



Other Transactions: Do the Rewards Outweigh the Risks?

In recent years, the federal government has made a large shift in how it expends taxpayer dollars on federal contracts.¹ Numerous laws have mandated new or expanded use of rapid procurement processes² or other transaction agreements (OTA),³ which are now a preferred procurement vehicle.⁴ OTAs, while not contracts governed by the Federal Acquisition Regulation (FAR), are legally binding contracts that were once considered tools of last resort because they put taxpayers and the government at risk.

The theory behind OTAs is that nontraditional vendors would be lured into the government contracting marketplace by streamlined procurement processes. The hope is that nontraditional contractors that were unable or unwilling to enter into traditional procurement contracts would come to the table and bring with them innovative solutions that traditional contractors were not offering.⁵ The reality, however, is that these speedy buying procedures are being leveraged by large traditional contractors that are looking to boost their bottom line by avoiding normal contract administration, oversight, and accountability protections.

“Other transactions” is a term commonly used to refer to the authority to enter into transactions other than contracts, grants, or cooperative agreements.⁶ Agencies have authority to award such agreements in limited circumstances—research, prototype, and now defense follow-on production projects.⁷ Unlike a normal government contract, OTA is

¹ In FY 2018 the federal government spent over \$554 billion on contracts according to USAspending.gov.

² “Rapid acquisition authority” and “middle tier of acquisition for rapid prototyping and rapid fielding” are procurement processes provided to the Department of Defense to speed up the acquisition process. U.S. Congress, “National Defense Authorization Act for Fiscal year 2016” (P.L. 114-92), signed November 25, 2015, Sections 803 and 804. <https://www.congress.gov/114/plaws/publ92/PLAW-114publ92.pdf> (Downloaded February 6, 2019)

³ OTA also refers to “other transaction authority.” Sometimes OTA is shortened to “other transaction” (OT). OTA will be used throughout this paper for consistency. 10 U.S.C. § 2371; Government Accountability Office, *Federal Acquisitions: Use of ‘Other Transaction’ Agreements Limited and Mostly for Research and Development Activities* (GAO-16-209), January 7, 2016, pp. 1, 4. <https://www.gao.gov/assets/680/674534.pdf> (Hereinafter GAO-16-209) (Downloaded February 6, 2019)

⁴ Annejanette Heckman Pickens and Daniel J. Alvarado, “Other Transaction Agreements: An Analysis of the *Oracle* Decision and its Potential Impact on the Use of OTAs,” *The Procurement Lawyer*, Vol. 54, No. 1, Fall 2018, p. 20. https://www.americanbar.org/groups/public_contract_law/publications/procurement_lawyer_home/past_issues/fall-18/oracle/ (Downloaded February 6, 2019)

⁵ As noted in footnote 1 above, contract spending on products and services is well over \$500 billion annually, so any gaps in procuring innovative technologies is not limited by the amount of federal contract and other discretionary spending.

⁶ 38 C.F.R. § 48.620, defining “cooperative agreement” as “an award of financial assistance” like a grant, but with more government involvement.

⁷ 10 U.S.C. §§ 2371 and 2371b; GAO-16-209, p. 5.

promoted as a more flexible agreement that can speed up the buying process and be better tailored based on changes in technology and the government's needs.⁸

One of the inherent problems with OTAs is that rather than the government controlling the negotiation process by specifying well-defined contract requirements and terms in a statement of work, OTA vendors are in the powerful position of saying "here's what we will do for you." Federal procurement spending priorities are thereby being driven by contractors and consortia,⁹ especially when it comes to determining pricing, deliverables, and intellectual property rights.

In addition to leaving the government at the mercy of vendors, OTAs generally are not subject to many of the federal laws and regulations governing procurement contracts that protect the government and taxpayers,¹⁰ including the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS),¹¹ competition requirements,¹² the Truth in Negotiations Act,¹³ the Procurement Integrity Act,¹⁴ Cost Accounting Standards,¹⁵ audit access for examination of contractor records by auditing agencies,¹⁶ the Bayh-Dole Act,¹⁷ and transparency protections,¹⁸ to name a few.¹⁹ Those laws

⁸ Timothy A. Furin, "The Future of Acquisition in the Federal Government: Innovation and Rapid Procurement Through Other Transaction Authorities and Other Transaction Agreements," Cohen Seglias, June 20, 2018. <https://federalconstruction.phslegal.com/2018/06/articles/federal-procurement-policy/future-acquisition-federal-government-innovation-rapid-procurement-use-transaction-authorities-transaction-agreements/> (Downloaded February 8, 2019)

⁹ OTAs can be agreements between an authorized agency and a company, group of companies, or consortium. Department of Defense, "Other Transactions Guide for Prototype Projects" (Version 1.2.0), January 2017, C2.6.1, p. 17. [https://www.acq.osd.mil/dpap/cpic/cp/docs/OTA_Guide%20\(17%20Jan%202017\)%20DPAP%20signature%20FINAL.pdf](https://www.acq.osd.mil/dpap/cpic/cp/docs/OTA_Guide%20(17%20Jan%202017)%20DPAP%20signature%20FINAL.pdf) (Hereinafter Other Transactions Guide for Prototype Projects)

¹⁰ L. Elaine Halchin, "Other Transaction (OT) Authority" (RL34760), Congressional Research Service, July 15, 2011, pp. 19-22. <https://fas.org/sgp/crs/misc/RL34760.pdf> (Hereinafter Other Transaction (OT) Authority) (Downloaded February 6, 2019)

