Prototype Other Transactions
Legal Framework

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Section 845 Statutory Definition and Requirements

- Must be for “prototype projects” that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the DoD

- Must be at least one nontraditional defense contractor “participating to a significant extent” OR mandatory one third cost sharing for traditional defense contractor

- Competition to the maximum extent practicable (CICA not applicable)
What is a Prototype Project?

• No statutory definition BUT current DoD OTA guide says:

  With regard to section 845 authority, a prototype can generally be described as a physical or virtual model used to evaluate the technical or manufacturing feasibility or military utility of a particular technology or process, concept, end item, or system. The quantity developed should be limited to that needed to prove technical or manufacturing feasibility or evaluate military utility.

• In general, Research, Development, Test & Evaluation (RDT&E) appropriations will be appropriate for OT prototype projects.

• Low Rate Initial Production quantities are not authorized to be acquired under prototype authority.
Directly Relevant

• Not just relevant –DIRECTLY relevant
• Just about all we do is relevant
• MUST clearly identify direct relevance
  – Not many steps removed from a weapon system
  – Provide detailed rationale for ACC and Legal Office review/approval well in advance
  – Conservative definition subject to close scrutiny
Definition of Non-Traditional Contractor

• Is a **business unit** that has not, for a period of at least one year prior to the date of the OT agreement, entered into or performed on:
  - (1) any procurement contract that is subject to full coverage under the cost accounting standards, OR
  - (2) any FAR based procurement contract in excess of $500,000 to carry out prototype projects or to perform basic, applied or advanced research

• Many small businesses and academia do NOT qualify as non-traditional contractors (very narrow definition)

• A unit of a traditional may qualify as a non-traditional contractor
What is Significant Participation?

• No statutory definition. DoD OTA guide says (as examples) it includes:
  - Supplying new key technology or products; or
  - Accomplishing a significant amount of the effort; or
  - Causing a material reduction in the cost or schedule or increase in performance.

• Nontraditional does not necessarily have to be a prime contractor -- can be a subcontractor, lower tier vendor, intra-company business unit or teamed with a traditional as long as participation is “significant” (as per DoD OTA guide).
  – Determination of what is significant is very debatable!
    Determination is documented in the file.
Cost Sharing Defined

• Resources expended by the award recipients on the proposed project SOW and subject to the direction of the project management. Costs a reasonable person would incur (necessary to) carrying out project SOW.

• Cost Sharing does NOT involve Funds Directly to USG

• Two Types of Cost Sharing
  – **Cash**: Outlays of funds to perform the OT project
    • Includes labor, materials, new equipment, subcontractor effort
    • Sources include *new IR&D funds*, profit or fee from another contract, overhead or capital equipment expense pool
  – **In-Kind**: Reasonable value of equipment, materials or other property used in performance of OT work
Cost Sharing (cont’d)

- IR&D funds can be utilized as cost sharing
  - **New** IR&D funds offered to be spent on the project SOW and subject to the direction of the project management.
  - Parallel research that might be related to the project but will not be part of the SOW or subject to the direction of the project management is **NOT** considered cost share.
  - Will not count cost of prior research as cost share.
Cost Sharing (cont’d)

– Cost share may be different among partners
– Cost share may be different milestone to milestone
– Need some financial reporting that provides appropriate visibility into expenditures of USG v. private funds
– Agreement may provide for adjustment of investments if the other party is not able to make its required investment. Trigger and procedures for adjustment is negotiable.
Cost Sharing (cont’d)

• What is NOT Acceptable Cost Share
  – Sunk costs or costs incurred prior to project
  – Foregone fees, profits, G&A.
  – Bid and Proposal costs.
  – Value claimed for existing intellectual property
  – Parallel or prior research.
  – Cash or in-kind whose availability is not clearly and convincingly demonstrated
  • Burden of proof on proposer
What Does an OT Do For You?

