

OTA Today: DAU Year in Review

DAU OT Team

DAU

Agenda

- Introductions
- DAU Accomplishments: DoD Workforce Trained and Certified
- Prototype OTs and Spending Trends
- “Follow-on Production” Lessons Learned
- Statutory and Guidance Changes
 - FY23 NDAA
 - Guide to Research OTs (R&E, June 2023)
 - Guide to Other Transactions (A&S, July 2023)
 - Policy Impact
- Notable Cases and Decisions

DAU Accomplishments: Courses and Workshops

- CON 2880

- Virtual 2-hour course focused on prototype/production OTs
- Offered monthly
- 600+ students enrolled in FY23



- CON 2990

- 2-day simulation with group Capstone project
- Ability to tailor Capstone projects



- WSC 035 Advanced Issues in Other Transaction Authority

- In person at Ft. Belvoir, VA
- Wednesday, December 6, 2023
- Breakout session tracks:
 - Going to production
 - Combining OTA with Pathways
- Plenary session on OT administration
- Meet the SME opportunities

Registration now open in iCatalog. Click on individual enrollment button on the top right of page. Open to first 100 students.

DAU Accomplishments: OTA Credential (CCON 023)

- Comprised of 5 Assets:
 - CON 0660 (replaced CLC 066)
online course focused on Research
OTs and Intellectual Property
Concerns Common to OTs
 - CON 2880
 - IP video
 - Pricing OTs video
 - CON 2990



- 115 students successfully completed the OTA Credential in its first year
- 449 students enrolled
- “apply” now

The type of “experiential learning” that Congress has identified as a need for OTs in 10 U.S.C. 4021(g)

DAU Accomplishments: Web Events



- First Tuesday of the month at 2 p.m. Eastern
- Office hours, tools you can use, innovative contracting ideas, profess'l development opportunities



Co-sponsored
with TJAGLCS

- FY 23 NDAA *Joint Explanatory Statement* encouraged DOD to invest in OT education for attorneys in addition to other members of the acquisition workforce



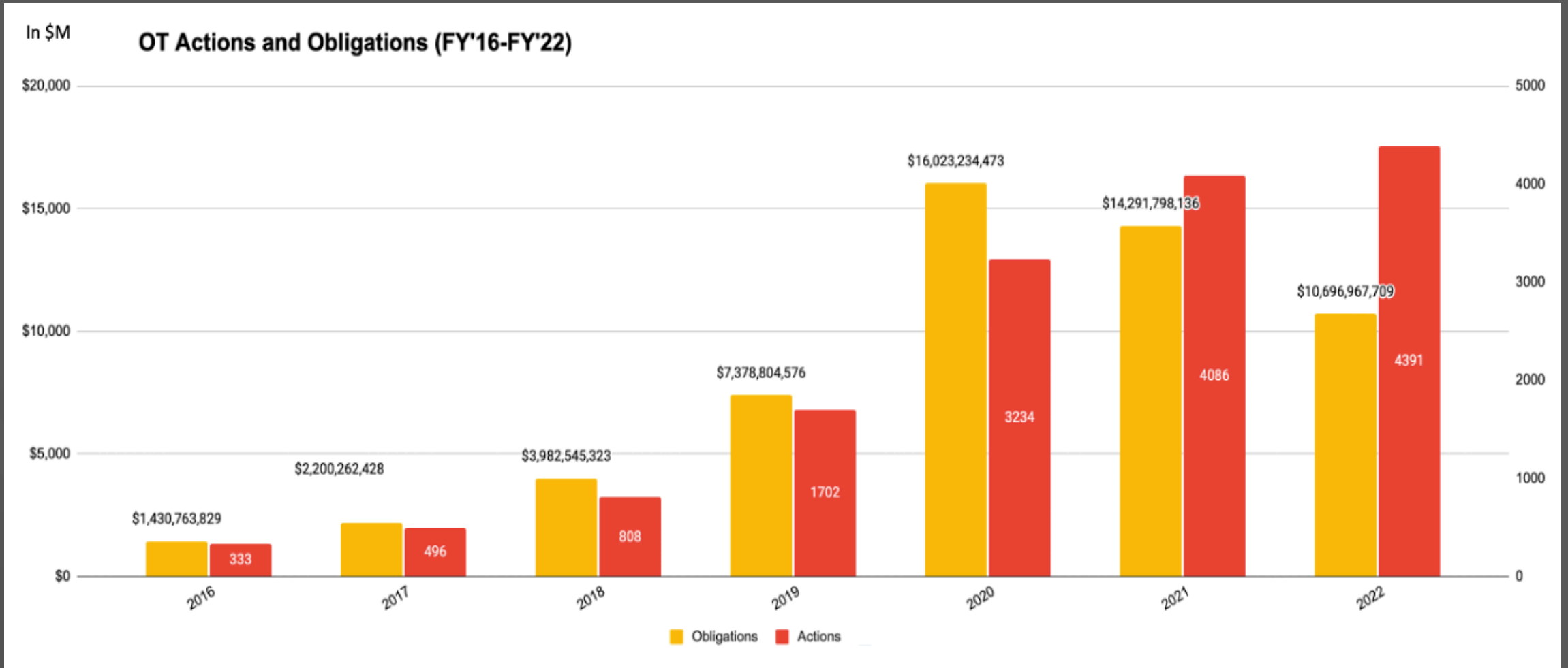
- 2nd Wednesday of each quarter
- Recorded
- Detailed updates on new guidance, consortium
- Upcoming program on Partnership Intermediary Agreements

