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FEATURE COMMENT: DOD's Prototype OTA Guide Offers Insight Into DOD's Experiment In Regulation-Free Acquisition

In January 2017, the Department of Defense issued updated guidance for acquisition officials entering into and managing what are known as other transaction agreements (OTAs) for prototyping projects. As a general rule, OTAs are not considered procurement contracts, grants or cooperative agreements, but something else; and they are not subject to the Federal Acquisition Regulation, the Competition in Contracting Act, the Truth in Negotiations Act, or a number of other onerous rules Congress and regulators have imposed on federal contracting over the years. This makes OTAs highly attractive to federal agencies and contractors, who alike have developed distaste for procurement-related red tape.

DOD's new authority, as well as its Other Transactions Guide for Prototype Projects, significantly expands the breadth of acquisitions to which OTAs can be applied raises the dollar value of OTAs that can be awarded, and opens up OTAs to small businesses. See DOD, Other Transactions Guide for Prototype Projects, Version 1.2.0 (January 2017) (Prototype OTA Guide or the Guide). These changes almost certainly will expand DOD's pursuit of OTAs and commensurately raise new legal challenges to their use. This Feature Comment will explore these issues after first offering some background on the evolution of OTAs.

Evolution of the OTA: from Space Race Experiment to a Gateway to Commercial Firms—Although most agencies are authorized to enter into contracts, grants and cooperative agreements, Congress has granted only a select few agencies the authority also to enter into "other transactions." This last category, effectively a catchall, has proved difficult to define.

The National Aeronautics and Space Administration was the first agency to receive other transaction authority in 1958, as the U.S. struggled to keep pace technologically with the Soviet Union. Congress, mindful of the importance of American prominence in outer space, granted NASA "broad authority" to "enter into and perform contracts, leases, agreements, and other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate." National Aeronautics and Space Act of 1958, P.L. 85-568, 72 Stat. 426 (1958); see H. Rep. 1770, Establishment of National Space Program (May 24, 1958). Some warned that "[t]his very important and far-reaching grant of power deserve[d] more study," and "appear[ed] too broad." H. Rep. 1758, Appendix I, Analysis of the President's Bill to Establish a National Aeronautics and Space Agency (May 21, 1958).

These concerns have been all but forgotten in the decades since. Nearly 60 years and 10 such authorizations later, Congress sees OTAs as keys "to access new source[s] of technological innovation, such as Silicon Valley startup companies and small commercial firms," because they are "attractive to firms and organizations that do not usually participate in government contracting due to the typical overhead burden and 'one size fits all' rules." H. Rep. 114-270, Conference Report to Accompany H.R. 1735, National Defense Authorization Act (NDAA) for Fiscal Year 2016 (Sept. 29, 2015).

Congress has since granted 10 other agencies authority to enter into OTAs, but the closest it has come to defining these lightly regulated agreements is as "transactions (other than contracts, cooperative agreements, and grants)." See 10 USCA § 2371(a). For years, the Government Accountability Office, the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Federal Claims looked to the Federal Grant and Cooperative Agreement Act (FGCAA) for guidance when classifying legal

instruments as either a "contract," "grant" or "cooperative agreement," or if none of these, as an OTA. See *Rocketplane Kistler*, Comp. Gen. Dec. B-310741, 2008 CPD ¶ 22 at 3–4; *Exploration Partners, LLC*, Comp. Gen. Dec. B-298804, 2006 CPD ¶ 201 at 5; *Hymas v. U.S.*, 810 F.3d 1312 (Fed. Cir. 2016). Under this regime, an instrument was properly classified as a contract instead of an OTA if "the principal purpose of the instrument [was] to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government." 31 USCA § 6303.

Recently, however, GAO has departed from this rule, instead looking solely to an agency's authorizing statute to define the types of other transactions the agency may execute. In *MorphoTrust USA, LLC*, GAO found that "although the FGCAA provides applicable guidance to all federal agencies when the choices are limited to (1) procurement contracts, (2) grants, or (3) cooperative agreements, it provides no guidance when determining when an agency may properly use its other transaction authority." Comp. Gen. Dec. B-412711, 2016 CPD ¶ 133 at 10. This new rule finds ancillary support in Congress' grant of other transaction authority to DOD to acquire prototyping services, which sets aside the FGCAA in favor of a more prescriptive approach to distinguishing between OTAs and procurement contracts.

