OTHER TRANSACTION AUTHORITY

Saint or Sinner For DEFENSE ACQUISITION?

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The Department of Defense (DoD) has a powerful tool at its disposal to reach innovative, nontraditional defense contractors and execute rapid, flexible business arrangements with industry. Legislation refers to this tool as Other Transaction Authority. One type of agreement made under this authority is Other Transactions (OT) for prototype projects. These agreements are powerful because they sidestep the vast majority of existing laws and regulations dictating how the government goes about spending money. They carry an absolute minimum level of restrictions and place significant discretion into the hands of the government when spending taxpayer funds. Shall we hail OTs as a savior to a broken acquisition system, or shall we decry them as sinners circumventing a sound set of needed policies and procedures? This article provides an overview and history of OTs as well as examines whether to advocate expansion or seek curtailment of this powerful business instrument.

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The “Marshmallow Challenge” requires small teams to build freestanding structures out of dry spaghetti noodles, string, and tape with a single marshmallow positioned as high as possible on top of the creation. Tom Wujec, author, speaker, and Autodesk Fellow, presented results from this problem-solving exercise at a 2010 Technology, Entertainment and Design (TED) talk. He described how teams of kindergarteners consistently outperformed many other groups and bested business school students by a significant margin. To what did Wujec attribute the kindergarteners’ superior results? Early prototyping. Business students invariably spent all of their allotted time orienting the team, planning the structure, building it to specification, and attempting to place the marshmallow atop their precarious design at the very last moment, often with poor results (crash!). In contrast, kindergarteners learned by doing, throwing out ideas and attempting them early and often. They ended up producing stable designs that consistently reached modest, yet commendable heights (Wujec, 2010).

What does this say about the Defense Acquisition System? It conveys the importance of prototyping defense articles early in the acquisition process and submitting those prototypes to rigorous testing in order to tease out the most capable designs to meet defense needs.

### The Problem

A powerful tool is now at the disposal of the Department of Defense (DoD) to accomplish just that. Legislation refers to this tool as Other Transaction Authority. One type of agreement made under this authority is Other Transactions (OT) for prototype projects (10 U.S.C. § 2371b, 2016). These agreements are powerful because they sidestep the vast majority of existing laws and regulations dictating
how the government goes about spending money. They carry an absolute minimum level of restrictions and place significant discretion into the hands of the government when spending taxpayer funds.

Government contractors are not alone in this state of distrust. The government bureaucracy operates under a staggering amount of rules and regulations, inversely proportional to the level of trust extended by the public.

In a report covering the use of OTs across the federal government, the Government Accountability Office (GAO) noted, “this authority carries risk, however, because such agreements may be exempt from the Federal Acquisition Regulation and other requirements that are intended to protect taxpayers’ interests” (GAO, 2016, highlights). Former Director of Defense Procurement and Acquisition Policy Claire M. Grady stated that “the flexibility to start from what is essentially a blank sheet of paper when drafting an OT eliminates the safeguards inherent in using the standard statutory and regulatory contract language and clauses” (Grady, 2017, p. ii). Shall we hail OTs as a savior to a broken acquisition system, or shall we decry them as sinners circumventing a sound set of needed policies and procedures? This article provides an overview and history of OTs as well as examines whether to advocate expansion or seek curtailment of this powerful business instrument. This analysis will show that to date, the benefits of OTs have outweighed their risks. Although OT authority is inherently risky, there is no record of defense acquisition officials significantly abusing it and there are recognizable benefits to its use; therefore, this work recommends a cautious and controlled expansion of OT agreements. Yet, in order to understand the importance of OTs, it is necessary to provide context by first reviewing the Defense Acquisition System.

