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GUIDE ON SECTION 845/804

OTHER TRANSACTIONS (OTs) FOR PROTOTYPE PROJECTS

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GUIDE ON SECTION 845/804  
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10 USC 2371, Section 845/804 Other Transactions for Prototype Projects

- 10 USC 2371 authorized award of other transactions. Two types of commonly used other transactions are:
  - Other transactions authorized by the basic 10 U.S.C. 2371 authority for basic, applied and advanced research projects. These types of other transactions are generally used to provide support or stimulation (i.e., "assistance").
  - Other transactions authorized by 10 U.S.C. 2371, as supplemented by section 845 of Public Law 103-160, as amended by section 804 of Public Law 104-201 and section 241 of Public Law 105-261, for prototype projects directly relevant to weapons or weapon systems proposed to be acquired or developed by the DoD. This type of other transaction is an acquisition instrument, commonly referred to as an other transaction for a prototype project, prototype other transaction, or a section 845 other transaction.
- The focus of this guide is on other transactions for prototype projects. Guidance for use of other transactions for research can be found at <http://alpha.lmi.org/dodgars>.

Delegation of Authority to Enter into Other Transactions for Prototype Projects

- USD(A&T) memorandum of December 14, 1996, provided the military departments and defense agencies the authority to enter into other transactions for prototype projects.
- Authority for award of other transactions for prototype projects shall be in accordance with agency procedures.
- Many of the agency delegation letters or links to agency web sites can be found in the References section of this Defense Acquisition Deskbook Special Interest Item.
- The following is a listing of Agency POCs for other transactions for prototype projects and existing agency web sites:
  - Air Force - Sandy Schwartzwalder, 937-255-5643 or e-mail: [schwartzwalders@afrl.af.mil](mailto:schwartzwalders@afrl.af.mil)  
<http://afmc.wpafb.af.mil/HQ-AFMC/PK/pkt/>
  - Army - Steve Lake, SARDA, 703-681-1039 or e-mail: [lakes@sarda.army.mil](mailto:lakes@sarda.army.mil)

- Navy - Deborah Tronic, ASN(RD&A), 703-602-2842 or e-mail: tronic.deborah@hq.navy.mil  
<http://www.abm.rda.hq.navy.mil/bpot.html>
- Defense Advanced Research Projects Agency - Don Sharkus, 703-696-2383 or email: dsharkus@darpa.mil
- National Imagery and Mapping Agency - Brian Wolfe, 301-227-7825 or e-mail: wolfeb@nima.mil
- National Security Agency - Primary is Sharon Holste, 410-859-4071, or e-mail: shar@romulus.ncsc.mil and Alternate is Gloria Yarbrough, 301-688-7544 or e-mail: gloriay@romulus.ncsc.mil

### Decision to Use an Other Transaction for a Prototype Project

- USD(A&T) Memorandum of December 14, 1996, requires that you document the reason for choosing to use an other transaction and address the benefits expected from using an other transaction (vice a contract). Consider, for example:
  - Do we expect to attract business entities that do not normally do business with the government?
  - Is there some type of business arrangement that is not conducive to a FAR contract?
  - Are there specific FAR requirements that would not be accepted by a new defense business entity (e.g., Cost Accounting Standards, Intellectual Property)?
  - Are there specific FAR requirements that are inhibiting the integration of commercial and military procedures or processes and do we expect to be able to achieve integration by using an other transaction?
  - Do we expect to acquire more affordable technology, reduce program costs, schedule or improve performance by using an other transaction?
  - Will the prototype project increase competition for follow-on efforts?
  - Do we expect to be able to transition from the prototype project to a FAR Part 12 production contract?
  - If the follow-on effort is not expected to be a commercial item procurement, will we be able to continue the development or production with a FAR contract?
- In accordance with agency procedures and OUSD(A&T)/DDP memorandum of October 16, 1997, the specific rationale for selecting an other transaction and the benefits expected should be fully addressed in Block 36 of the DD 2759, with supplemental pages as needed (see Government Prototype Project Reporting Requirements section).

## Acquisition Strategy

- Acquisition planning is key to a successful section 845 other transaction prototype project. Section 845 other transaction authority does not extend beyond prototyping.
- A prototype project should not be undertaken as an other transaction without developing an acquisition strategy that considers any expected follow-on activity.
- The strategy for transitioning beyond the prototype project to a FAR-based contract should be addressed during acquisition planning.
- Other key issues such as sustainment, test and evaluation, and competition should also be addressed.