Register online at DAU events (<https://www.dau.edu/events>) or email Kristine.Kassekert@dau.edu to be added to email announcements

Thank you to all who supported the DAU OT Team!

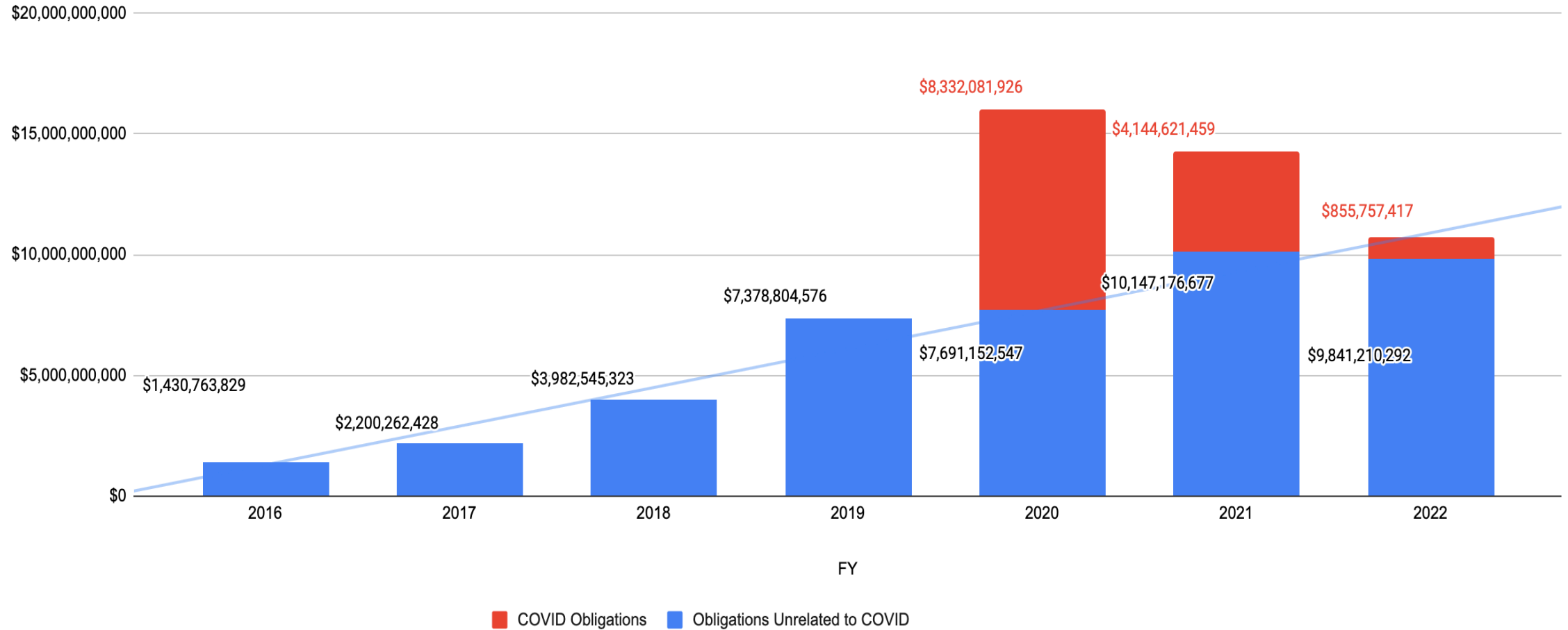
- LTC Tom S. Hong
- Maj Chanrasmi
- Elizabeth Urrutia
- Maj Zach Thurber
- Azza Jayaprakash
- Denise Scott
- Max Kidalov
- Charles Park
- Galina Fomenkova
- Andy Smith
- Maj Josh Fix
- Mariluz Chan-Endres
- April Davison
- Maj Michael Gerbasi
- Maj Shamika Woodruff
- Roshan Jessani
- Larry McLaury
- Renee Stahl
- Mike Clark
- William (Greg) Davis
- DAVE, AIR and Advana representatives
- Stephanie Halcrow
- John McCabe
- Chris Chambers
- Maj Staci Rouse
- Jason Day
- Diane Sidebottom
- Patricia J. Fox
- Cherissa Tamayori
- Elizabeth Midkiff