¹¹ Federal Acquisition Regulation. <https://www.law.cornell.edu/cfr/text/48/chapter-1>; Defense Federal Acquisition Regulation Supplement (DFARS). <https://www.acq.osd.mil/dpap/dars/dfarspgi/current/>

¹² The Competition in Contracting Act (10 U.S.C. §§2301 *et seq.*; 41 U.S.C. §§253 *et seq.*) does not apply to OTAs. In the case of DoD research OTAs, competition is not essential pursuant to 10 U.S.C. § 2371, and DoD prototype OTAs only require competition to the "maximum extent practicable" pursuant to 10 U.S.C. § 2371b(b)(2). 10 U.S.C. § 2371b(d)(1) mandates that a DoD prototype OTA may only be entered into if: 1. at least one nontraditional defense contractor participates to a "significant extent"; 2. all significant participants are small businesses; 3. at least one-third of the costs are paid with nonfederal funds; or 4. a senior procurement official justifies the agreement.

¹³ 10 U.S.C. § 2306a; 41 U.S.C. § 3506.

¹⁴ 41 U.S.C. § 2101 *et seq.*

¹⁵ 41 U.S.C. § 1501 *et seq.*

¹⁶ Other Transaction (OT) Authority, p. 19 (citing 10 U.S.C. § 2313); 10 U.S.C. § 2371b(c) provides the Government Accountability Office with a limited right to examine OTA records on certain prototype projects. Government Accountability Office, *Homeland Security: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority* (GAO-05-136), December 15, 2004, p. 6. <https://www.gao.gov/assets/250/244980.pdf> (Downloaded February 6, 2019)

¹⁷ 35 U.S.C. §§ 201-212; 10 U.S.C. §§ 2320-2321.

¹⁸ Roger Waldron, "Other Transaction Authority: A tool in the toolbox," *Federal News Network*, February 16, 2018. <https://federalnewsnetwork.com/commentary/2018/02/other-transaction-authority-a-tool-in-the-toolbox/> (Downloaded February 6, 2019)

¹⁹ See Other Transaction (OT) Authority, pp. 19-22.

and regulations not only protect against waste, fraud, abuse, and corruption, but also provide mechanisms for ensuring fair and reasonable pricing,²⁰ and for government ownership of intellectual property rights.

Another flaw with the OTA negotiation process is that the government is at a disadvantage when determining price reasonableness, which is vital during the negotiation. Determining price reasonableness can be a real chore for contracting officials—the burden rests entirely on the government official to review commercial or market data rather than pricing information from the vendor. While pricing reasonableness is a problem for all agencies with other transaction authority, the Department of Defense’s “Other Transactions Guide” specifically states that price reasonableness “must” be determined; however, it goes on to add that “the [agreement officers] should exhaust other means to establish price reasonableness before resorting to requesting cost information [from the vendor].”²¹ Essentially, this is equivalent to Uncle Sam buying a car without knowing—or having limited access to or being able to ask for—the sticker price, a system that places taxpayer dollars at risk.

The risk to taxpayers is compounded by the unprecedented barriers OTA proponents insist on placing in these agreements, including taking the vendors’ word on the contract’s claimed costs. Generally, these barriers keep the government from reviewing or auditing the claimed or purported OTA costs. Often left out of discussions about the use of OTAs, or even intentionally ignored, is the fact that the majority of dollars expended under such agreements, especially research projects, is spent on a cost-reimbursement basis.²² This type of contract that places taxpayer dollars at risk when cost principles and accounting standards are absent.²³ When the government pays recipients of OTAs for work performed under cost-type contracts, the funding agency is essentially reimbursing the recipient of the OTA for their *claimed costs*, which is like providing vendors with a blank check because the government has few tools to challenge those costs. The proponents of OTAs argue that any check on pricing or costs is an “administrative burden to companies.”²⁴ Simply stated, proponents want the government to just treat an OTA recipient’s statements of cost as if they are sacrosanct. To paraphrase President Eisenhower when describing the “military-industrial complex,” OTAs present “the potential for the disastrous rise” of unchecked spending by entities that are essentially traditional federal contractors.²⁵ In no other arena of federal

²⁰ Exempting OTAs from cost accounting standards, the Truth in Negotiations Act, and FAR Part 31 cost contract principles and procedures can prevent the government from obtaining fair and reasonable costs or prices.

²¹ Other Transactions Guide for Prototype Projects, C2.11.1, C2.11.2 p. 18.

²² Department of Defense Inspector General, “Cost Charged to Other Transactions,” Report No. D-2000-065, December 27, 1999, p. 5. <https://media.defense.gov/1999/Dec/27/2001715606/-1/-1/1/00-065.pdf>; Dave Donley, “Other Transaction Authority (OTA) – Is it Worth it?,” ReliAscent, June 12, 2018.

<https://www.reliascent.com/government-contracting-blog/other-transaction-authority-ota-is-it-worth-it> (Downloaded February 13, 2019)

²³ Scott Amey, “POGO Opposes Blanket Cost Accounting Standards Exemption for Commercial Item Acquisitions,” Project On Government Oversight, January 18, 2013. <https://www.pogo.org/letter/2013/01/pogo-opposes-blanket-cost-accounting-standards-exemption-for-commercial-item-acquisitions/>

²⁴ Other Transaction (OT) Authority, p. 5.