## Metrics

- Consistent with USD(A&T) memorandum of December 14, 1996, OUSD(A&T)/DDP memorandum of October 16, 1997, and agency guidance, the agreements officer and prototype project manager must document what is expected to be gained by using an other transaction and track whether the expected benefits were actually achieved.
- Metrics should be established prior to award that will gauge key measures of merit and determine whether the expected benefits of using an other transaction were achieved.
- USD(A&T) memorandum of December 14, 1996, requires that an annual report on the actual benefits and lessons learned for each prototype project be submitted to OUSD(A&T)/DDP by November 15<sup>th</sup> of each year.

## Other Transaction Agreement

- 10 U.S.C. 2371, section 845, as amended, provides flexibility to negotiate terms and conditions appropriate for the acquisition, without regard to the Federal Acquisition Regulation.
- The agreements officer is responsible for ensuring terms and conditions are appropriate for the particular prototype project and should consider expected follow-on program needs.
- It is the agreements officer responsibility to ensure the other transaction incorporates good business sense and appropriate safeguards to protect the government's interest. This includes assuring that the cost is reasonable, the schedule and other requirements are enforceable, and the payment arrangements promote on-time performance.
- It is essential that legal counsel is closely involved in the development of the agreement's terms and conditions.

- Other transactions for prototype projects shall identify the 9<sup>th</sup> position of the award number as a "9".

#### Agreements with Consortia or Joint Ventures

- The government should obtain evidence of all members' commitments to the project prior to award of an agreement to a consortium or joint venture.

#### Government Team Composition

- A small, dedicated team of experienced individuals works best.
- You need to get the early participation of senior management, DCMC, DFAS and legal experts.
- The role of DCMC and DCAA should be decided up front.
- There are four DCMC offices designated as Agreements Administration Centers with expertise in administering other transactions. If administration is to be delegated to DCMC, refer to Section 10 of the DoD CAS Component directory to determine the appropriate administration location. The DCMC POCs can be found at "<http://www.dcmc.hq.dla.mil>". Click on "site index", "CAS Component Directory", and "Section 10".
- You need to determine and contact the cognizant paying office for the other transaction. DCMC can provide assistance in determining the appropriate paying office.
- DCAA is available to provide financial services during the proposal review process, OT performance, and upon completion of the other transaction.

#### Price Reasonableness

- The government must be able to determine that the amount of the agreement is fair and reasonable.
- The agreements officer may require whatever data are needed to establish price reasonableness, including commercial pricing data, market data, parametric data, or cost information. However, the agreements officer should attempt to establish price reasonableness through other means before requesting cost information. If cost information is needed to establish price reasonableness, the government should obtain the minimum cost information needed to determine that the amount of the agreement is fair and reasonable.
- DCAA is available to provide financial advisory services to the agreements officer to help determine price fairness and reasonableness.

### Allowable Costs

- The agreement should stipulate that federal funds and the OT awardee's cost sharing funds are to be used only for costs that (i) a reasonable and prudent person would incur in carrying out the prototype project, and (ii) are consistent with the purposes stated in the governing Congressional authorizations and appropriations.

### Accounting Systems

- The OT awardee must maintain adequate records to account for federal funds received and any required cost sharing.
- For other than "fixed-price type" instruments, the OT awardee should have an accounting system that accumulates and reports costs consistently within the appropriate business unit.
- For other than "fixed-price type" instruments, the agreements officer should ensure that the OT awardee's accounting system satisfies the above criteria and should incorporate into the agreement the requirement to maintain such an accounting system.
- DCAA is available to provide information on the status of the awardee's accounting system or to respond to any questions regarding accounting treatment to be used for the other transaction.

### Financial Reporting

- The other transaction needs to provide for financial reporting that provides for appropriate visibility and explanation of the financial situation (see the Other Transaction Awardee Reports section).
- When a prototype project exceeds six million dollars (FY 1996 \$) and when it may evolve into a major defense acquisition program, it is advisable for the prototype manager to contact the Cost Analysis Improvement Group (CAIG). The CAIG is responsible for collecting actual costs of prototype systems and for using these cost data in their statutory role of developing independent cost estimates for our acquisition executives. If the CAIG concludes there is no other available source of relevant cost information, a summary cost report may be required. Such a cost report would generally be in OT awardee-specified format and would be submitted to the contractor Cost Data Report Project Office located at 1111 Jefferson Davis Highway, Suite 500, Arlington, Virginia.

## Performance Management and Reporting

- Prototype projects that meet the dollar criteria or risk management considerations discussed in DoD 5000.2-R, should be managed using the principles of earned value management.
- When appropriate, due to the risk or dollar value of the prototype project, it is recommended that the project manager seek appropriate experts to advise on the elements of performance management visibility.