Prototype OTs and Spending Trends

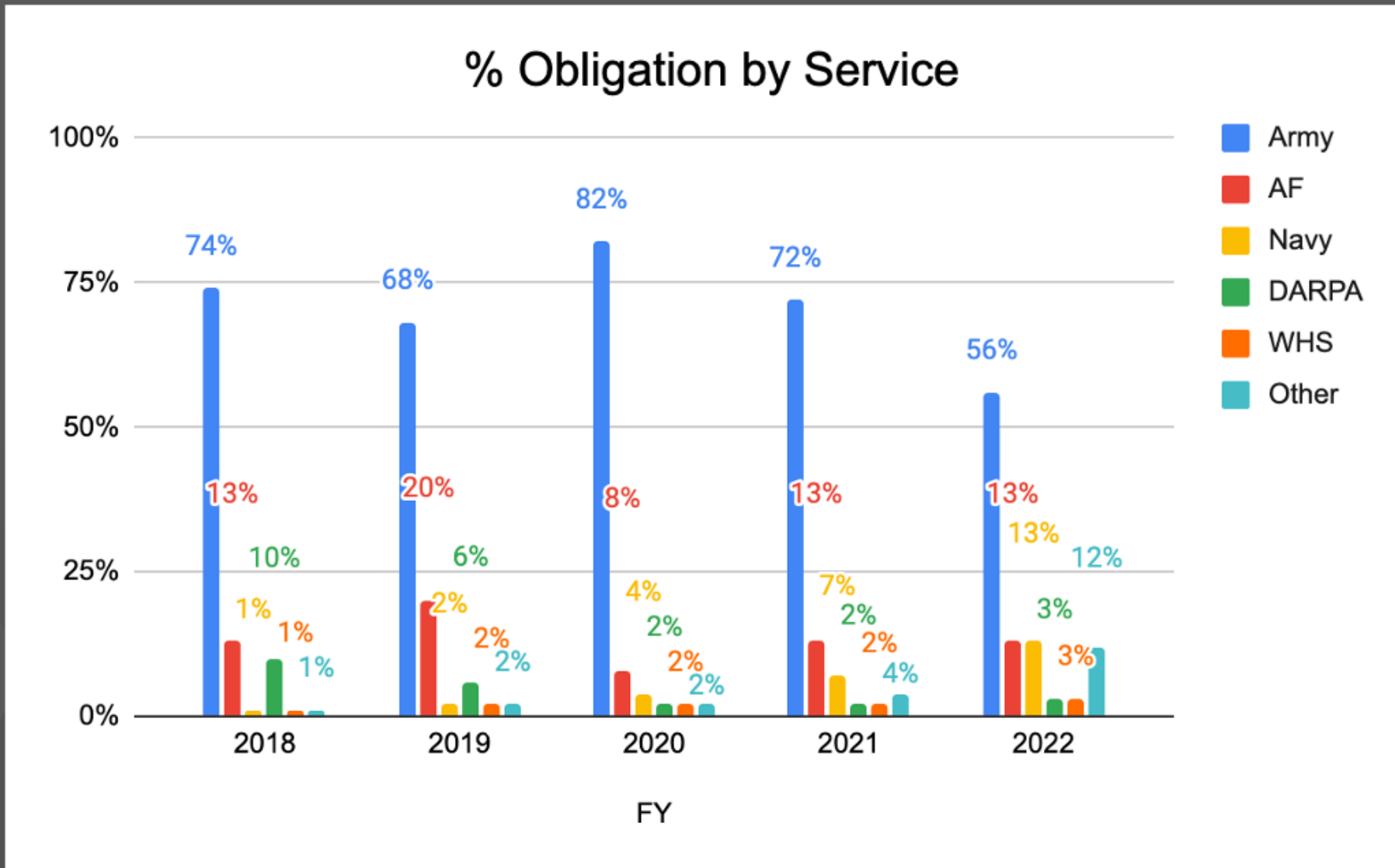


Prototype OTs and Spending Trends

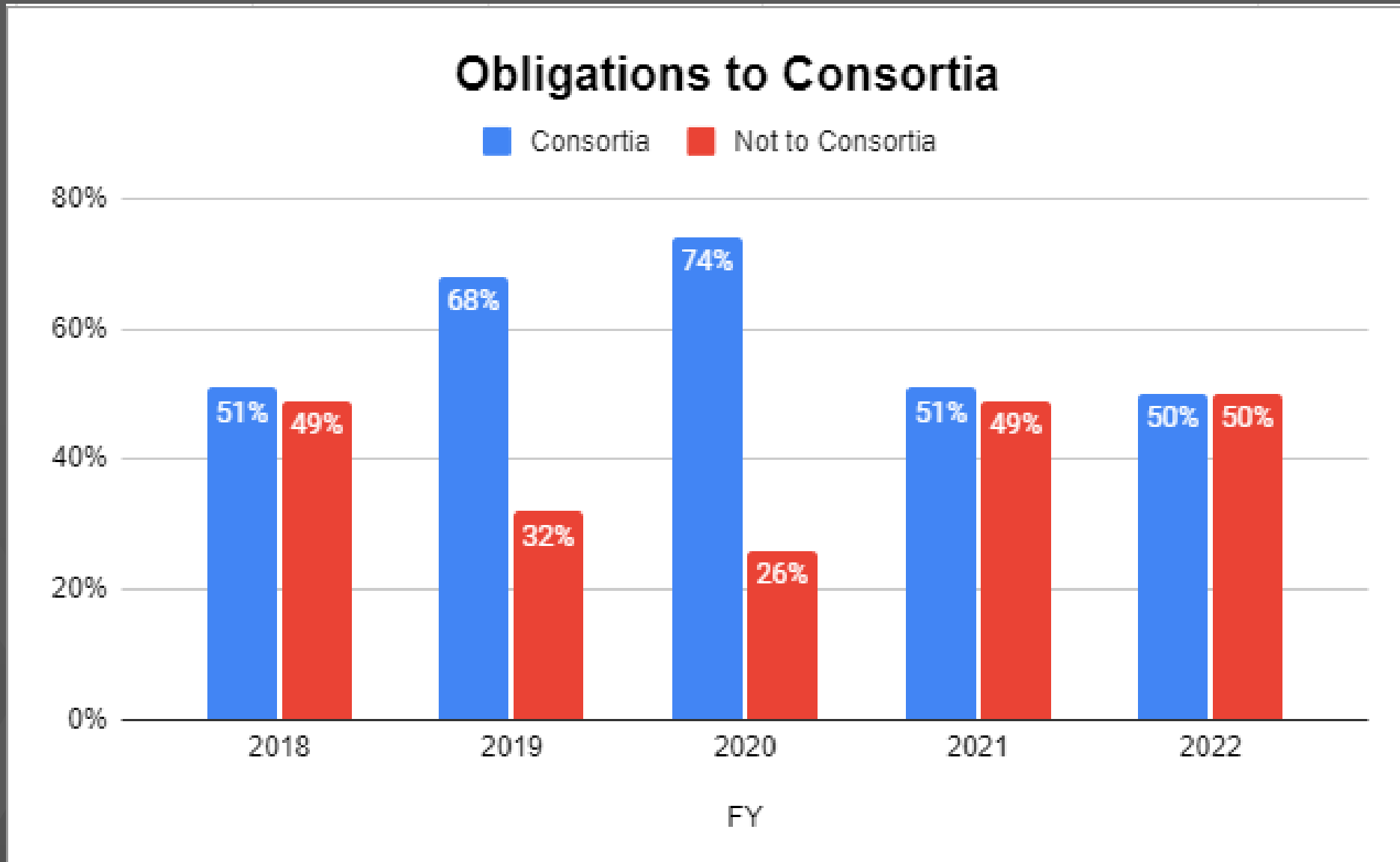
COVID vs. Non-COVID Spend



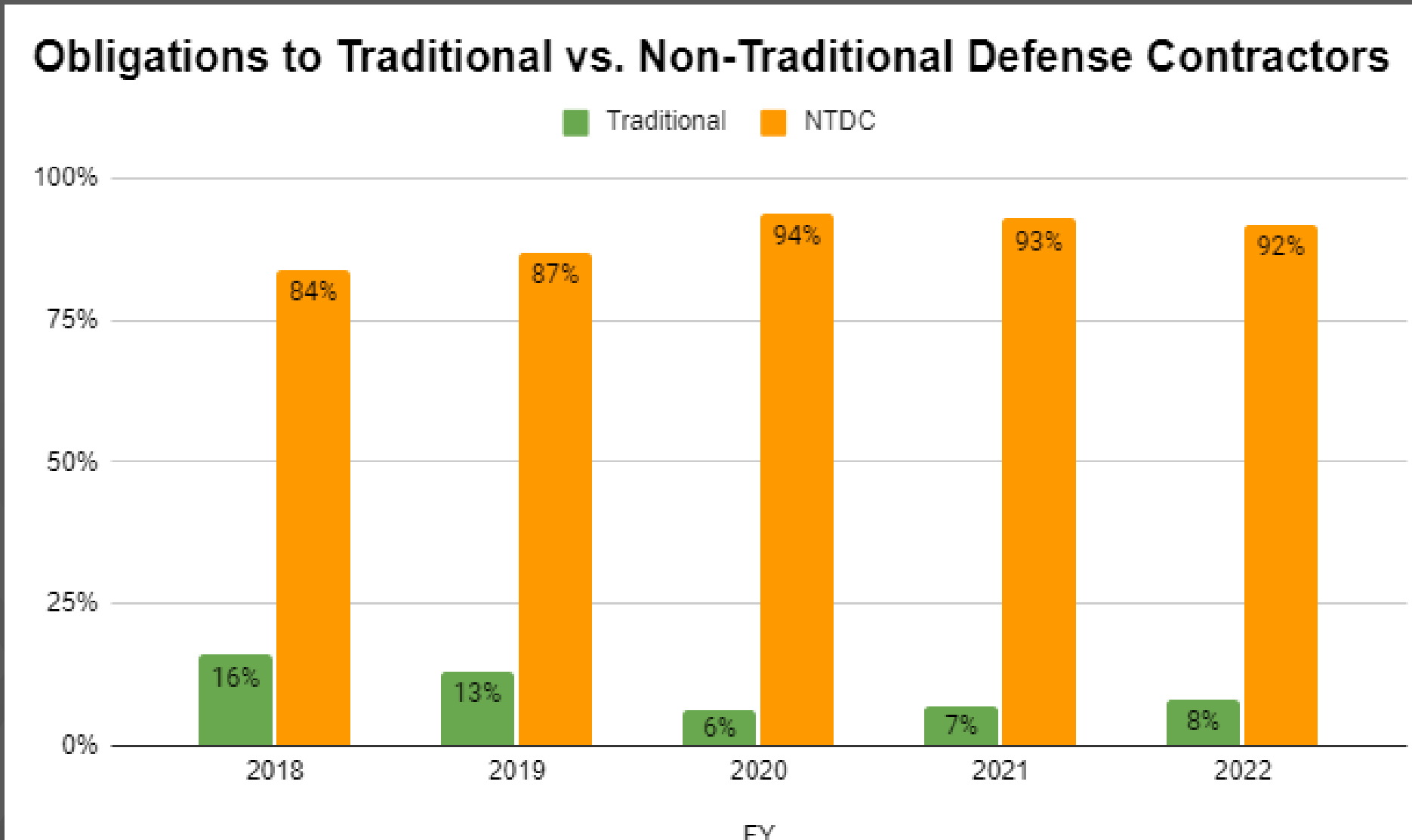
Prototype OTs and Spending Trends



Prototype OTs and Spending Trends



Prototype OTs and Spending Trends



“Follow-on Production” Lessons Learned

- Production requires planning during the prototyping phase
- Why consider a follow-on production award as opposed to a contract?
 - Will the performer accept the applicable FAR clauses?
 - What is the long-term plan? For example, will the prototype need to be sustained under a traditional FAR-based contract in the future? Or will the prototype be integrated into a system purchased under a traditional FAR-based contract?