Review and Analysis

Defense Acquisition: A Den of Distrust

In a simplistic view, defense contracting is a matter of trust—or lack thereof. In July of 1985, President Ronald Reagan asked the well-respected business executive David Packard of Hewlett-Packard (HP) to convene a panel of experts to review and report on possible areas of improvement for the U.S. Defense Acquisition System. This review followed a famously reported
$435 hammer purchased by the Navy among other claims of overcharging and acquisition mismanagement in the early 1980s (Barron, 1983). The resultant report issued on June 30, 1986, contained a number of observations and recommendations that significantly influenced subsequent legislation and policy reforms for the DoD. Although not one of the central findings, the following observation appeared in the report:

In recent years there has been increasing public mistrust of the performance of private contractors in the country’s defense programs. Numerous reports of questionable procurement practices have fostered a conviction, widely shared by members of the public and by many in government, that defense contractors place profits above legal and ethical responsibilities. (Packard, 1986, p. xxvii)

As Stephen Covey (2006) argues in his book *The Speed of Trust*, individuals are only able to conduct business with each other at a rate directly corresponding to the degree in which they trust each other. The economist Francis Fukuyama explains the implications of conducting business in an untrusting environment:

People who do not trust one another will end up cooperating only under a system of formal rules and regulations.... This legal apparatus, serving as a substitute for trust, entails what economists call “transaction costs.” Widespread distrust in a society, in other words, imposes a kind of tax on all forms of economic activity, a tax that high-trust societies do not have to pay. (Fukuyama, 1995, pp. 11, 27–28)

Government contractors are not alone in this state of distrust. The government bureaucracy operates under a staggering amount of rules and regulations, inversely proportional to the level of trust extended by the public. Excluding agency-specific regulations, the average defense acquisition professional must navigate a combined 4,775 pages of regulations and guidance in order to equip warfighters with the tools needed for national defense.¹ This volume of rules signals significant distrust on behalf of the nation.

In 2012, the Defense Business Board, an independent advisory group for economic and business expertise, provided a report to the Vice Chairman of the Joint Chiefs of Staff summarizing the state of reforms to the Defense Acquisition System since the 1986 work by Packard’s committee. This
report indicated the “DoD’s acquisition system continues to take longer, cost more, and deliver fewer quantities and capabilities than originally planned” (Punaro, 2012, p. 3). The report noted that average development cycles for weapon systems were at 15–18 years (Punaro, 2012, p. 5). Authors Linda S. Brandt and Francis W. A’Hearn perhaps sum up the continuing challenge faced by efforts to reform the Defense Acquisition System when they state the following:

Though we rightfully pursue reform, we ironically do so in a system which, by the express intent of the American body politic, was not designed for efficiency. The Defense Acquisition System was designed with many goals in mind, but efficiency was not one of them, and notwithstanding public protestations to the contrary, this is precisely how the American body politic would have it. (Brandt & A’Hearn, 1997, p. 34)

Simply put, it appears as though the U.S. public does not trust the government to spend its money responsibly. In turn, the government does not trust contractors to use this money properly. In order to prevent an abuse of discretion, the system removes as much discretion as possible. Operating under such mistrust comes at a cost, and the nation is currently questioning whether it is prepared to continue paying it.

**The Need for Speed**

Former Air Force Vice Chief of Staff for Intelligence Lt Gen David Deptula said, “Al Qaeda doesn’t have a JCIDS [Joint Capabilities Integration and Development System] process ... we need to be able to operate much quicker and inside our adversary’s decision loop” (Miller, 2017, p. 40). President Donald Trump’s 2017 National Security Strategy contains telltale phrases and terms that signal an affinity for an expedited authority like an OT. For example, within the national security pillar it states, “The United
States will pursue new approaches to acquisition... [w]e must harness innovative technologies that are being developed outside of the traditional defense industrial base” (Trump, 2017, p. 29). Former Secretary of Defense James Mattis’ strategic documents are flush with references to practices that mirror the characteristics of OTs. For example, his National Defense Strategy highlighted the concern that, “The current bureaucratic approach, centered on exacting thoroughness and minimizing risk above all else, is proving to be increasingly unresponsive” (Mattis, 2018, p. 10). Will dictating the need for change in strategy documents and memoranda realize the intended effect? In light of prior, failed efforts at reform, the question of how to reform the DoD acquisition system becomes paramount.

