OT MYTHS

Myth #1 – The main goal and purpose behind OTs is that they are faster to award than other contractual instruments

- **FALSE**. The main goal of both Other Transactions authorities is to attract non-traditional performers to work with the Government. The statutes were written to exempt the OT agreements from the traditional procurement statutes, regulations, and processes in an effort to remove the aspects of the traditional Government acquisition system which with commercial industry found it difficult to work. By eliminating these hindrances, the goal was to make the OT process as similar to the commercial contracting process as possible and not require the commercial performers to conform unnecessarily to government processes. By eliminating the traditionally slow procurement process, agencies can speed up their OT awards if they choose to embrace the flexibility of the authority. This increase in award speed is merely a side effect, however, of using the OT authority. The main consideration and goal in using an OT should be to attract non-traditional performers.

Myth #2 – OTs will always be faster to award than other instruments

- **FALSE**. The OT award process will not always be faster than the traditional procurement processes and sometimes can be as long or longer. The speed of award is tied to many factors, many of which are internal to the organization. For example, some agencies will award an OT but conduct the source selection process as if it were subject to FAR Part 15. In that case, awarding the OT will probably take nearly as long as a procurement contract. Likewise, if the OT award must go through the same approval chain as a procurement contract, it will take about as long. Also, because all of the terms and conditions in an OT are negotiable, drafting the agreement and negotiating it between the Government and the performer can take a long time. The OT award process can be faster but only if the Government team is prepared and the process is kept as streamlined as possible.

Myth #3 – There is only one type of OT available to DoD

- **FALSE.** There are two different OT authorities. The first is for basic, applied, and advanced research projects at 10 U.S.C. 2371. The second is for prototype projects at 10 U.S.C. 2371b. There are differences between the two authorities and agencies should consider which is makes the most sense for their particular goal. The OT for Prototype authority is much more commonly known, but that does not mean that it is appropriate for all circumstances. Consider the following when determining which authority is appropriate:
    - Does the technology have a dual use application (application in both the commercial and government sectors)? Are we entering this program to push the state-of-the-art in a particular technology area? Do we need to create items to test out the approach to determine how far we've pushed the technology but keeping the test items was incidental to the overall effort? Then this program should result in an OT under 10 U.S.C. 2371.
    - Is the application of the technology for primarily military uses? Is the ultimate goal of the program to create a prototype asset that will be delivered to the Government? Is the main desire to acquire a reasonable number of prototypes to test in the field before making the decision to purchase in quantity? Then this program should result in an OT under 10 U.S.C. 2371b.

Myth #4 – To use an OT, you must award through a consortium

- **FALSE.** OTs have been awarded by DoD since 1989 and most have not been to or through consortia. The inherent flexibility of the OT authority allows for the consideration of a variety of teaming options, including, but not limiting to, prime/sub relationships, teams, consortia, partnerships, and joint ventures. Each construct has its advantages and issues, and each situation may dictate a different approach. Ideally, the Government should allow the performers to determine the best way to organize their teams. Artificially forcing performers into a particular team structure often has adverse effects on efficiency and performance.
- The consortia model that many organizations are currently using (task order arrangements awarded through an administrative facilitator) is a business model that has been chosen for its perceived ease or efficiency. It is important to understand that use of this business model is not dependent upon use of the OT authority. This same model could be used with a variety of different award instruments. The choice to use the OT authorities and the choice to use a consortium are two separate and distinct business decisions that are not mutually dependent.
- OTs can be awarded to a variety of different team structures, including partnerships, joint ventures, teams/consortia, and prime/subs. Consortia can include any type of teaming arrangement, not just the task order type arrangements so recently popular. Organizations can choose to issue their own solicitations without working with a consortium. The possibilities are endless. What is important is to first see what you are trying to accomplish and what your end state goal is. Only then should you look to determine the best award vehicle and business structure to accomplish that goal.

Myth #5 – Since an OT is termed an "agreement," it is not a contract

- **FALSE**. When most people in the Government hear the term "contract," they automatically think "procurement contract" awarded under the traditional acquisition process and subject to all of the acquisition statutes and regulations. OT agreements are not procurement contracts, but they are still legally valid contracts. They have all six legal elements for a contract (offer, acceptance, consideration, authority, legal purpose, and meeting of the minds) and will be signed by someone who has the authority to bind the federal government, i.e. an Agreements Officer. The terms and conditions can be enforced for and against either party. The organizations within DoD routinely using OTs have called them agreements to ensure that there would be no confusion between these arrangements and procurement contracts.

