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FEATURE COMMENT: New DOD Other Transactions Guide: Retreating From Innovation

The long awaited revision to the Department of Defense Other Transaction (OT) Guide of 2018 has been issued. A positive note is that the general format and much of the useful content of the 2018 Guide has been retained. Interesting new case studies have been added. The Guide maintains its character as a *guide* with relatively few mandatory (*shall, must*) provisions. The 2018 Guide was a breath of fresh air. The new Guide is a disappointment. It contains gaps and errors that can mislead or confuse practitioners. Noted below are some of the areas of concern as well an attempt at analysis of how the Guide turned out as it has.

The Guide displays a lack of understanding of the OT statutes (10 USCA §§ 4021, 4022), not to mention their legislative history and prior practice. This is illustrated throughout the Guide. Appendix D of the Guide is titled Common Myths and Facts. Myth 6 states as fact "Both OT authorities require the use of competitive procedures to the maximum extent practicable." The research OT statute, 10 USCA § 4021, does not mention competition. Myth 6 of the Guide creates a myth rather than stating a fact. In contrast and contradiction is Appendix C, titled OT Type Comparison Table, containing a bullet point stating that prototype OTs require "[c]ompetitive procedures to the maximum extent practicable" but silent regarding competition for research OTs. Also in the Appendix C comparison table the words in § 4022 "directly relevant" are highlighted. The glossary (Appendix A) entry for those words misconstrues them based on an apparent lack of understanding of the original statutory wording to which they related.

Section K of the Guide titled Audit is remarkable in two respects. First, it discusses audits in precatory terms but without relating them to the mandatory Comptroller General audit requirement of § 4022(c) referenced in § E.3. More remarkably, it references 32 CFR 3.8. Part 3 of 32 CFR was promulgated in 2001. Within a few years, it became essentially irrelevant due to statutory changes and was generally ignored. In 2015, the statutory basis for Part 3 (§ 845, P.L. 103-160) was superseded, making the provision completely inoperative. Despite this, it remains on the books. The Guide refers to and invokes a nullified regulatory provision that has no legal effect.

Education is critical to understanding and fully using the flexibility of OTs. The memorandum promulgating the Guide concludes with the following statement: "To help the field utilize OTs, Defense Acquisition University [DAU] recently introduced CCON 023, OT Authority Credential. The credential includes training courses and webinars on how to appropriately structure OTs based on requirements, and how to mitigate risk under the authority." There is no discussion in the Guide to further elucidate the need for or means of obtaining education on innovative contracting, including experiential learning as mandated by Congress in § 4021(g). The errors in the Guide suggest new content was added to the Guide in the absence of adequate knowledge of OTs. The unfulfilled statutory education mandate for management, technical and contracting personnel was added by Congress more than five years ago. More recently, congres-

sional report language urged DOD to extend OT education to lawyers as well. To date DOD has not complied with the congressional education mandate, and the changes in the new Guide contribute little to practitioners who seek such learning.

Another congressional directive with which DOD has failed to comply is the mandate for creating a preference for using OTs and other forms of innovative contracting. Not only does the Guide fail to create or reference such a preference but its Appendix B, titled OT Authority – Legislative History, does not even mention the mandate, which was enacted by § 867, National Defense Authorization Act of 2018.

The Guide states that an Agreements Officer need not be a contracting officer. However, it uses the term "warranted individual" in its definition. What is needed to execute an OT agreement is delegated statutory authority. The term "warranted" smacks of business as usual and implies a traditional contracting officer. There is no reason why the signatory of an OT needs to be designated an "agreements officer," a term also used by officials authorized to award assistance instruments. The early Defense Advanced Research Projects Agency (DARPA) OT agreements were signed by the director of the agency or other senior officials with delegated authority. The terminology "warranted individual" as an agreements officer is just one example of business as usual thinking and terminology invading the domain of innovative contracting.

There are several examples of issues that could be discussed more helpfully. In § E.3., Selection and Negotiation of Terms, the discussion of disputes differs somewhat from the discussion in the previous edition of the Guide but offers little real guidance. In the same section the recovery of funds discussion is weak. It fails even to mention a possible return based on royalties of commercial sales of products developed with Government funding. More critically, it provides no guidance on whether DOD organizations may establish sub-accounts to the support accounts statutorily created by 10 USCA § 4021(f). A support account from which disbursements can be made is essential to give full effect to the recovery of funds provision of § 4021(d). In § D.4. the discussion of resource sharing under 10 USCA § 4021 fails to state that under some circumstances the private sector contribution could be zero.