²⁵ President Dwight D. Eisenhower, Farewell Address to the Nation, January 17, 1961. <http://mcadams.posc.mu.edu/ike.htm>

spending, whether under contracts, grants, or cooperative agreements, is such faith placed in the recipient of taxpayer funds.²⁶

We have been using OTAs for 60 years yet we still have very little information or data about how OTAs are used, any analysis of their costs, or how effective they have been in producing cutting-edge technologies.²⁷ Federal agencies and Congress should be made to prove that OTA benefits outweigh the risks and that their results justify the complete elimination of taxpayer protections. We have yet to see such proof, and there doesn't seem to be justification for recent expansions of statutory authorities and the use of OTAs.

OTAs Not Achieving the Stated Intent

Other transactions were created 60 years ago for the National Aeronautics and Space Administration and expanded through the years to other federal agencies with the goal of luring nontraditional contractors that could bring innovative ideas to the government.²⁸ While 11 agencies have OTA authority,²⁹ the Department of Defense (DoD) is where the greatest expansion has taken place.³⁰ DoD officials, however, have struggled to meet the intent behind the creation and expansion of OTA: luring in nontraditional vendors, and providing more bang for the buck.

For example, 72 percent of the research OTA funding and 97 percent of the prototype OTA funding went to traditional DoD contractors in the late 1990s.³¹

An official inside the Department of Defense Inspector General's (DoD IG) office described the failures of OTAs a few years later, stating:

Based upon our most recent audits of prototype other transactions, we have found that other transactions have not attracted a significant number of nontraditional Defense contractors to do business with the Government. Available data for FY 1994 through FY 2001 illustrates this point. Traditional Defense contractors have

²⁶ Office of Management and Budget, Circular A-123. <https://www.whitehouse.gov/omb/information-for-agencies/circulars/>; See Comptroller General of the United States, *Agencies Need Better Guidance for Choosing Among Contracts, Grants, and Cooperative Agreements* (GGD-81-88), September 4, 1981, pp. 44-47. <https://www.gao.gov/assets/140/134758.pdf>

²⁷ At best, the "Federal Procurement Data System - Next Generation" (FPDS) includes OTA information, but that data may not be complete or updated in a timely fashion.

²⁸ GAO-16-209, p. 6; 10 U.S.C. § 2302(9). "The term 'nontraditional defense contractor', with respect to a procurement or with respect to a transaction authorized under section 2371(a) or 2371b of this title, means an entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section."

²⁹ GAO-16-209, pp. 6, 9-10.

³⁰ 10 U.S.C. §§ 2371 and 2371b as amended.

³¹ "Statement of Donald Mancuso, Deputy Inspector General, Department of Defense, before the Subcommittee on Readiness and Management Support of the Senate Committee on Armed Services on Defense Acquisition" (Report No. D-2000-118), April 26, 2000, p. 15. <https://media.defense.gov/2017/Apr/18/2001734016/-/1/1/00-118.PDF> (Hereinafter Mancuso Statement) (Downloaded February 6, 2019)

received 94.5 percent of the \$5.7 billion in funds for 209 prototype other transactions.

We find this trend disturbing, as other transactions do not provide the government a number of significant protections, ensure the prudent expenditure of taxpayer dollars, or prevent fraud. Procurement statutes and the FAR provide contracting officers the tools to negotiate fair and reasonable prices, and to ensure that taxpayer dollars are expended for costs which are allowable and consistent with federal procurement policies. [The Truth in Negotiation Act], [Cost Accounting Standards] and the various audit provisions are among the tools that have provided contracting officers' visibility into contractor costs and help the government ensure that prices negotiated and eventually paid are reasonable. These provisions have served the interests of the government and the taxpayer for many decades. Congress has given agencies the authority to waive some of these protections, in certain circumstances, in connection with FAR contracts. Thus, the current methods of acquiring goods and services from contractors already provide considerable flexibility to accommodate the needs of the parties.³²

The Congressional Research Service outlined a few reasons OTAs did not lure in nontraditional vendors, including ambiguity about the definition of nontraditional contractors and the use of OTAs for weapons systems, which are generally awarded to large defense contractors.³³ No matter the reason, OTAs were going to large contractors. Recent data shows that traditional contractors are still major players in the OTA game. Three of the top five DoD contractors—Lockheed Martin, Northrop Grumman, and Boeing—are also in the top 5 of those “nabbing” the most OTA dollars.³⁴

With the top contractors still obtaining a chunk of OTAs, there is a new justification for OTAs: DoD has lost its technological advantage over adversaries.³⁵

We cannot expect much to change in the future as Congress has redefined the term “nontraditional defense contractor” (NDC) with respect to OTAs to include “an entity” that has not been subject to “cost accounting standards” or submitted “certified cost or pricing data” to the Defense Department over the past year.³⁶ The narrow definition, and specifically the use of the term “entity,” will allow contractors already doing business with the

³² “Statement for the Record, Robert J. Lieberman, Deputy Inspector General, Department of Defense, to the Subcommittee on Technology and Procurement Policy, House Committee on Government Reform, on the Service Acquisition Reform Act (SARA) of 2002” (Report No. D-2002-064), March 12, 2002, pp. 11-12. <https://media.defense.gov/2002/Mar/12/2001712299/-1/-1/02-064.pdf> (Downloaded February 6, 2019)

³³ Other Transaction (OT) Authority, p. 25.