On July 26, 2016, then Secretary of Defense Ashton Carter championed a means to reform defense acquisition when he announced the opening of a Defense Innovation Unit Experimental (DIUx) office in Boston, Massachusetts (Kuykendall, 2017). Contained in this announcement was a specific vision for acquisition reform:

And in the long run, we’ll look at how many DoD components adopt DIUx practices... particularly nontraditional acquisition mechanisms.... If DIUx is truly successful in catalyzing broader interaction between DoD and nontraditional technology firms as I’m confident it will be, then it will eventually put itself out of business since the department as a whole will be doing what DIUx is doing today. (Carter, 2016, para. 41)
The nontraditional acquisition mechanisms Secretary Carter hoped would upend traditional practices at the DoD principally rely upon OTs. They are the foundation for DIUx business arrangements with industry (DIUx, 2016). Further understanding of this issue requires expanded knowledge of an OT itself.

So What Really Is an OT?

Legislation defines an OT by what it is not. It is not a contract, grant, or cooperative agreement, which are traditional government contracting mechanisms. This definition is the source of the “other” moniker. Within the DoD, OTs are grouped into two fundamental buckets: basic research OTs called Technology Investment Agreements (TIA) (32 CFR § 37.100, 2009); and acquisition agreements for prototype projects, described as prototype OTs (10 U.S.C. § 2371b, 2016).

The Code of Federal Regulations defines TIAs as assistance instruments used to stimulate or support research (32 CFR § 37.110, 2009). Prototype OTs do not have further clarifying regulations like TIAs. Legislation and two short policy memoranda provide the only hard constraints for prototype OTs, and a guidebook produced by the Office of the Under Secretary of Defense for Acquisition and Sustainment furnishes their only guidance. Former Air Force Materiel Command Commander Gen Ellen Pawlikowski called prototype OTs “the latest buzzword” (Williams, 2018a, para. 2), and they are the principal subject of this review. In comparison to the 4,775 pages of policy, regulation, and best practices used by the majority of defense acquisition offices, those utilizing OTs for prototype projects are constrained by approximately 65 pages of documentation.2

The GAO, when considering why commercial organizations would not want to bid on government work, determined that high-dollar contracts could take up to 2 years to award (GAO, 2017a). Making use of OTs, Secretary Carter (2016) indicated in the DIUx announcement quoted previously that “DIUx will negotiate and execute fast, flexible, and collaborative awards with the goal to issue funding within 60 days of a first meeting with the company” (para. 28). In 2017, DIUx awarded roughly $104 million on 48 OTs through a process that averaged 90 days from first contact with the commercial firm (DIUx, 2017). Although extending beyond the targeted 60 days identified by Secretary Carter, this is half the time of 180 days identified by the GAO for new Army contracts of a comparable dollar value—roughly $3 million (GAO, 2017a). This expediency contributed to OTs increasing popularity over the last few years as both a means to reach nontraditional defense contractors and to circumvent the highly cumbersome and onerous acquisition system.
Therefore, reviewing the history and nature of OTs to understand why Congress would allow such a liberal skirting of acquisition procedures is both informative and worthwhile.

**History of Other Transactions—A Pocket of Trust for the Sake of Progress**

The OT was born in 1958 shortly after the launch of Sputnik by the Soviet Union. Congress first gave the National Aeronautical and Space Administration (NASA) the authority to enter into these agreements in order to catch up to the Soviets (National Aeronautics and Space Act of 1958). The DoD did not see this authority until 1989 when Congress extended it solely to the predecessor organization of the Defense Advanced Research Projects Agency (DARPA) (National Defense Authorization Act [NDAA] for Fiscal Years 1990 and 1991, 1989).

The intent behind extending this authority to the DoD was to create an attractive means for innovative firms focused on the commercial marketplace to provide their expertise to the DoD while not burdening those companies with the government regulatory overhead that would render them uncompetitive in the commercial marketplace (Dunn, 2017). In 1991, the authority for TIAs was provided more broadly throughout the DoD (NDAA for Fiscal Years 1992 and 1993, 1991). In 1994, Congress created the prototype OT authority and issued this authority to DARPA alone (NDAA for Fiscal Year 1994, 1993). In 1996, Congress extended prototype OT authority across the department (NDAA for Fiscal Year 1997, 1996). Continued use of this tool depended on Congress renewing the authorizing legislation every few years. Starting in 2016, however, Congress permanently authorized and refined the use of prototype OTs (NDAA for Fiscal Year 2016, 2015). As an explanation, the conference report accompanying the 2016 NDAA states:

> The conferees believe that the flexibility of the OTA authorities... as modified and codified in this provision, can make them 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. The conferees believe that expanded use of the OTAs will support Department of Defense efforts to access new sources of technical innovation, such as Silicon Valley startup companies and small commercial firms. (NDAA for Fiscal Year 2016, 2015b, p. 703)
Worth considering is why the DoD would pursue—and Congress would endorse—efforts to tap “new sources of technical innovation.” Increased pursuit of new sources by DoD and Congress is likely the result of the fact that since the end of the Cold War, the preponderance of research and development efforts shifted away from government sponsorship and to the commercial sector (GAO, 2017a).

**DoD and Industry: A Fraught Relationship**

Widely proliferated rumors indicate that the notorious Willie Sutton said he robbed banks “because that’s where the money is.” If critical innovation is happening in the commercial sector, then in order to maintain its edge the DoD must also go where the money is. The Figure identifies this growing trend.

![FIGURE. DOD AND PRIVATE SECTOR RESEARCH AND DEVELOPMENT SPENDING](image)

**Note.** Expenditures have been adjusted for inflation in accordance with DoD National Defense Budget Estimates for Fiscal Year 2017. Industry research and development spending may include funding provided by DoD for research performed by industry. (GAO, 2017a)

The firms investing heavily in technologies critical to defense needs such as data analytics, cybersecurity, and autonomy are not traditional defense contractors (GAO, 2017a). The summation of spending from just the top six commercial R&D companies matches all DoD spending on R&D (Casey & Hackett, 2014).

While our nation’s leaders are pushing to realize a quicker, more responsive approach to developing new weapons systems, the commercial sector fights deep suspicions of working for the government. For example, in recent
years Google acquired a number of robotic firms including some with DoD contracts, like Boston Dynamics. Yet, the company explicitly stated they do not plan to continue pursuing government work after existing contracts expire (Lynn, 2014). Some analysts blame the 2013 Edward Snowden affair for losses topping anywhere from $35 billion to $180 billion, along with creating a bad taste in the tech industry’s mouth for working with the government (Miller, 2014). Recent events indicate Congress recognizes this problem and is attempting to do something about it.

**Congressional Action**

The record shows Congress increasingly believes prototype OTs to be the mechanism capable of bridging the gap between the DoD and industry. Actions supporting this assertion began in earnest in the 2016 NDAA. This legislation expanded and made permanent the prototype OT authority as discussed previously. Legislators also tasked GAO to undertake two topical studies in committee and conference reports concurrent with the legislation. They tasked GAO to study DoD R&D prototyping efforts as well as to determine why leading technology companies do not pursue government work.

GAO Report No. 17-644 identified six significant challenges that deter companies from developing products for military use. After interviews with both nontraditional defense contractors and a select number of traditional suppliers, GAO’s concerns fall into the following six categories (GAO, 2017b):

1. Complexity of DoD’s process
2. Unstable budget environment
3. Long contracting timelines
4. Intellectual property rights concerns
5. Government-specific terms and conditions
6. Inexperienced DoD contracting workforce

Although GAO did not make recommendations in their report, of significant note is that the concerns identified in items 1, 3, 4, and 5 are all patently addressed and potentially resolved through the use of prototype OTs. Also important to note is that when considering item 6, the DoD has traditionally been highly selective in its process to grant signature authority for OTs. An acquisition professional must already have warrant authority as a traditional Contracting Officer (CO) before considered eligible, and “should
have a level of responsibility, business acumen, and judgement that enables them to operate in this relatively unstructured environment” (Grady, 2017, p. 3). This really leaves item 2, an unstable budget environment, as the only identified challenge that is unaddressed through prototype OTs.

Fundamentally, the standard acquisition system is designed to demonstrate the government’s ability to spend funds in a trustworthy manner, and not following these practices invites scrutiny.