• Relief from FAR and supplemental regulations
  – FAR, DFAR, AFAR, DoDGARS not applicable

• Flexibility to use “best practices”
  – Costs reasonable
  – Schedule & requirements enforceable
    • Payment arrangement promote on time performance

• Competition only to maximum extent practicable (CICA not applicable)
What Does an OT Do For You?

• Negotiable/Flexible
  – Don’t feel constrained by previous USG contract practices and conventions.
    • May use tailored FAR provisions or not
    • No automatic unilateral changes or equitable adjustment
    • No automatic Termination for Convenience or Default
  – Intellectual property negotiable
What Does an OT Do For You?

• Flexible Payment Provisions
  – No mandatory cost accounting standards/reporting
  – No certified cost and pricing data
  – Commercial standards
  – Use payable milestones
What Does an OT Do For You?

• Payable Milestones
  – Proposed by you to fit your approach
  – Observable technical achievements or events
  – Recognition of completion by USG Tech/PM
  – Cost share may be different milestone to milestone

• Two Types
  – Firm Fixed Price
    • Not adjusted for actual costs
  – Cost Reimbursable
    • Adjusted for actual costs
    • Need accounting system that accumulates and reports costs consistently within the appropriate business unit.
What does not apply?

– Competition in Contracting Act
– Bayh-Dole & Rights in Technical Data
– Truth in Negotiations Act
– Contract Disputes Act
– Procurement Protest System
– Procurement Integrity Act
– Grants and Agreements Regs (DODGARS)
– See DOD Prototype Guide, January 2001, Appendix 1
  • http://www.acq.osd.mil/dpap/Docs/otguide.doc
OT LIMITATIONS

- Criminal Law (False claims/statements) applies
- Federal Fiscal Law applies
- Comp Gen access to records required
- Laws of general applicability
- No supporting regime of commercial law
  - no UCC to fill in gaps
  - freedom of contract/ no regulatory framework
Concept of Operations

- Companion OTA and Consortium Member Agreement (CMA)
  - Fully executed CMA first
  - Sole source OTA executed with consortium

- CMA governs dealings among industry/academia
  - USG is not a party to the CMA
  - CMA mirrors OTA but is separate instrument that also includes non-OTA terms and conditions
Concept of Operations

CMA (cont’d)

- Allocates risks, responsibilities, rewards
- Someone Firmly in charge/ focus for USG
- Establish Membership Process
  - Procedures to admit new members/terminate membership
  - Revolving admission
  - Low barriers to entry
  - Significant Nontraditional membership
- Dispute resolution process
- Handling of proprietary information
- Guidelines for publication of data
Concept of Operations

• OTA has omnibus type broad SOW that describes type of prototype efforts to be pursued but no defined projects.

• Place specific prototype projects with individual members or teams of members through issuance of a competitive announcement (mirrors an RFP)
  – Includes evaluation factors for selection of winner/placement of project.
  – Every project is governed by the terms and conditions of the basic OTA but special T&Cs may be negotiated on a project by project basis.

• Selection made by USG based upon published evaluation factors.
  – Generate written technical evaluations and Agreements Officer (AO) is source selection authority.
QUESTIONS??
BACK-UP SLIDES
OTHER TRANSACTIONS (OT’s)  
OT’s FOR RESEARCH

• Authority: 10 USC 2371

• Definition: A legally binding instrument other than a procurement contract, grant or cooperative agreement for performing basic, applied and advanced research and development.

• Grants and Agreement Officer may sign
RESEARCH OT’S - Conditions

• SECDEF shall insure that:
  – To the maximum extent practicable, no OT for research duplicates research conducted under existing programs.
  – To the extent that the Secretary deems practicable, the funds provided by the USG do not exceed the total amount provided by the other parties to the OT (desired 50/50 cost share)
• SECDEF shall ensure that (no qualifiers):

  – An Other Transaction is used for a research project when the use of a standard contract, grant or cooperative agreement for such project is not feasible or appropriate.

  – Determination subject to Protest.