Some agencies, like NASA, have broad authority to enter into OTAs for any purpose necessary to carry out their agency functions. Others, like DOD, are limited to specific activities. In 1989, Congress first granted the predecessor to the Defense Advanced Research Projects Agency authority, now found in 10 USCA § 2371, to enter into OTAs for "carrying out advanced research projects," though it limited DARPA's authority to "only when the use of standard contracts or grants is not feasible or appropriate." In 1991, Congress extended this authority to all departments of the military. Then, as part of President Clinton's Technology Reinvestment Project aimed at encouraging dual-use research and production in the post-Cold War era, Congress instituted a three-year pilot program in which DARPA could enter into OTAs to carry out "prototype projects" that were directly relevant to weapon systems DOD intended to acquire or develop.

Interestingly, when the pilot program was introduced, the focus was more on tapping into DOD's authority to enter into cooperative agreements under 10 USCA § 2371, rather than OTAs. See 139 Cong. Rec. 20,727 (statement of Sen. Jeff Bingaman (D-N.M.)) (introducing amendment to allow the predecessor to DARPA "on a pilot basis over the next 3 years to experiment with use of cooperative agreements in carrying out its purely military research and development projects, to which we should not expect industry to contribute its own resources"). Nonetheless, 12 years later, after a number of extensions and expansion of the pilot program in 1996 to all military departments, Congress finally etched this authority into statute at 10 USCA § 2371b, with the FY 2016 NDAA.

DOD's prototype OTAs are unique in some ways. For one, DOD's authority to enter into OTAs for prototype projects is at odds with the FGCAA's mandate to use a procurement contract when the Government is acquiring goods or services for its direct benefit, and indeed, DOD's guidance admits that these OTAs, unlike others, are "acquisition instruments." Prototype OTA Guide at 1–2. Nevertheless, DOD's guidance may serve as a standard-bearer for other agencies. Indeed, because Congress has framed DOD's prototype OTA authority in 10 USCA § 2371b as a subset of DOD's broader OTA authority in 10 USCA § 2371, one may infer that certain "acquisition instruments" are a natural subset of "other transactions," and that all other agencies that have been granted other transaction authority similarly may enter into acquisition instruments styled as OTAs.

Scope of DOD's Prototype OTA Authority—The scope of DOD's prototype OTA authority is first defined by the scope of the project being performed. Under 10 USCA § 2371b, DOD may enter into OTAs for "prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces." This provides little, if any, real restriction by subject matter; almost any DOD acquisition likely is intended to enhance, in some way, the mission effectiveness of military personnel or to improve platforms or systems used by the armed forces. The limiting question, then, is whether something is a "prototype project."

According to DOD's Prototype OTA Guide, a prototype project can range all the way from a preliminary pilot or test to a full evaluation, demonstration or "agile development activity," and it may

include all levels of a system or platform, including "subsystems, components, materials, methodology, technology, or processes." The Guide adds, as an illustration, that such a prototype project may involve simply "a novel application of commercial technologies for defense purposes." DOD shows some modest restraint though: The Guide specifies that the quantity produced under a prototype project "should generally be limited to that needed to prove technical or manufacturing feasibility or evaluate military utility." But, as discussed below, prototype OTAs may provide for the award of a follow-on production contract, allowing DOD to purchase additional quantities without competition.

Criteria for Prototype OTAs: In addition to this subject matter limitation, each prototype OTA must meet at least one of four criteria Congress has proffered to define DOD's prototype OTA authority. Two of these criteria focus on the types of entities that can participate in an OTA, a third requires OTA holders to share a significant portion of the costs involved, and the last leaves discretion to DOD to identify "exceptional circumstances" that require an OTA. In other words, DOD must ensure that prototype OTAs meet at least one of the following:

(1) There is at least one nontraditional defense contractor participating to a significant extent in the prototype project;
(2) all significant participants in the transaction other than the Federal Government are small businesses or nontraditional defense contractors;
(3) at least one-third of the total cost of the prototype projects is to be paid out of funds provided by parties to the transaction other than the Federal Government; or
(4) the senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that (a) provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or (b) would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