The other GAO action generated in response to the NDAA for Fiscal Year 2016 reviewed how the DoD’s R&D funds are used and whether this approach effectively supports activities such as prototyping (NDAA for Fiscal Year 2016, 2015a, p. 84). The subsequent GAO report indicates that prototyping is advantageous and “can help ensure that new, innovative, and disruptive technologies are available for inclusion into potential future weapons and demonstrate the value of new technologies or systems” (GAO, 2017b, p. 1).

Although discerning a direction or presupposing Congressional intent is usually inadvisable, the combination of legislative changes and requested investigative reports points to the conclusion that Congress is increasingly convinced OTs are the answer to bridging the gap between DoD and industry. Supporting this notion is the Senate Armed Services Committee statement included in advance policy questions posed to current Under Secretary of Defense for Acquisition and Sustainment Ellen Lord prior to her 2017 confirmation hearing:

The Committee has acted to allow for greater use of Other Transaction Authorities, particularly early in the acquisition cycle and for innovative acquisitions. However, the Department of Defense has been reticent to use these authorities. The Committee has in the past been critical of the perceived misuse of Other Transactions Authority for major programs, such as the Army’s Future Combat Systems. If confirmed, how will you drive greater use of these flexible authorities while also ensuring they are not abused? (Senate Armed Services Committee, 2017, p. 17)

With such a rare and valuable asset such as Congressional support behind this initiative, what could possibly go wrong?
Causes for Concern: Removal of Safeguards to Protect Taxpayers’ Interests

As alluded to in the confirmation hearing for Under Secretary of Defense for Acquisition and Sustainment Ellen Lord, Congressional sentiment for OTs has not always been favorable. In a 2005 Senate hearing on the Army’s grand vision to reshape its fighting forces, described as the Future Combat System (FCS), Senator John McCain stated:

Since the 1994 act, the Department of Defense (DoD) officials and industry have repeatedly requested that we extend “other transaction authority” to production contracts. Congress has consistently refused to do so because we have taken the view that with hundreds of millions of dollars or even billions of dollars at stake, the taxpayer needs the protections built into the traditional procurement system. (Department of Defense Authorization, 2005, p. 2)

In May of 2003 the Army’s FCS program made use of a prototype OT to enter into the system development and demonstration phase of its maturation (GAO, 2005). With an agreement value of approximately $21 billion, it was highly unusual for a major defense acquisition program to use such an instrument for this kind of work. The action therefore garnered significant Congressional interest. Although problems with the FCS program and its eventual cancellation were not directly attributable to the use of an OT, it was widely reported that Congressional criticism of an OT used for this purpose motivated the program to transition the instrument into a standard FAR-based contract in March of 2006 (GAO, 2007). Fundamentally, the standard acquisition system is designed to demonstrate the government’s ability to spend funds in a trustworthy manner, and not following these practices invites scrutiny. The lack of these efforts likely contributed to the FCS program office’s inability to prove its OT was the right business arrangement for its program. To further understand these complaints, it is important to review the principal concerns expressed for OTs by industry and government alike.

Two primary concerns warrant further consideration regarding OTs—government financial oversight and protection of intellectual property rights.

Problem one: financial oversight. As stated before, the government, and by extension the nation writ large, is loath to remove requirements for financial oversight when spending public funds. Conversely, industry does not want to expend time and money complying with defense-unique
accounting procedures when the DoD is outside of their core market. These oft-lamented concerns are in a large number of government audits, reviews, or reports covering the issue of OTs. Although the potential exists for significant failings in oversight, analysis shows financial mismanagement is not significantly present in prototype OT projects. A potential source of this concern may be born out of a simple assumption that the lack of traditionally required contract clauses automatically engenders insufficient oversight. Yet, a 2002 RAND report considering the costs and benefits of OTs in defense contracting found just the opposite:

OT usually gives the contractor greater program management responsibility and authority, but also gives the government greater insight into contractor decisions and status. Rather than the adversarial relationship between government and industry under traditional processes, OT requires a more collaborative working relationship. (Smith, Drezner, & Lachow, 2002, p. 3)

Perhaps the inherent risks of an OT spur participants to nurture a more collaborative working relationship when other controls are absent. Common sense tells us that a collaborative and close working environment will produce better overall results than a distant and transactional relationship. In lieu of standard contract clauses for protection, agreements officers and government managers may find themselves relying instead upon their own eyes and ears. Indeed, in the concluding remarks for the RAND report they state, “It is undeniable that the relaxation of financial and other controls inherent in the OT process opens some opportunity for abuse. However, the process also strengthens the access and information available to government managers, thus reducing such risks” (Smith, Drezner, & Lachow, 2002, p. 32).