³⁴ Chris Cornillie, “A Closer Look at the Pentagon’s \$2 Billion a Year OTA Pipeline,” *Federal News Network*, January 22, 2019. <https://federalnewsnetwork.com/fiscal-2019-federal-contracting-playbook/2019/01/a-closer-look-at-the-pentagons-2-billion-a-year-ota-pipeline-2/> (Downloaded February 6, 2019)

³⁵ Joe Gould, “Reform panel warns Congress to overhaul Pentagon acquisitions, or lose technological edge,” *Defense News*, January 15, 2019. <https://www.defensenews.com/news/pentagon-congress/2019/01/15/reform-panel-overhaul-pentagon-acquisitions-or-lose-technological-edge/>; Alexander Rossino, “Other Transaction Authority is Hot at the DoD,” *Deltek*, December 19, 2017. <https://www.deltek.com/en/learn/blogs/b2g-essentials/2017/12/other-transaction-authority-is-hot-at-the-dod> (All downloaded February 6, 2019)

³⁶ P.L. 111-383, § 866(g)(1) (2011).

government to qualify as nontraditional or “to partner with firms who do not qualify for NDC status.”³⁷ The definition of nontraditional will also favor large traditional contractors in DoD prototype OTAs, as 10 U.S.C. § 2371b(d)(1)(A) allows the OTA if “[t]here is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project,” without defining the term “significant extent.” As a result, the definition of “nontraditional defense contractor” will hinder OTAs from being awarded to bona fide nontraditional contractors, which are the companies that the government allegedly wants to lure to the procurement table.

A Push for Intellectual Property Rights

While using OTAs to lure nontraditional contractors might be struggling to reach the levels desired, contractors have crafted a new reason Uncle Sam should be using OTAs more frequently—intellectual property rights. Contractors claimed that concerns over intellectual property rights were a barrier to doing work for the government.³⁸ As a result, OTAs allow companies to negotiate to retain intellectual property rights, and the ability to profit from programs and research that were funded by taxpayers.³⁹

Industry lawyer Angela Styles does not hide the goal of gaining intellectual rights to property funded by the taxpayer:

Protect your intellectual property. Don’t let the Defense Department, another company or a consortium lead take more of the company’s IP than is absolutely necessary to perform the OTA. There are no statutory requirements for the department, a prime or a consortium lead to take intellectual property in these agreements.

Ensure the company’s lawyers review each OTA-related agreement and treat it like the company would treat any other commercial agreement. Enhanced IP [intellectual property] protection is the most significant benefit of OTAs, so make sure to use it.⁴⁰

³⁷ 10 U.S.C. § 2302(9); “Is My Firm a Nontraditional Defense Contractor?,” U.S. Army Tank Automotive Research, Development and Engineering Center. <https://tardec.army.mil/pages/airs/resources/Is%20my%20firm%20a%20Nontraditional%20Defense%20Contractor.pdf> (Downloaded February 8, 2019)

³⁸ GAO-16-209, p. 12; “Statement of Jack L. Brock, Jr., Managing Director, Acquisition and Sourcing Management, General Accounting Office, before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, House of Representatives, on Intellectual Property: Industry and Agency Concerns Over Intellectual Property Rights” (GAO-02-723T), May 10, 2002, pp. 8-10. <https://www.gao.gov/new.items/d02723t.pdf> (Downloaded February 6, 2019)

³⁹ Philip J. Jasper, “Intellectual Property Rights Demands Stifle Innovation,” *National Defense*, April 30, 2018. <http://www.nationaldefensemagazine.org/articles/2018/4/30/industry-perspective-intellectual-property-rights-demands-stifle-innovation> (Downloaded February 6, 2019)

⁴⁰ Angela Styles, “Other Transaction Authority - Big Rewards, Risks,” *National Defense*, September 27, 2018. <http://www.nationaldefensemagazine.org/articles/2018/9/27/ethics-corner-other-transaction-authority---big-rewards-risks> (Downloaded February 6, 2019)

There is an inherent conflict if winning a technological advantage over our adversaries is the stated goal for OTAs, yet the government is willing to allow its contractors to retain intellectual property rights and sell the resulting products to foreign governments or commercial vendors. It seems like the government is being played here. If others could convince a federal agency to buy their house and then sign over the title, you would not hear any complaints from the homeowners.

Where are the Results?

Despite concerns with the use of OTAs, large contractors did not let up in their push for OTA authority expansion. The Acquisition Reform Working Group (ARWG), a co-mingling of defense trade associations representing the interest of defense contractors, promoted the increased use of OTAs for years. ARWG's legislative agendas in the early 2000s stated that Congress must "Eliminate Impediments to 'Other Transaction' Contracting Authority."⁴¹ The RAND Corporation also threw its support behind OTAs despite the fact that data related to OTA results was non-existent. RAND published a study on the use of OTAs in 2002, expressing concerns about results and risks.⁴² While RAND's general conclusions were that OTAs bring in new companies and better results, the authors of the study noted that they were unable to measure OTA results, adding that they were "constrained by difficulties in measuring OT effects" and had to rely on qualitative more than quantitative data.⁴³ The authors of the RAND study, however, did not shy away from the known problems with other transactions, stating that criticisms focused on two points:

(1) that some agreements limit, to varying degree, direct DoD access to financial records in order to verify that contractor costs have been properly stated, and (2) that some agreements limit the DoD rights to intellectual property flowing from the project.⁴⁴

RAND added that "[i]t is undeniable that the relaxation of financial and other controls inherent in the OT process opens some opportunity for abuse," and that it could not really assess those risks.⁴⁵