Many of these criteria were carried over from the pilot program. Significant participation by nontraditional defense contractors, for example, has long been a reason to enter into a prototype OTA, in the spirit of opening up the defense industry. Nontraditional defense contractors are defined as entities that have not performed, for at least the past year, a DOD contract subject to full Cost Accounting Standards coverage. 10 USCA § 2302(9). Notably, many small businesses may qualify as nontraditional defense contractors, as many small business contracts and subcontracts currently are exempt from CAS. This being the case, small businesses representing themselves as nontraditional defense contractors should make sure their contracts and subcontracts during the previous year were not subject to full CAS coverage.

If a small business does not qualify as a nontraditional defense contractor, it still may be eligible for award of a prototype OTA, so long as all significant participants in the OTA other than the Government (e.g., just the business itself, in a two-party OTA) are small businesses. Congress added this criterion with 10 USCA § 2371b, and the extent to which it enlarges the pool of potential OTA recipients has yet to be seen. Now, both small businesses and nontraditional defense contractors may enter into prototype OTAs one on one with the Government, but only a nontraditional defense contractor may enter into a multi-party OTA that includes both the Government and a large business as parties.

The cost-sharing and exceptional circumstances criteria remain unchanged from the pilot program, allowing large, traditional defense contractors to enter into two-party prototype OTAs as well.

Dollar Thresholds for Prototype Projects: Congress has imposed a dollar limit on DOD's use of prototype OTAs, although it significantly increased the threshold when codifying DOD's authority. DOD now may award OTAs valued up to $50 million for prototype projects without additional approvals, and up to $250 million with a written determination by a department's senior procurement executive that certain requirements will be met. Under the pilot program, these thresholds were $20 million and $100 million, respectively.

Follow-On Production Contracts: As in the pilot project, DOD may award follow-on production contracts. And also as in the pilot project, DOD may award such a follow-on production contract without the use of competitive procedures if competitive procedures were used to award the prototype OTA and the participants successfully completed the prototype project.

However, where the pilot project previously limited the number of units that could be produced under

such a follow-on contract, there is no such limit in 10 USCA § 2371b. So although the quantity of prototypes to be delivered under a prototype OTA is limited to prove feasibility or evaluate utility, there is no limit to the quantity of production units that may be purchased subsequently through a sole-source follow-on production contract, subject to the FAR but awarded without competition.

Other Transactions Guide for Prototype Projects—DOD's January 2017 Other Transactions Guide for Prototype Projects seeks to help DOD procurement personnel hold competitions for, enter into and manage prototype OTAs. Contractors who are party to an OTA, or who wish to be, should bear in mind DOD's position with regard to a few key areas.

Distinction between a Contract and an OTA—Recall that the FGCAA requires federal agencies to use a "procurement contract" when the "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government." As with DOD's prior guidance under the prototype OTA pilot program, it is clear that DOD views 10 USCA § 2371b as an all-but-blank check to use OTAs without regard for this direction in the FGCAA. Indeed, the Guide presents only the criteria listed in § 2371b to delimit when use of DOD's prototype OTA authority is appropriate.

In following this guidance, DOD officials will not consider whether a contract, grant or cooperative agreement would be more appropriate under the FGCAA. Nor must DOD officials document why a procurement contract, grant or cooperative agreement is not feasible or appropriate. To the contrary, the Guide allows that "awards for prototype projects are intended to provide DoD a direct benefit," and therefore these OTAs are "acquisition instruments." By tracking key language from the FGCAA and then disregarding its conclusion, DOD invites one to read between the lines: "The FGCAA does not apply to us here."

If a prototype OTA is an "acquisition instrument" through which the Government acquires prototyping services for its direct benefit, what then distinguishes it from a standard contract for these same prototyping services? From the Prototype OTA Guide, it appears DOD's answer would be simply that an OTA for prototyping services is not subject to the FAR or other contract-specific statutes or regulations.

This definition is circular: agreements are classified as OTAs, in DOD's view, by what statutes and regulations apply to them, rather than by their substance; yet, these statutes and regulations are invoked based only on how an agreement is classified. More succinctly, in DOD's apparent view, Congress has authorized DOD, in certain specific circumstances, to enter into agreements that substantively amount to contracts, but that are unhindered by typical procurement requirements and oversight.

