

Takeaways on Reviewing Modifications from the OT Counsel Corner
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Elizabeth Urrutia, Team Lead for OTs at Washington Headquarters Services (WHS) and Pentagon Force Protection Agency Office of General Counsel, walked participants through questions to consider when reviewing modifications to prototypes OT awards. WHS has awarded a significant number of standalone and consortium OT awards and has a CSO with DIU. With a great deal of experience on her side, Ms. Urrutia explained the modifications are common and, pointing to the DOD OT Guide, that prototype projects evolve over time and changes, even significant changes, should be anticipated. She provided the following questions to help guide attorneys in thinking through prototype OT modifications:

- Is the modification consistent with the original intent of the prototype project and fair to prospective interested parties? Keep in mind that CICA does not apply, so concepts such as any significant increase in the value through the modification causing the modification to be denied as out of scope are inapplicable. Broad solicitations and differing SOWs typical of OTs may also expand the universe of outcomes that could be fair and consistent with the original intent.
- Is the type of work being added appropriate for a prototype OT, or is the subject matter of the proposed modification better suited for another contract instrument? For example, if the award is to a university and a significant portion of the modification is to improve the university's facilities to facilitate the prototyping, should a portion of the award be a grant for assistance? Alternatively, for a consortium manager award, is the Government requesting reports relevant to the business of the consortium or that would be more appropriate for a professional services contract under the FAR?
- Would it be more appropriate to make a follow-on production award than to modify an existing prototype OT award for the proposed work?
- Does the modification undermine the authority under 10 U.S.C. 4022 upon which the OT was awarded? For example, was the award made without a cost share because of significant participation by a nontraditional defense contractor? Note that the statutory language focuses on that decision at the time of award, not a modification to the award, so make an informed decision as to whether this a reason to question the modification.
- Are the terms of the modification in the Government's interests and is the modification a good business decision? For example, does the modification have additional IP that is in the Government's interest to account for?
- Have there been any DoD memos that require insertion of additional terms (for example, the Section 889(a)(1)(B) Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment)?
- What impact will the modification have on follow-on production under 10 USC 4022(f)? If the modification undermines the statutory requirement for competition to the maximum extent practicable, the Government may choose to proceed with the prototype knowing that it will not go to production or seek production under a FAR-based award that complies with CICA.
- Can you mitigate any risks associated with these considerations? Sometimes regaining some level of competition is possible. Documentation of contemporaneous reasoning and context can also help mitigate future risk.

In short, DoD should not be afraid to modify prototype OT awards as long as the AO is using sound business judgment rooted in the statute, policy documents and memoranda, as well as any decisions from GAO or the courts (although there are very few). The DOD OT Guide is also a useful document, although it does not have the legal authority of these other sources.

You can find Ms. Urrutia's slides on the DAU events page [here](#). Ms. Urrutia can be reached at elizabeth.e.urrutia.civ@mail.mil.