About that same time, the Army turned to the Defense Advanced Research Projects Agency (DARPA) to help procure the Future Combat System (FCS)—a system of land and air vehicles

⁴¹ Acquisition Reform Working Group, "Statement on *Acquisition Reform Initiatives*, Submitted for the hearing record of the House Government Reform Subcommittee on Technology and Procurement Policy," May 22, 2001, p. 7 (PDF p. 110). <https://ia601900.us.archive.org/25/items/gov.gpo.fdsys.CHRG-107hhrg77329/CHRG-107hhrg77329.pdf>; Acquisition Reform Working Group, "Key Legislative Issues for the Year 2003," March 18, 2003, Slide 10. [https://www.acq.osd.mil/dpap/Docs/DAEC/ARWG-DAEC%20presentation\(3-18-03\).ppt](https://www.acq.osd.mil/dpap/Docs/DAEC/ARWG-DAEC%20presentation(3-18-03).ppt) (All downloaded February 6, 2019)

⁴² Giles Smith, Jeffrey Drezneer, Irving Lachow, "Documented Briefing: Assessing the Use of 'Other Transactions' Authority for Prototype Projects," *RAND Corporation*, 2002, p. 3. https://www.rand.org/content/dam/rand/pubs/documented_briefings/2005/DB375.pdf (Hereinafter *Assessing the Use of 'Other Transactions' Authority for Prototype Projects*) (Downloaded February 6, 2019)

⁴³ *Assessing the Use of 'Other Transactions' Authority for Prototype Projects*, pp. viii, 9-10.

⁴⁴ *Use of 'Other Transactions' Authority for Prototype Projects*, p. 26.

⁴⁵ *Assessing the Use of 'Other Transactions' Authority for Prototype Projects*, p. 32.

procured through an OTA.⁴⁶ Critics, including the Project On Government Oversight (POGO), argued that the FCS should be purchased using a traditional FAR-based contract.⁴⁷ The FCS was also under fire because it was listed as a commercial item, which prompted Senator John McCain to inquire, “Tell me ... where might I be able to purchase such a vehicle commercially?”⁴⁸ The program’s ballooning \$157 billion price tag wasn’t helping to keep the program out of the spotlight.⁴⁹ Within days of a Senate acquisition reform hearing, McCain, then-chairman of the Senate Armed Services’ Airland Subcommittee, sent a letter to the Secretary of the Army asking for “an estimate as to what additional costs the program would incur if the current OTA were converted to a FAR Part 15 contract, so as to require compliance” with the normal taxpayer protections that do not apply to an OTA.⁵⁰ Within weeks, the Army converted the FCS program from an OTA to a FAR-based contract, stating that such a contract would be “more appropriate,” according to news sources.⁵¹ Eventually the FCS program was canceled, despite the investment of nearly \$19 billion into the program, including an estimated \$500 million in termination costs.⁵²

The Department of Homeland Security similarly found itself in hot water. The Government Accountability Office criticized the agency for not documenting the reason for entering into OTAs, and found that the agency was not tracking “information to measure the benefits of other transaction authority, which include reaching nontraditional contractors.”⁵³

The Congressional Research Service has also expressed concerns to Congress about the inability to assess OTA results, stating:

⁴⁶ Andrew Feickert, “The Army’s Future Combat System (FCS): Background and Issues for Congress” (RL32888), *Congressional Research Service*, April 28, 2005, pp. 2-3, 13. <http://pogoarchives.org/m/dp/dp-CRS-RL32888-2005.pdf> (Hereinafter The Army’s Future Combat System)

⁴⁷ “Written Testimony of POGO’s Danielle Brian on DoD’s Use of ‘Commercial’ Acquisition and ‘Other Transaction Authority’ before the Senate Armed Services Committee, Airland Subcommittee,” March 15, 2005. <https://www.pogo.org/testimony/2005/03/written-testimony-of-pogos-danielle-brian-on-dods-use-of-commercial-acquisition-and-other-transaction-authority-before-senate-armed-services-committee/>; The Army’s Future Combat System, pp. 13-14.

⁴⁸ Megan Scully, “Boeing again finds itself in McCain’s investigative sights,” *The Hill*, March 9, 2005. <https://thehill.com/business-a-lobbying/2885-boeing-again-finds-itself-in-mccains-investigative-sights> (Downloaded February 6, 2019) (Hereinafter “Boeing again finds itself in McCain’s investigative sights”)

⁴⁹ The Army’s Future Combat System, p. 6.

⁵⁰ Letter from Senator John McCain, Chairman, Airland Subcommittee, Senate Armed Services Committee, to Francis J. Harvey, Secretary of the Army, about the use of OTAs, March 31, 2005. <http://pogoarchives.org/m/dp/dp-McCain-Army-04012005.pdf>

⁵¹ “Boeing again finds itself in McCain’s investigative sights,” Frank Tiboni, “Fuss about Future Combat Systems,” *Federal Computer Week*, April 18, 2005. <https://fcw.com/articles/2005/04/18/fuss-about-future-combat-systems.aspx>; See Section 212 of the 2006 NDAA mandated that DoD use FAR Part 15 rather than OTA for the Future Combat Systems program. U.S. Congress, “National Defense Authorization Act for Fiscal Year 2006” (P.L. 109-163), signed January 6, 2006, Section 212. <https://www.congress.gov/109/plaws/publ163/PLAW-109publ163.pdf> (All downloaded February 6, 2019)