DOD's Prototype OTA Guide attempts to distinguish OTAs from contracts, and it directs acquisition strategy teams to seek out "agreements officers well-versed in the FAR" to "help articulate which legal instrument best fits the needs of the situation." But once one unweaves the web of definitions in the Guide, one is left to conclude that a prototype OTA may be simply a contract that is not subject to the FAR. Although §§ 2371 and 2371b refer to OTAs as "transactions (other than contracts, cooperative agreements, and grants)," DOD's Prototype OTA Guide asserts that "Section 2371b authorizes DOD to carry out prototype projects using a legal instrument other than a *procurement* contract, grant or cooperative agreement." The Guide introduces the qualifier procurement before contract, and then defines a "procurement contract" as "a contract that is subject to the Federal Acquisition Regulations."

So, an OTA may be an acquisition instrument in which the Government purchases prototyping services—in essence, a contract—but, by DOD definition at least, an OTA cannot be a contract subject to the FAR.

Protest and Claim Jurisdiction: As DOD's Prototype OTA Guide notes, GAO likely does not have bid protest jurisdiction over prototype OTAs. GAO has taken the general position that "agreements issued by an agency under its 'other transaction' authority 'are not procurement contracts, and therefore [GAO] generally do[es] not review protests of the award, or solicitations for the award, of these agreements under [its] bid protest jurisdiction." *MorphoTrust USA, LLC*, Comp. Gen. Dec. B-412711, 2016 CPD ¶ 133 at 7 (quoting *Rocketplane Kistler*, Comp. Gen. Dec. B-310741, 2008 CPD ¶ 22 at 3). GAO has never examined its jurisdiction over challenges to prototype OTAs specifically, but given its past decisions and the language of its jurisdictional statute, which limits GAO's review to solicitations for or awards of a "contract for the procurement of property of services," GAO likely would not make an exception for prototype OTAs.

The COFC, on the other hand, might, and DOD's Prototype OTA Guide alerts agreements officers to be

prepared for potential protests at the court. Under the Tucker Act, the COFC has jurisdiction over "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." The Federal Circuit has interpreted this grant of jurisdiction broadly to include "all stages of the process of acquiring property or services." *Distributed Solutions., Inc. v. U.S.*, 539 F.3d 1340, 1345 (Fed. Cir. 2008); 50 GC ¶ 332.

One could argue that a prototype OTA, as an acquisition instrument, falls within this broad scope, particularly if it provides for a follow-on production contract. Therefore, as anticipated in DOD's Prototype OTA Guide, actual or potential offerors should consider protests at the COFC if, for example, an agency does not comply with the § 2371b requirement to use competitive procedures to the maximum extent practicable. See 10 USCA § 2371b(b)(2).

With regard to claims, DOD's Prototype OTA Guide states that prototype OTAs are not subject to the Contract Disputes Act, which applies to any express or implied contract for "the procurement of" property or services, but can be the subject of a claim in the COFC under the Tucker Act, which grants the court jurisdiction over claims "upon any express or implied contract with the United States." Accordingly, the Guide suggests that DOD agreements officers should ensure that each OTA addresses the basis and procedures for resolving disputes.

Flexibility in Competition: CICA, including its requirement for full and open competition, applies only to agencies "conducting a procurement for property or services." Despite the discussion above regarding the nature of prototype OTAs as "acquisition instruments," DOD has concluded that prototype OTAs, like other OTAs, are not subject to CICA.

Nevertheless, the Prototype OTA Guide recognizes that 10 USCA § 2371b requires DOD to use competitive procedures "to the maximum extent practicable." The Guide suggests that competition should be "consistent with the industry practice for [the applicable] market segment," but it otherwise leaves agencies conducting OTA competitions "free to create their own process to solicit and assess potential solutions provided it is a fair process and the rationale for making the Government investment decision is documented." The Guide further suggests, however, that agencies should avoid procurement terms of art such as "request for proposals" when drafting solicitations, most likely as a preemptive defense against protest.