The main text of the Guide contains a brief discussion of consortia in § N.1., Legally Responsible Party (p. 31) and a longer exposition of consortia in Appendix F (pp. 46–50). Nowhere is there a clear discussion of the predominant way in which DOD has been utilizing so-called "consortium" OTs, which do not on their face comply with the prototype OT statute.

Many DOD organizations have been soliciting and awarding OTs to a *consortium manager* who will not perform, fund, or select a prototype project or use the results of one. Rather, the consortium manager acts as a support services contractor for the Government contracting office to form and administer a competitive indefinite-delivery/indefinite-quantity contract sometimes referred to as a multiple award task order (MATO) contract. The consortium manager is paid a fee for administering the competitive MATO arrangement and awarding subcontracts for projects to be performed by members of the so-called consortium. The performers also pay a membership fee to the consortium manager.

The Government rather than the consortium manager selects projects for funding, but does not award an OT to a responsible party since it has no privity of contract with the project performer (the so-called consortium is typically not a legal entity with power to contract). The Government's ostensible OT is with the consortium manager, which does not perform prototype projects in any meaningful sense but engages in only administrative functions.

In providing its administrative services, the consortium manager represents both the Government and the consortium members and is paid by each—a clear conflict of interest. The consortium manager has no role in the prototype projects per se but only in performing administrative functions that would otherwise be performed by the Government contracting office.

The Guide rightly points out that multi-party OTs can be executed through a variety of structures. What is essentially a support services contract masquerading as a prototype OT is not one of them. Unfortunately, DOD leadership has failed to assure that the most common use of OT authority by DOD organizations complies with statutory requirements. Nothing in the Guide's extended discussion of consortia aids in clearly understanding the problem or rectifying it.

Sadly missing from the new Guide is any refer-

ence to Partnership Intermediaries (PIs) authorized by 15 USCA § 3715. PIs can play an important role in conjunction with OTs. SOFWERX, the PI supporting U.S. Special Operations Command, has been utilized for outreach in conjunction with OTs and has been recognized as an integral part of the competitive procedures Special Operations Command uses to enter prototype OTs and other innovative contracting arrangements. Failure to include this as a case study or otherwise mention PIs is an unfortunate failing of the new Guide.

A huge backward step is the revised discussion in § D.3. of the new Guide compared to its predecessor. This also relates to the language in the promulgating memorandum quoted above which mentions a DAU credential based on how to "structure OTs based on requirements." The new Guide invokes "requirements necessary to meet the Government's needs" conforming to the Federal Acquisition Regulation paradigm that requirements always precede and are separate from the acquisition process. The new § D.3. is titled "Defining the Government's Intent" and may imply the Government team is to hone the details of a pre-existing requirement created external to the team. The title to § D.3. in the 2018 Guide is "Defining the Problem." Nowhere in the superseded section is the word "requirement" used. The new Guide's case study of Global Hawk uses the word "requirement" twice. Readers should be aware that there was no formal requirement for Global Hawk before it was transitioned from DARPA to the Air Force, a transition that took place after Global Hawks had flown operational missions. The seeming minor change in § D.3. appears to be a disappointing change in philosophy.

An underlying problem with the new Guide may be that it fails to embrace the understanding that research and prototyping are primarily about the acquisition and application of *knowledge*. This is fundamentally different than the *procurement* of *supplies and services*. This distinction is recognized in FAR pt. 35 (35.002 and 35.003). The Guide (§ C.1., Purpose of OTs) refers to the flexibility of OTs. However, the vision of the potential of Other Transactions to break down old paradigms and do business in completely new ways to meet emerging challenges seems lacking as reflected in new § D.3. It seems that the new Guide attempts to limit OTs from exploring truly new ways of doing business. While maintaining a gloss of innovation, the Guide imports business as usual concepts. Limiting OTs in this way reduces the imperative and congressional mandate for a well-educated workforce capable of applying critical thinking. A workforce educated in innovative contracting is key to finding new ways to address problems in a rapidly changing national security environment. The Guide is step backward in this quest.

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This Feature Comment was written for THE GOVERNMENT CONTRACTOR by **Richard Dunn.** ***Mr. Dunn was the first general counsel of DARPA and 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.***