set up to track consortium OTs and projects. For exam-

ple, seven Army OTs, valued at \$22.4 billion, in the IG’s sample were actually 503 OT projects, awarded through seven consortia and worth \$8 billion.

Because of a lack of guidance, contracting personnel did not always comply with regulations and laws when awarding OTs or consistently negotiate CMO fees. Officials did not always compete OTs when possible, document key decisions and requirements, consistently implement approval authority levels, or include language to allow agency-level protests.

DOD failed to secure controlled or restricted information sent to an OT consortium because it relied on the consortium to vet members and safeguard data, the IG found. DOD did not require consortium members to register in the System for Award Management (SAM), and DOD personnel did not perform security reviews of cumulative technical information provided to consortium members, performing instead only per-project security reviews.

As a result of the tracking and security problems, DOD lacks key information to oversee consortia OTs, including “which contractor received the OT award and the specific costs associated with funded OT projects.” Thus, DOD may not always obtain best value or responsibly invest in technologies through its OTs, and “not properly protecting sensitive prototype data could increase risk to our national security,” the IG concluded.

Recommendations—The IG recommended that DOD’s Defense Pricing and Contracting office (1) develop policies on awarding and tracking OTs using consortia and coordinate with the General Services Administration to update FPDS, (2) ensure consortium OTs use competition to the extent practicable and are documented by contracting personnel, (3) clarify the approval level required for consortium project awards and establish a protest process, (4) establish training on consortium OTs and a DOD-level agreement officer delegation and warrant process, (5) set guidelines for negotiating CMO fees, (6) ensure proper vetting of consortium members and disseminate solicitation information

only to members with proper security clearances, and (7) require security reviews of aggregate solicitation data provided to members and SAM checks of members before project award.

DPC agreed with the IG's recommendations and plans to update its OT Guide, except that it only partially agreed with the recommendation to implement an agreement officer delegation and warrant process. DPC will collaborate with DOD components, but "the guidance must also permit Component flexibility to manage their delegation and warranting process."

Section 833 of the National Defense Authorization Act for FY 2021 directs DOD to publish "a list of the consortia used by the Secretary to announce or otherwise make available opportunities to enter into" OTs.

In 2019, the Government Accountability Office reported a sharp increase in DOD's use of OT agreements. See 61 GC ¶ 356. For a discussion of intellectual property rights in DOD OTs, see DeVecchio, Feature Comment, "Here Is How You Actually Negotiate IP Rights In Other Transactions," 62 GC ¶ 41; for a discussion of DOD OTs, see Dunn, Feature Comment, "New Administration: New Acquisition System?," 62 GC ¶ 344.

Audit of Other Transactions Awarded Through Consortiums (DODIG-2021-077) is available at media.defense.gov/2021/Apr/23/2002626394/-1/-1/1/DODIG-2021-077.PDF.

◆ **Practitioner's Comment**—It is interesting that while applying a FAR-based "business as usual" analysis, the IG report fails to ask fundamental questions about the arrangements that were reviewed. In most of the current OT "consortia" there is no agreement among the "members," merely individual agreements between the members and the CMO. The definition of consortium that comes up in an internet search is: "A consortium is an association of two or more individuals, companies, organizations or governments (or any combination of these entities) with the objective of participating in a common activity or pooling their resources for achieving a common goal." There is no apparent association or common purpose among the members, each of which competes against the others for the award of sub-projects to be awarded by the CMO to individual firms on behalf of the Government.

This is an important question since 10 USCA § 2371b(f) regarding follow-on production references "a consortium of United States industry and academic

institutions" and "part of a consortium." The IG report fails to address this, either not recognizing it as a subject for inquiry or accepting that what looks like a multiple-award task order contract constitutes a "consortium" for purposes of the statute. A somewhat related unasked and unanswered question is whether at the time of award the arrangement between the government and CMO is a legitimate use of OT authority. The CMO is the only entity in privity with the Government, and there is no intent that the CMO will perform any research or conduct a prototype project. Rather, actual project work will take place only after award of the OT when the multiple-award task order arrangement is given effect. The CMO's primary function is to set up and administer the multiple-award task order arrangement on behalf of the Government. The report's silence in these matters may suggest the IG views these arrangements as consortia within the meaning of the statute and a legitimate application of OT authority.

The report's reading of the statute is clearly wrong in at least one instance. The report says, "[s]pecifically, DOD contracting personnel did not always compete base OT awards to the maximum extent practicable." What the statute requires is "to the maximum extent practicable, competitive procedures shall be used." § 2371b(b)(2). Competitive procedures are not defined in the statute, and the Office of the Secretary of Defense's OT Guide (Nov. 2018) points out that competition can take many forms. The report speaks in terms of "formal competition"—words not appearing in the statute and clearly not required.

The report finds that additional guidance and oversight are needed. While some additional guidance may be helpful, added oversight and regulation have the potential to destroy the utility of OTs and their value as an alternative to the overregulated FAR system. However, the key to avoiding heavy handed guidance and layers of oversight is contained in the report's finding of inadequate education. DOD leadership has failed to fully implement 10 USCA § 2371(g) requiring DOD to provide "adequate education and training" to "management, technical, and contracting personnel." Education, not regulation, is what is needed.



This Practitioner's Comment was written for THE GOVERNMENT CONTRACTOR by Richard Dunn. Mr. Dunn was the first general counsel of the Defense

Advanced Research Projects Agency. He was instrumental in creating DOD's OT authority. Currently, Mr. Dunn acts as a consultant providing advice and engaging in research and analysis related to the deployment and implementation of technology in the military and civil sectors through partnering and other innovative means. Mr. Dunn conducts research in national security

operations, technology and their interactions; and analyzes laws, policies and practices that impact the effective implementation of technology. He is the founder of the Strategic Institute for Innovation in Government Contracting, strategicinstitute.org. Mr. Dunn is also a member of The George Washington University Law School, Government Contracts Program advisory council.