⁵² Amber Corrin, “Army to pay \$500M for Future Combat Systems termination,” *Federal Computer Week*, May 29, 2012. <https://fcw.com/articles/2012/05/29/army-future-combat-systems-500-million-cancellation-fee.aspx> (Downloaded February 6, 2019)

⁵³ Government Accountability Office, *Department Of Homeland Security: Further Action Needed to Improve Management of Special Acquisition Authority* (GAO-12-557), May 8, 2012, p. 11. <https://www.gao.gov/assets/600/590702.pdf> (Downloaded February 6, 2019)

It appears that a favorable consensus exists regarding the use of OT authority, which seems to be based largely on the experiences and observations of individuals who participate, or have participated, in OTs. Yet, because of the nature of OTs and the types of work performed pursuant to them, it also appears that no one has been able to devise, let alone conduct, a study that has the methodological features and rigor sufficient for producing reliable and valid results.⁵⁴

OTA Spending Exploding but Oversight Lacking for Now

In addition to the concerns about luring in non-traditional vendors, the DoD IG has a history of exposing OTA problems related to monitoring work against funds paid, compliance with cost sharing arrangements, receiving final research reports, and standardizing audit clauses.⁵⁵

In 2000, DoD Deputy Inspector General Donald Mancuso pleaded with Congress to rein in OTAs. “Given the inapplicability of traditional controls to other transactions, any expansion of the authority for other transactions should provide the needed protections both for the Department and the American taxpayers,” he said.⁵⁶

After a few relatively stagnant spending years on the OTA front,⁵⁷ and a lapse of memory within government circles that OTAs were not working as originally intended, contractors were back to endorsing this buying vehicle in 2013.⁵⁸

According to data in the Federal Procurement Data System – Next Generation, spending through OTAs has increased from approximately \$845 million in 2015 to approximately \$3.9

⁵⁴ Other Transaction (OT) Authority, p. 28.

⁵⁵ “Statement for the Record, Eleanor Hill, Inspector General, Department Of Defense, before the Subcommittee on Readiness and Management Support of the Senate Committee on Armed Services on Acquisition Reform in the Department of Defense” (Report Number 99-117), March 17, 1999, p. 8.

<https://media.defense.gov/1999/Mar/17/2001715646/-1/-1/1/99-117.pdf> (Downloaded February 6, 2019)

⁵⁶ Mancuso Statement, pp. 16-17.

⁵⁷ “Other Transaction Authority (OTA) Trends, Points of Interest, and Entry Points”, GovWin + Onvia from Deltek, September 07, 2018. <https://iq.govwin.com/neo/marketAnalysis/view/3008?researchTypeId=1>

⁵⁸ Winning Strategies Washington, Senate Lobbying Registration for New Client: Center for Energy Environment and Demilitarization (CEED), August 2, 2013.

<https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=3108B290-78DE-4726-8B43-B629EA0421FA&filingTypeID=1>; Later lobbying reports were filed for the Consortium Management Group, Inc.

(CMG), which operates two OTA consortia: Consortium for Energy, Environment and Demilitarization (CEED) and Consortium for Command, Control and Communications in Cyberspace (C5). Those consortia are composed of hundreds of small and large companies. Consortium Management Group, “CEED Member List.”

<https://cmgcorp.org/ceed/member-list/>; Consortium Management Group, “C5 Member List.”

<https://cmgcorp.org/c5/member-list/>; CMG listed OTA as an activity on which it lobbied as recently as January 17, 2018. Winning Strategies Washington, House Lobbying Report for Client: Consortium Management Group, January 17, 2019. <http://disclosures.house.gov/ld/ldxmlrelease/2018/Q4/301006100.xml> (All downloaded February 6, 2019)

billion in 2018,⁵⁹ with DoD accounting for 93 percent of the total.⁶⁰ That spending has grown because Congress has extended DoD OTA authorities, redefined nontraditional contractors, allowed follow-on production authority in Defense authorization acts,⁶¹ and doubled the ceiling for OTA prototype projects from \$250 million to \$500 million.⁶² A billion-dollar OTA is no longer a contractor's pipe dream; it is a reality.⁶³ And an expert panel created to streamline DoD acquisition rules recently recommended that follow-on production agreements for OTAs should be made easier,⁶⁴ which will likely cause overall OTA spending to reach the tens or hundreds of billions of dollars in the not-so-distant future.

In the past, OTAs were used in the "space race" to the Moon; now they are being used "in areas as diverse as armaments, communications, electromagnetic spectrum uses, cyber security and medical technologies."⁶⁵ Launch services and cloud computing are other recent areas where OTAs are being utilized.⁶⁶

⁵⁹ According to *Bloomberg Government*, other transaction spending was \$4.2 billion in fiscal year 2018. Chris Cornillie, "The Federal IT Market Grew by 10 Percent in Fiscal 2018," *Bloomberg Government*, January 25, 2019. <https://about.bgov.com/blog/federal-market-grew-10-percent-fiscal-2018/> (Downloaded February 6, 2019)

⁶⁰ FPDS-NG, *Other Transaction Actions and Dollars Report*, for calendar years 2015 and 2018. For instructions on recreating these reports, see:

https://www.fpds.gov/help/about_reports/help_Other_Transaction_Actions_and_Dollars_Report.html

⁶¹ Follow-on production agreements are limited to instances when "competitive procedures were used for the selection of the parties for participation in the transaction" and when "the participants in the transaction successfully completed the prototype project provided for in the transaction." 10 U.S.C § 2371b(f)(2)