## Audit Requirements

- Agreements should provide for the agreements officer's authorized representative to have access to financial records for a specified period of time (normally three years) after payment of the final invoice.
- The agreements officer's authorized representative should have direct access to sufficient records and information to ensure full accountability for all government funding under the agreement.

## Cost Sharing

- Cost sharing is not required statutorily for prototype projects. Generally, cost sharing may be appropriate if there are commercial or other benefits to the contractor. If cost sharing is determined to be appropriate, the amount of contractor cost sharing should be commensurate with the commercial applicability or other benefits to the contractor. Ensure you understand and evaluate the nature of the cost share (generally it should be cash and may be in the form of corporate Independent Research and Development).
  - Agreements officers should not count the cost of prior research as private sector cost share. Only the additional resources provided by the private sector and needed to carry out the prototype project should be counted.
  - Ensure you have a clear understanding of the accounting treatment for cost share.
- Generally the government's payments or financing should be representative of its cost share as the work progresses, rather than front loading government contributions.
- Other transactions that require cost sharing should require financial reporting that provides appropriate visibility into expenditures of government funds and expenditures of private sector funds.



- Other transactions that require cost sharing should generally provide for adjustment of government or private sector investment if the other party is not able to make its required investment. Such other transactions will address the conditions that will trigger an adjustment and address the procedures for making the adjustment.

### Termination

- Many of the assistance other transactions for research have provided the OT awardee the right to terminate under specific situations. This may be appropriate when the OT awardee's cost contribution matches the government's and the specific purpose of the effort is to stimulate technological advancement.
- When acquiring a prototype it is not generally appropriate to permit the OT awardee to terminate unilaterally. However, if the OT awardee is making a substantial investment in the prototype project, it may be appropriate to provide the OT awardee the unilateral right to terminate.

### Changes

- The agreement needs to address how changes will be handled. Consider whether the government should have the right to make a unilateral change to the agreement, or whether all changes should be bilateral.
- The government may need the right to make a unilateral change to the agreement to ensure that critical requirements are met. If a significant cost contribution is not expected from the OT awardee, then the government should normally retain its right to make a unilateral change for specified circumstances.

### Payments

- The agreement needs to identify clearly the basis and procedures for payment. Consider the following in drafting the agreement payment provisions:
  - Are payments intended to track to expenditures?
  - Are the payment amounts subject to adjustment during the period of performance?
  - If the payments can be adjusted, what is the basis and process for the adjustment?
  - What are the conditions and procedures for final payment and agreement close-out?
  - Is a final audit of costs needed?

- Generally, the government should avoid making advance payments to the OT awardee.
- If advance payments are authorized, the agreement shall require the OT awardee to maintain funds in an interest-bearing account unless one of the following applies:
  1. the OT awardee receives less than \$120,000 in Federal awards per year;
  2. the best reasonably available interest bearing account would not expect to earn interest in excess of \$250 per year on such cash advances; or
  3. the depository would require an average or minimum balance so high that it would not be feasible within the expected cash resources for the project.
- The interest earned should be remitted annually to the agreements administration officer. The agreements administration officer shall forward the funds to the responsible payment officer, for return to the Department of the Treasury's miscellaneous receipts accounts.
- Payable Milestones. Payable milestones are one means of financing other transactions for prototype projects. There is not one uniform provision or set of procedures for payable milestones. Payable milestone procedures vary, depending on the inherent nature of the agreement.
  - Agreements with firm-fixed price characteristics may contain payable milestone provisions that do not require adjustment for actual expenditures. In these cases, this fact should be clear in the agreement and the negotiated payable milestone values should be commensurate with the estimated value of the milestone events.
  - Agreements with cost-reimbursement features should require payable milestones reasonably to track to actual expenditures. When this is the case, the agreement must address the procedures for adjusting the payable milestones based on actual expenditures. Payable milestones should be adjusted as soon as it is evident that payable milestones are no longer reasonably representative of actual or expected expenditures.
  - See the OT Awardee Reports section.

### Disputes

- The Contract Disputes Act does not apply to other transactions for prototype projects, but the other transaction language should address the procedures for resolving disputes.
- The final dispute authority should generally reside with a government official who can render an impartial decision.

## Protest

- The GAO protest rules do not apply to other transactions for prototype projects.
- The offerors' rights and procedures for filing a protest should be stipulated in the solicitation document for an other transaction.