Myth #6 – Since the Competition in Contracting Act (CICA) doesn't apply to OTs, competition and fairness are not a consideration

- **FALSE.** Both OT authorities require the use of competitive practices to the maximum extent practicable. Agencies are not required to do the formal competition structure laid out in CICA (i.e. three tiers of competition – full and open, limited and sole source with justification and approval) nor follow the complicated competition rules in the acquisition regulations. The OT statutes and guidance allow the agency to determine what the competition will look like and how it will be structured.
- Competition is a good thing. It helps keep prices low, quality high, and gives theGovernment some leverage in negotiations. When using the OT authorities, agencies can create competitive environments that reap the benefits of the competitive approach while also creating a streamlined and efficient process. While it is permissible to do a sole source OT award, it is relatively uncommon. Remember, the goal is to attract non-traditional performers to work with the Federal Government. Unless the solicitation is widely disseminated with its more streamlined processes and flexible options, you won't know who might have the best solution.
- Also, 10 U.S.C. 2371b (OTs for Prototypes) has an important aspect that will not be an available options unless the original OT award was competed. If the agency wishes to follow on from an OT for Prototype agreement into either an OT for Production or a procurement contract without recompeting, the original OT award must have been competitive and contemplate the award of either follow-on award.

Myth #7 – Anyone in DoD can award an OT

- **FALSE.** Some DoD organizations are given the authority directly from the statutes. Under both statutes, the authority is given directly to the Secretary of Defense, DARPA, and the Secretaries of the Military Departments. The Defense Agencies must have the authority delegated to them by the DoD Director, Procurement and Policy.
- Currently the authority has been delegated to the Missile Defense Agency (MDA), Washington Headquarters Services (WHS), Defense Information Systems Agency (DISA), United States Transportation Command (TRANSCOM), United States Special Operations Command (SOCOM), United States Cyber Command (CYBERCOM), and the Defense Microelectronics Activity (DMEA). The Department of Interior (DOI) Interior Business Center can use the authority when acting as a DoD agent.

Myth #8 – You can use OTs for any acquisition

- **FALSE**. At their core, these authorities are focused on research, development, test, and evaluation (RDT&E) activities. The scope of the authorities include basic, applied, and advanced research and prototyping. Recently, the OT for Prototypes statute has been amended to allow for follow-on efforts into production as an OT or procurement contract without recompetition. However, in order to take advantage of the follow-on option, the effort had to be originally awarded as an RDT&E project under the OT for Prototypes authority.
- While these authorities have a broad scope, they are not a full substitute for the traditional acquisition system. The traditional acquisition process was created to buy normal operational supplies and services and should be used for these everyday non-RDT&E purchases.

Myth #9 – None of the federal statutes or regulations apply to OTs

- **FALSE**. Generally, the statutes and regulations applicable to acquisition and assistance do not apply to OTs. Since OTs are defined in the negative – they are NOT procurement contracts, grants, or cooperative agreements – any statute, regulation, or policy that applies solely to these types of contractual arrangements will not apply to OTs. Statutes and regulations applicable to acquisition and assistances, however, are only a subset of all federal statutes or regulations. Laws and regulations that are unrelated to the acquisition or assistance process will still apply to OTs. These can include, but are not limited to, appropriations, security, export control, socio-economic and criminal laws.

Myth #10 – The OT authorities are new and have been rarely used

- **FALSE**. The underlying concept of OTs have been around for more than 60 years. Beginning with the NASA Space Act in 1958, OTs have been a tool available to the Federal R&D community for many years. DoD was given the authority for Research OTs in FY89 and Prototype OTs in FY94. More than 7 civilian agencies, in addition to NASA, have the authority to do either one or both types of OTs. While the use of these authorities have ebbed and flowed in these organizations as a whole over the years largely tied to the swings of acquisition reform, they have been continuously used in the majority of Federal R&D agencies and at DoD since FY89.