⁶² Section 822 of the National Defense Authorization Act for FY 2002 (P.L. 107-107); Sections 847 and 1441 of the National Defense Authorization Act for FY 2004 (P.L. 108-136); Section 823 of the National Defense Authorization Act for FY 2008 (P.L. 110-181); Section 824 of the National Defense Authorization Act for FY 2009 (P.L. 110-417); Section 866 of the National Defense Authorization Act for FY 2011 (P.L. 111-383); Section 863 of the National Defense Authorization Act for FY 2013 (P.L. 112-239); Section 812 of the National Defense Authorization Act for FY 2015 (P.L. 113-291); Section 815 of the National Defense Authorization Act for FY 2016 (P.L. 114-92); Sections 216, 862, 864, 867, and 1711 of the National Defense Authorization Act for FY 2018 (P.L. 115-91); and Sections 211, 226, and 311 of the National Defense Authorization Act for FY 2019 (P.L. 115-232).

⁶³ Frank Konkel, "Pentagon's \$1 Billion Cloud Deal May Signal New Era in Government Buying," *Nextgov*, February 27, 2018. <https://www.nextgov.com/it-modernization/2018/02/pentagons-1-billion-cloud-deal-may-signal-new-era-government-buying/146273/> (Downloaded February 6, 2019)

⁶⁴ Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations*, Volume 3 of 3, Part 2, January 2019, pp. 440-448 (PDF pp. 240-248). <https://section809panel.org/wp-content/uploads/2019/01/Volume-3-Report-Part-2.pdf> (Downloaded February 6, 2019)

⁶⁵ Brian Piedfort, "How OTA collaborations are streamlining government acquisitions," *Federal News Network*, December 28, 2018. <https://federalnewsnetwork.com/commentary/2018/12/how-ota-collaborations-are-streamlining-government-acquisitions/> (Downloaded February 6, 2019)

⁶⁶ U.S. Air Force, "Air Force awards three Launch Service Agreements," October 10, 2018. <https://www.af.mil/News/Article-Display/Article/1658765/air-force-awards-three-launch-service-agreements/>; Jared Serbu, "GAO overturns DoD agreement for \$1B in cloud computing services," *Federal News Network*, June 1, 2018. <https://federalnewsnetwork.com/defense-main/2018/06/gao-overturns-dod-agreement-for-1-billion-in-cloud-computing-services/> (All downloaded February 6, 2019)

But a closer look at other transactions in FPDS-NG and government reports shows agreements for questionable services—management support,⁶⁷ utilities-electric,⁶⁸ custodial/janitorial services,⁶⁹ guard services,⁷⁰ video surveillance,⁷¹ background investigations,⁷² training (including ironically enough, “other transaction training for the office of procurement operations”),⁷³ and canine teams.⁷⁴

Using OTAs for such buying is raising questions in Congress—especially questions about the lack of competition, transparency, and other essential taxpayer protections.⁷⁵ *Federal News Radio* cited an unnamed Congressional staffer saying to that OTAs “are more akin to corporate welfare than a way to bring small and nontraditional companies with new ideas into the Pentagon’s fold.”⁷⁶

Additional questions have been raised about the experience and knowledge levels of contractors, government methods to detect fraud, waste, and abuse, and the level of requisite skills and training needed to develop and administer OTAs by the acquisition workforce.⁷⁷

⁶⁷ FPDS-NG, “W15QKN1090006” (Army OTA with Insitech, Inc.).

<https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.5.1&s=FPDS.GOV&q=W15QKN1090006> (Downloaded February 6, 2019)

⁶⁸ FPDS-NG, “70T01018T9NCKP016” (Transportation Security Administration OTA with Massachusetts Port Authority).

<https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.5.1&s=FPDS.GOV&q=70T01018T9NCKP016> (Downloaded February 6, 2019)

⁶⁹ FPDS-NG, “HSTS0113HCKP127” (Transportation Security Administration OTA with County of Palm Beach).

<https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.5.1&s=FPDS.GOV&q=HSTS0113HCKP127> (Downloaded February 6, 2019)

⁷⁰ FPDS-NG, “HSTS0216HSLR849” (Transportation Security Administration OTA with Sioux Falls Regional Airport Authority).

<https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.5.1&s=FPDS.GOV&q=HSTS0216HSLR849> (Downloaded February 6, 2019)

⁷¹ FPDS-NG, “HSTS0413HCT5719” (Transportation Security Administration OTA with the Port Authority of New York & New Jersey).

<https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.5.1&s=FPDS.GOV&q=HSTS0413HCT5719> (Downloaded February 6, 2019)

⁷² FPDS-NG, “70T02018T9NPIE200” (Transportation Security Administration OTA with Signature Flight Support Corporation).

<https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.5.1&s=FPDS.GOV&q=70T02018T9NPIE200> (Downloaded February 6, 2019)

⁷³ FPDS-NG, “DJFA3N300134” (Federal Bureau of Investigation OTA with SRW, Inc.).

<https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.5.1&s=FPDS.GOV&q=DJFA3N300134> (Downloaded February 6, 2019)

⁷⁴ FPDS-NG, “HSTS0210HCAN622” (Transportation Security Administration OTA with Piedmont Triad Airport Authority).