Intellectual Property: Some statutes familiar to those who deal with intellectual property in Government contracts do not apply to IP developed under prototype OTAs, including most notably, the Bayh-Dole Act, 35 USCA § 200 et seq., and DOD's data rights statutes at 10 USCA §§ 2320 and 2321. Nevertheless, the Guide supports the use of Bayh-Dole and 10 USCA §§ 2320 and 2321 as starting points from which to build IP rights and licensing clauses in prototype OTAs.

The Guide provides a number of additional IP-related suggestions to agreements officers, including:

- Consider allowing things that would normally constitute "subject inventions" to remain protected as trade secrets by allowing an OTA holder to decline to file a patent without risk of title reverting to the Government. Mitigate risks when allowing OTA holders to keep subject inventions secret by incorporating a perpetual patent indemnity clause to diminish the risk of a third party's patenting the same technology.
- Consider license structures in which the Government obtains greater rights after a set time, during which the contractor may commercialize its data.
- Ensure that the disputes clause in each OTA allows for march-in rights, see 35 USCA § 203 *and* Defense FAR Supplement 252.227-7038(h), and the validation of restrictive markings. See DFARS 252.227-7037.

The Guide also suggests that DOD has a reduced need for IP rights in acquisitions reliant on the commercial marketplace, but notes that agreements officers should negotiate for appropriate deliverables and license rights to allow for Government use of technology well past the normal extinction of the technology in the commercial marketplace. Further, the Guide suggests that agreements officers include in termination for default clauses a provision whereby the Government would obtain unlimited rights or Government purpose rights (defined in DFARS 252.227-7013(a)(13) and (16)) in IP created during performance.

Cost Accounting: Although the Prototype OTA Guide suggests that there is no need to invoke CAS or audit requirements in fixed-price OTAs, the Guide notes that accounting systems become more important for OTAs involving cost sharing. For prototype OTAs valued over $5 million, DOD must include a

clause allowing audit by the U.S. Comptroller General, unless the recipient has not in the preceding year entered into any other agreement providing audit access by a Government entity.

In any event, OTA holders, if they have not done so otherwise, should establish systems and procedures to monitor performance and costs appropriately, regardless of whether the OTA contemplates CAS or audit access. As DOD's Prototype OTA Guide notes, OTA awardees are "responsible for managing and monitoring each prototype project and all participants." The Guide suggests that effective performance reporting, while far from a full-blown earned value management system, should address cost, schedule and technical progress, and compare work accomplished and actual costs to the work planned and estimated costs. This is sound advice, as a contractor's failure to account properly for OTA costs could lead to mischarging on procurement contracts.

Changes: As some OTA holders know all too well, one of the most significant risks of entering into an OTA rather than a contract, from the contractor's perspective, is the absence of a mandatory Changes clause and the inapplicability of the CDA. See FAR 43.205; FAR 52.243-1 et seq. Contractors rely on Changes clauses and the CDA to pursue equitable relief when the Government makes changes, either expressly or constructively, that increase the cost of or time required for contract performance. Without a Changes clause, the OTA holder could be stuck footing the bill for such changes. Perhaps recognizing the magnitude of this risk on potential OTA partners, the Prototype OTA Guide suggests that DOD agreements officers include clauses to address how unilateral and bilateral changes will be handled.

Conclusion—In the taxonomy of legal instruments between the Federal Government and third parties, OTAs remain difficult to nail down. Prototype OTAs, authorized under 10 USCA § 2371b and only available to DOD, are unique among OTAs in their similarity to instruments that would normally be classified as procurement contracts; according to DOD, prototype OTAs are "acquisition instruments" intended to provide the Government a direct benefit.

The long reach of these OTAs, their use will invite new issues and disputes. One can anticipate jurisdictional arguments over protests and claims being hashed out in the COFC (and eventually the Federal Circuit), while the negotiating table likely will see innovative IP strategies. Other OTA-bestowed agencies will be watching, looking for traits they may adopt.

Perhaps DOD's other transaction authority for prototype projects will change the face of defense acquisition, as DOD hopes; perhaps Congress will like what it sees and expand the authority to other types of projects; or perhaps Congress will pull tight DOD's currently loose rein.

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This Feature Comment was written for **The Government Contractor** ***by*** **Locke Bell** ***and*** **Anna Sturgis*****, Morrison & Foerster LLP.***