 - Do you have personnel trained to administer an OT award?
 - If the dollar value is over \$100,000,000, can you justify the use of the OT for prototyping (“use of the authority”) if you are awarding a follow-on production contract?
 - How will you handle disagreements over contract terms? Is the escalation process sufficient? What is the disputes process?

Statutory and Guidance Changes

- FY 23 NDAA
 - Expanded authority in 10 U.S.C. 4022(a)
 - Replaced “carry out prototype projects that are directly related to enhancing the mission effectiveness of *military personnel and the supporting platforms...*” with
 - “Carry out prototype projects that are directly related to enhancing the mission effectiveness of personnel of the Department of Defense or improving platforms...”
 - Added Congressional notification requirement and written determination by covered official for follow-on production awards or contracts exceeding \$100,000,000 in 10 USC (a)(2)(C)
 - Covered official defined as service acquisition executive, Director DARPA, Director MDA, Undersecretary of Defense A&S, or Undersecretary of Defense R&E

Statutory and Guidance Changes (FY23 NDAA cont'd)

- Codified the definition of a “prototype project” in 10 U.S.C. 4022(e)(5):
 - The term “prototype project” includes a project that addresses--
 - (A) a proof of concept, model, or process, including a business process;
 - (B) reverse engineering to address obsolescence;
 - (C) a pilot or novel application of commercial technologies for defense purposes;
 - (D) agile development activity;
 - (E) the creation, design, development, or demonstration of operational utility; or
 - (F) any combination of subparagraphs (A) through (E).

"The list of prototype project types is not meant to be restrictive..." FY23 NDAA Joint Explanatory Statement

This codified the prototype project definition from the 2018 version of the OT Guide.

Statutory and Guidance Changes (FY23 NDAA cont'd)

- Removed notice of follow-on production requirement in solicitation that stemmed from GAO's *Oracle* decision by adding text to 10 U.S.C. 4022(f)(2):
 - (2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of ~~section 2304-1 of this title,~~ of chapter 221 of this title and even if explicit notification was not listed within the request for proposal for the transaction if...
- New 10 U.S.C. 4022 (i) PILOT AUTHORITY FOR USE OF OTHER TRANSACTIONS FOR INSTALLATION OR FACILITY PROTOTYPING.