Additionally, the awesome responsibility inherent to prototype OTs and the few instances of overreach may motivate offices using OTs to devote considerable attention to executing them within sound acquisition best practices regardless of law or regulation. Speaking to this notion, Under Secretary of the Army Ryan McCarthy, when asked about expansion of OT use, said that the Army is “trying to be very judicious about this authority so we don’t lose it” (Williams, 2018b, para. 2).

Lastly, the existing financial controls on OTs appear sufficient. The few OT constraints that do exist focus primarily on attracting small businesses and nontraditional defense contractors (10 U.S.C. § 2371b, 2016). These types of
firms are already exempt from most financial oversight provisions such as the Cost Accounting Standards (CAS)—specific accounting procedures the government requires when a firm does significant business with taxpayer money [48 CFR § 9903.201-1(b)(3), 2018]. The Department of Defense Inspector General (DoDIG) issued a report in 2001 with an objective of “reviewing the financial and cost aspects of other transactions”; however, the results of the review focused primarily on cost sharing practices for TIAs, and found no irregularities on prototype OTs (DoDIG, 1999, p. i). Legislated restrictions on the use of prototype OTs focus on attracting and forging better ties with small businesses and nontraditional defense contractors. Existing regulations favoring small businesses and historically disadvantaged classes of businesses indicate the government already chooses to trust those firms for the sake of furthering economic and socio-political goals; how much different then, are nontraditional defense contractors?

**Problem two: intellectual property.** The second primary concern is industry’s fear of forfeiting Intellectual Property (IP) rights to the government. Firms believe traditional contract terms do not offer the protections they require, and therefore decline government work or insist on OTs to conduct business (GAO, 2017b). Yet, is the lessening of government rights the correct answer to this problem? For the purpose of this analysis, the term “IP” will include only technical data and computer software as
defined within government regulation. Although government policies for patent rights have elements in common with technical data and computer software, they are more germane to basic and applied research activities and not the type of efforts contemplated under prototype OTs.

Within GAO Report 17-644, both traditional and nontraditional defense contractors cited the protection of IP as central to their corporate success (GAO, 2017a). Most of the anecdotes cited, however, appear to be the misapplication of existing DoD policies rather than the proper application of policies in need of reform. Generally, they describe situations where the government is asking to receive more rights than would normally convey under the circumstances. Existing IP regulations are specifically designed to accommodate firms active in the commercial marketplace such as nontraditional defense contractors. As evidenced by the University and Small Business Patent Procedures Act of 1980, also called the Bayh-Dole Act, the intent behind current government IP policy is both to provide the government the data it needs to produce and sustain its weapons systems as well as to further economic development in the private sector through commercialization of government-funded technology (35 U.S.C. § 200, 2012). Undoubtedly, the misappropriate use and handling of contractor IP can effect significant contractor damage, and appears to be the central problem driving industry concerns.

The existence of negative perceptions for government IP practices is also detrimental to the government. A company’s fear of government IP mismanagement could cause them to exclude their commercially developed IP from government products. Full reliance on the government to fund development efforts prevents the disclosure of privately developed IP, yet precludes the government from benefitting from the contractor’s full expertise. This lack of confidence could cause government acquisition to be more costly and less technically mature.

**Recommendations**

DoD spending on prototype OTs steadily increased over the last few years with roughly $1 billion obligated during Fiscal Year 2016 (DoD, 2017, p. 9). If this trend continues, the DoD will spend significant funds through this instrument in the coming years. In order to ensure these efforts are worthy of the considerable trust provided them, this analysis points to the following recommendations.
First, the DoD is cautioned from expanding the use of OTs so rapidly that it loses the ability to establish a close and collaborative working environment with contractors. As identified in the RAND report, past successes with prototype OTs have benefited from this tight working environment, and future efforts would do well to mirror them. Organizations seeking authority to execute OTs must learn from existing institutions and aggressively pursue best practices from their sister organizations.