## Patents and Technical Data

- The Bayh-Dole Act (Chapter 18 of Title 35, U.S.C.) is not applicable to other transactions.
  - The government should start with the applicable standard FAR or DFARS 52.227 patent-rights clause(s) and negotiate rights of a different scope only when necessary to accomplish program objectives and foster the government's interest.
- Similarly, 10 USC 2320 requirements on technical data do not apply to other transactions. However, the government team needs to identify what technical data and rights the government will need in the future to operate and maintain the item and negotiate appropriate rights to these data into the agreement.
- The government team needs to involve patent and technical data rights attorneys to ensure negotiation of appropriate patent and data rights provisions.
- The government team also needs to coordinate with the users to know what the data needs are for the program.

## Property

- General
  - The government is not required to, and generally should not, take title to property acquired or produced by a private party signatory to an other transaction.
  - Other transactions should identify any government property to be furnished under the agreement.
  - In deciding whether or not to take title to property under an other transaction, the government should consider whether known or future efforts may be fostered by government ownership of the property.
- Requirements and Guidance - Government Title. If the government takes title to property or furnishes government property, then the property is subject to statutes pertaining to the treatment and disposition of government property. The agreements officer may use the FAR/DFARS provisions pertaining to property or may create provisions tailored to the individual transaction. Any

tailored provision must be consistent with the Federal Property and Administrative Services Act and, as a minimum, should address the following:

- A list of property to which the government will obtain title.
- Whether the contractor or the government is responsible for maintenance, repair, or replacement.
- Whether the contractor or the government is liable for loss, theft, destruction of, or damage to the property.
- Whether the contractor or the government is liable for loss or damage resulting from use of the property
- The procedures for accounting for, controlling, and disposing of the property.
- Additional Government-Furnished Property Requirements. The other transaction should specify:
  - What guarantees (if any) the government makes regarding the property's suitability for its intended use, the condition in which the property should be returned, and any limitations on how or the time the property may be used.
  - A list of property the government will furnish for the performance of the agreement.
- Cost-Sharing Considerations. When the private party signatory has title to property that will be factored into the signatory's cost share amount, the private party signatory and the government must agree on the method for determining the value of the property.

#### Administration

- It is vital that administrative agreements officers receive all pertinent documentation to ensure the effective administration of the agreement.
- It is the administrative agreements officer's responsibility to ensure that all terms and conditions of the agreement are being satisfied.
- If the OT awardee has failed to comply with any term of the agreement, the administrative agreements officer must take timely, appropriate action to remedy the situation.

#### Other Transaction Awardee Reports

- DoD Instruction 3200.14 requires delivery of a technical report to the Defense Technology Information Center (DTIC) upon completion of research and engineering projects. Agreements must include this requirement and require the OT awardee to provide evidence to the administrative agreements officer of submittal of required reports to DTIC.

- Agreements officers, in consultation with the project manager, must consider whether reports required of the OT awardee (technical or financial) are important enough to warrant establishment of line items or separate payable milestones or if report requirements should be incorporated as a part of a larger line item or payable milestone. In either case, an appropriate amount must be withheld if a report is not delivered.

#### Agreement Close-Out

- Although other transactions are not subject to the FAR, the close-out process is generally the same as for contracts. The DCMC One-Book will include procedures on close-out; it can be found at <http://www.dcmc.hq.dla.mil>.
- Guidance that will facilitate agreement close-out is provided throughout this guide, in areas such as audit requirements, cost sharing, payments, property, and OT awardee reports.

#### Government Prototype Project Reporting Requirements

- USD(A&T) Memorandum of December 14, 1996, established prototype project annual reporting requirements to be submitted by November 15<sup>th</sup> of each calendar year to satisfy congressionally-mandated requirements and to collect lessons learned.
  - The Department must report to Congress on all initial awards, out of scope changes, or options awarded for the preceding fiscal year.
  - The military departments and defense agencies must report to the Director, Defense Procurement (DDP) annually on lessons learned for all on-going other transactions or other transactions where performance was completed in the preceding fiscal year.
- OUSD(A&T)/DDP Memorandum of October 16, 1997, implemented a data collection format and developed a DD 2759 Test Form to collect information on 845/804 other transactions for prototype projects.
  - DDP's goal is to use the DD 2759 Test Form to satisfy the statutory reporting requirements.
  - Provide DD 2759 data in accordance with agency procedures.
  - Block 37 on the DD 2759 Test Form is intended to answer two of the statutory questions. Please provide separate answers to each question, using supplemental pages, as needed. The following guidance is provided to aid in answering these questions:

- Extent the other transaction has contributed to a ***broadening of the technology and industrial base*** available for meeting DoD needs:
  - Focus on how use of an other transaction makes a difference.
  - Are we able to pursue technology areas we would not be able to pursue if we had to use a contract?
  - Are commercial products or processes being made available to DoD that would otherwise not be available?
  - Did the use of the OT result in business units participating in the prototype project that would not otherwise have participated in the project? If so:
    - Explain how the agreement attracted business units that would not otherwise have participated in the prototype project and identify these new players.
    - Were there provisions of the OT or features of the award process that enabled their participation? If so, explain specifically what they were.
    - What are the expected benefits of the business units' participation (e.g., technology that is better, more readily available, or less expensive) and how does this contribute to a broadening of the technology and industrial base available to DoD? Please be specific about the benefits and explain why you expect to realize them.
    - Why would they not have participated if a standard instrument were used? For example, are they business units that normally accept no business with the government, that do business only through OTs or contracts for commercial items, or that limit their volume of Federal contracts to avoid a threshold at which they would have to comply with cost accounting standards or some other government requirement?
  - Are there any other benefits of the use of the OT that you perceive helped the Department broaden the technology or industrial base available to DoD? If so, what were they, how do they help meet defense objectives, what features of the OT or award process enable us to realize them and why could they not have been realized using a standard instrument? Please be specific.
- Extent the other transaction has fostered within the technology and industrial base ***new relationships and practices*** that support the national security of the United States:

- Focus on what is different because we are able to use an other transaction.
- Did we attract business units that would not otherwise do business with DoD? If so, address how the relationship or business practices differ from what would be required under a FAR contract.
- Did the use of the OT result in the establishment of new relationships among for-profit business units, among business units of the same firm, or between business units and nonprofit performers that will help us get better technology in the future? If so:
  - Explain the nature of the new relationships.
  - Explain why it is believed that these new relationships will help us get better technology in the future.
  - Were there provisions of the OT or features of the award process that enabled their participation? If so, explain specifically what they were and why these relationships could not have been created using a standard instrument.
- Did the use of the OT permit traditional government contractors to use new business practices in the execution of the prototype project that will help us get better technology, get new technology more quickly, or get it less expensively? If so:
  - Who are those contractors and what are the new business practices?
  - What specific benefits do you believe that we will get from the use of these new practices, and why do you think so?
  - Were there provisions of the OT or features of the award process that enabled the use of these new practices? If so, specifically what are they and why you think that these practices could not have been used if the award had been made using a standard instrument?
- An annual reporting of lessons learned for every active other transaction prototype project is required to be submitted to OUSD(A&T)/DDP by November 15<sup>th</sup> in accordance with USD(A&T) memorandum of December 14, 1996. The following are examples of lessons to be reported:
  - whether the expected benefits are being achieved (specific measures of merit are the most useful)
  - any other benefits resulting from the use of an other transaction

- whether program costs were reduced, performance schedule shortened, or improved performance realized
- any lessons learned from negotiation or agreement execution

#### Major Weapon System Prototype Projects That Use Other Transactions

- There have been some instances where other transactions have been used to make award of major weapon system prototype projects.
- The DoD 5000 requirements are applicable to these prototype project awards.
- In addition to the acquisition strategy requirements of DoD 5000.2-R, section 3.3., major weapon system prototype projects acquisition strategies should also address the following:
  - The rationale for deciding to use an other transaction and why a contract would not be appropriate.
  - The expected benefits to the program from the use of an other transaction. Metrics should be identified to compare the performance of the other transaction to performance under a contract.
  - A discussion of the strategy for transitioning the prototype project to follow-on development or production.
  - A summary of the government's position on the key areas identified below, as a minimum. For each area address: (1) the expected agreement term, (2) the customary FAR provision, (3) the significance of the differences between the agreement term and the customary FAR provision, and (4) the rationale and benefit to the government of the agreement term.
    - Termination for Convenience of the Government
    - Termination for Default
    - Changes
    - Payments
    - Audit Requirements
    - Disputes
    - Service of Protest/Protest After Award
    - Rights in Technical Data and Computer Software
    - Patent Rights
    - Cost, Schedule and Technical Performance Management and Reporting
    - Government Property

#### Protection of Certain Information from Disclosure

- Certain types of information submitted to the Department in a process having the potential for award of an other transaction are exempt from disclosure requirements of 5 U.S.C. 552 (the



Freedom on Information Act) for a period of five years from the date the Department receives the information.

- Such information includes the following:
  - A proposal, proposal abstract, and supporting documents.
  - A business plan submitted on a confidential basis.
  - Technical information submitted on a confidential basis.
- Specifically, 10 U.S.C. 2371(i) provides that disclosure of this type of information is not required, and may not be compelled, under FOIA during that period if a party submits the information in a competitive or noncompetitive process having the potential for an award of an other transaction.