Statutory and Guidance Changes:

Guide to Research OTs (R&E, June 2023)

Guide to Other Transactions (A&S, July 2023)

- OTA Today: Newly Released Guide to Research OTs (July 12, 2023)
 - DAU hosted Diane Sidebottom, Director of Contracts, ARPA-H (formerly Senior Policy Advisor, DARPA); Ms. Patricia J. Fox, Procurement Analyst, Army; and Mr. Scott Ulrey, DARPA, Contracts Management Office
 - Recording available online at:
https://media.dau.edu/playlist/dedicated/249203943/1_kz6bqucf/1_sxw9mduo
- OTA Today: Introduction to the Updated DOD OT Guide (August 2, 2023)
 - DAU hosted Larry McLaury, Senior Procurement Analyst, USD(A&S) Defense Pricing & Contracting; Cherissa Tamayori, Director, Acquisition, DIU; and Ms. Elizabeth Midkiff, Procurement Analyst for SAF/AQCP
 - Recording available online at:
https://media.dau.edu/playlist/dedicated/249203943/1_kz6bqucf/1_jbetesnn

Statutory and Guidance Changes: Policy Impact

- OSD Memorandum "Definitions and Requirements for Other Transactions Under Title 10, United States Code, Section 2371 b" (November 2018) superseded by:
 - FY 23 NDAA
 - OT Guide (July 23)
 - "While the requirement to provide notice of a follow-on production in the solicitation and agreement has since been superseded in the FY23 NDAA (and is no longer required per section 842), it still considered to be best practice."
 - DFARS 206.001–70 Exception for prototype projects for follow-on production contracts.
 - "The statutes and regulations that implement DoD's other transactions authority permit DoD to provide, in the agreement, for the award of a follow-on production contract to a participant in the prototype project. Agreements made under DoD's other transactions authority are not subject to the Federal Acquisition Regulation (FAR) or DFARS; however, the award of a follow-on production contract resulting from such an other transaction agreement is subject to these acquisition regulations." 88 Fed. Reg. 33834 (May 25, 2023)
 - "clarifies that an other transaction agreement is still statutorily required (10 U.S.C. 4022(f)(1)) to provide for the award of a follow-on production contract in order for a contracting officer to award the follow-on production contract without obtaining competition." *Id.*

Notable Cases and Decisions

- Court of Federal Claims *Hydraulics*
 - OTA Today (October 12, 2022) hosted Galina Fomenkova, Attorney, United States Department of Justice; Major Jason Coffey, Attorney, U.S. Army Legal Services Agency (USALSA); and Andy Smith, Chief, Bid Protests, U.S. Army Legal Services Agency (USALSA)
 - Recording available online at:
https://media.dau.edu/playlist/dedicated/249203943/1_kz6bqucf/1_kyiub7f7
 - Follow up at the OT Counsel Corner on October 5, 2023 with Major Joshua Fix joining the team, and guidance to “practice good Government”
- In case you need a citation that the FAR does not apply to OTs
 - “Such prototype agreements are executed under DoD’s ‘Other Transaction Authority’ and, as a statutory matter, are not subject to the FAR, which is the primary regulation otherwise used by the Government agencies in their acquisition of supplies and services with appropriated funds.” [citations omitted] *United States ex rel. Jackson v. Ventavia Rsch. Grp., LLC*, No. 1:21-CV-00008, 2023 WL 2744394, at *11 (E.D. Tex. Mar. 31, 2023)

Notable Cases and Decisions

- Practice points from Ms. Denise Scott's experience with a protest that was withdrawn prior to decision before GAO (OT Counsel Corner, July 6, 2023)
 - If an OT award is going to be protested, the likelihood is that the protest will challenge the follow-on production award. Make sure you have ticked the box that competitive procedures were used to award the prototype OT.
 - In any protest filed before GAO, the agency is likely to face a strong presumption that CICA applies. Any language – even language in internal emails – that references FAR Part 15 concepts such as “debriefings” may undermine an agency's position that the award is an OT. So be careful that the OT Team avoids any FAR-based terminology.
 - GAO's timeliness rules apply to OT awards, so clearly document when you provided feedback to performers so that you can show they failed to protest within 10 days of knowing or when they should have known of protest grounds.

Thank you!

Any questions?

DAU