Next, focus acquisition workforce education efforts on the correct application of IP law and regulation. The NDAA for Fiscal Year 2018 calls for the expansion of workforce education for acquisition personnel working with prototype OTs (NDAA for Fiscal Year 2018, 2017). This analysis identifies the correct application of IP practices as critical to protecting contractor interests as well as providing the government the most effective products at the best price. Expanded authority to modify or uniquely tailor IP practices is not called for at this time. Instead, this work advocates for the return of confidence in the government’s ability to handle privately developed IP.

Also, OT use should be expanded exclusively within R&D efforts and not within production efforts or major defense programs. Legislation currently allows for the use of OTs for limited production efforts if there was competition for the product development. Although limited data exist on past failures, clearly, the lack of programmatic rigor and decision documentation will engender suspicion and a lack of trust as a system, program, or product progresses through its life cycle. Therefore, this analysis advocates expansion within the DoD R&D portfolio alone.

Lastly, this analysis points to the need for more research. The DoD should answer the foundational question, “Are OTs effective at their stated purpose?” Previous research concluded that “the OT process is providing improved access to important commercial technologies as well as improved efficiencies in conducting technologically risky prototype projects” (Smith, Drezner, & Lachow, 2002, p. 31). Yet, much has changed since 2002 and new organizations such as DIUx are executing OTs in a manner not previously contemplated. Also, research is called for regarding the existence of IP concerns amongst traditional and nontraditional defense contractors. Subsequent reviews should not combine the concerns of these different parties as though they speak with one voice. Their different priorities and motivating factors may skew the debate when considering the overall goal of reaching more nontraditional defense contractors and the advanced technology they harbor.
Conclusions

OTs allow for unique and tailored business arrangements with nontraditional defense contractors bringing a potential for rapid advancement of critical technologies into defense systems. These business arrangements also carry a potential for limited oversight, loose IP practices, and otherwise reduced accountability. These risks are in direct opposition to core tenets of sound defense acquisition. The balance of use called for in order to achieve the best risk-reward profile is a controlled expansion within the R&D portfolio alone. As demonstrated through the FCS program, use of OTs on a major weapon system fails to provide sufficient justification of trust. Additionally, further expansion of OTs into production activities also expands the risks inherent to OTs and is not advisable at this time. Prototype OTs’ existing constraints are not a significant departure from current allocations of trust and are specifically designed to limit the government’s cost risk. Existing government IP policies are sufficient to protect industry and further government interests; therefore, further loosening of these policies is not called for. Rather, education and enforcement of existing IP policies are advocated.

If not careful in expanding the use of OTs, the DoD may find itself once again lamenting an inability to provide responsive acquisition solutions to the warfighter. Much like Tom Wujec’s business students standing around a collapsed spaghetti tower, missteps during expansion could result in rescinded OT authority and a great opportunity for reform dropped from the acquisition tool set. Instead, like the kindergarteners, the DoD should take measured and incremental steps towards OT expansion, all the while assessing success against identified goals. Only then will the DoD fully capitalize on such a critical and necessary tool as Other Transaction Authority.
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**Endnotes**

1 The latest publication of the Federal Acquisition Regulation (FAR) in the summer of 2018 has 2,288 pages, the Defense Federal Acquisition Regulation Supplement (DFARS) is 1,680 pages, the DoD Directive 5000.01 and DoD Instruction 5000.02 together top 117 pages, and the Defense Acquisition Guidebook (DAG) is approximately 690 pages.

2 OT legislation at Title 10 U.S.C. § 2371 consists of roughly eight pages; the PDF version of the DoD Other Transactions (OT) Guide found at https://aaf.dau.mil/ot-guide/ is 52 pages; and the two memoranda from the Under Secretary of Defense (Acquisition & Sustainment) and Under Secretary of Defense (Research & Engineering), signed on November 20, 2018, are five pages combined.

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