<https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.5.1&s=FPDS.GOV&q=HSTS0210HCAN622> (Downloaded February 6, 2019)

⁷⁵ Scott Maucione, “As OTAs grow, traditional contractors are reaping the benefits,” *Federal News Network*, July 17, 2018. <https://federalnewsnetwork.com/contracting/2018/07/as-otas-grow-prime-contractors-are-reaping-the-benefits/> (Downloaded February 6, 2019) (Hereinafter As OTAs grow, traditional contractors are reaping the benefits)

⁷⁶ As OTAs grow, traditional contractors are reaping the benefits.

⁷⁷ Other Transaction (OT) Authority, p. 29.

Yet, Congress has made it easier to award OTAs with little, or no, evidence that these concerns have been addressed.

Even Stan Soloway,⁷⁸ a longtime contracting industry promoter, has raised questions about whether OTAs are working as intended. Soloway highlights important questions that have not been answered: “Are OTAs delivering on their promise? Are they, in fact, delivering new, otherwise inaccessible capabilities and innovation in a more timely and responsive manner than the traditional acquisition process? And are they doing so in a manner consistent with a set of core principles: accountability, competition and transparency?”⁷⁹ Predictably however, Soloway assumes the answers are “yes,” and notes that if OTAs are working they should become the new normal when buying products and services.

In essence, Soloway advocates the industry line: call these agreements whatever you want, just do not subject the companies receiving federal funds to cost or pricing data disclosure, sharing of reasonable intellectual property rights, or any type of pre- or post-award review and audit. It’s the old saw: the government should just “put the money on the stump and run.”

Possibly realizing that its push for OTAs without the necessary justifications could be a problem, Congress inserted provisions into the 2018 and 2019 Defense Authorization bills, which then became law, to build OTA intellectual property skills inside the DoD workforce and reporting requirements. The 2018 law required DoD to “establish a cadre of personnel who are experts in intellectual property matters.”⁸⁰ The 2019 law requires DoD to report to Congress on Defense Innovation Unit Experimental’s use of traditional and nontraditional defense contractors, the goods being delivered to troops, and administrative functions of using OTAs.⁸¹ The reporting provisions required by Section 873 of the FY 2019 National Defense Authorization Act and the 2019 Defense Appropriations Act are designed to inform Congress about the use of OTAs and the expanded use of follow-on production agreements.⁸²

Without data about the use of OTAs and the results as compared to typical FAR-based contracts, there is no assurance that OTAs are working as intended. Are agencies working with truly nontraditional contractors, are innovative products and services being produced, is the government saving money, and are the deals involving the intellectual property rights protecting the appropriate party? Any thought that OTAs should become the “new normal” is premature and reckless. It’s time to admit that OTAs are just one-sided contracts designed to appease large defense and other traditional contractors.

⁷⁸ Stan Soloway is president and CEO of Celero Strategies, LLC. He was previously CEO of the Professional Services Council and deputy undersecretary of defense.

⁷⁹ Stan Soloway, “Will the empire strike back? OTA and the future of acquisition,” *Army Times*, April 27, 2018. <https://www.armytimes.com/opinion/commentary/2018/04/27/will-the-empire-strike-back-ota-and-the-future-of-acquisition/> (Downloaded February 6, 2019)

⁸⁰ Section 802 of the National Defense Authorization Act for FY 2018 (P.L. 115-91).

⁸¹ Section 244 of the National Defense Authorization Act for FY 2019 (P.L. 115-232).

⁸² Section 873 of the National Defense Authorization Act for FY 2019 (P.L. 115-232); Department of Defense Appropriations Act, 2019 (P.L. 115-245).

Recommendations

POGO supports cutting procurement costs, buying faster, and bringing nontraditional companies to the government procurement table. That said, OTAs could be improved if certain administrative, oversight, and transparency protections were incorporated into the agreements to prevent wasteful spending and ensure that projects achieve their intended missions.

First, Congress must restore the original intent of bringing innovation to the public from nontraditional government contractors, rather than throwing billions of dollars with no oversight controls to the government's top vendors. The definition of nontraditional contractors should be revised and the rules should be changed to prohibit any vendor who has accepted a FAR contract from being eligible to receive an OTA.

Second, Congress should strengthen policies covering cost or pricing data disclosure, cost principles and accounting standards, audit access rights, and intellectual property rights to ensure that taxpayers are protected. If Uncle Sam paid for it, Uncle Sam should be able to make sure the results were the ones bargained for and to own or have unimpeded rights to the finished product.

Finally, federal agencies should look to renegotiate certain OTAs under contracting vehicles that provide taxpayer protections—mainly, FAR Part 15 contracts.

Speeding up the contracting process and bringing in cutting-edge technologies is essential to better buying, but it cannot come at the expense of taxpayers' protections just because contractors find them burdensome. And while luring in nontraditional vendors may be a laudable goal, it is essential we protect sensitive technologies that are being created and prevent them from being shared with foreign governments or on the commercial market, which could fall into the hands of adversaries. Let's not be fooled into believing that OTAs or other rapid acquisition processes are designed to actually meet all of the goals proffered by proponents. Contractors wanted processes where the rules do not apply to them and oversight is minimal to non-existent. Sadly, Congress recently handed them mostly everything on their wish list.

Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. POGO champions reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. POGO strives above all to be fair and accurate in our investigations and reporting. We are diligent in our research. We give credit where credit is due and hold those to account who need to be held accountable—without regard to party. POGO originally worked to expose outrageously overpriced items such as a \$7,600 coffee maker and a \$435 hammer. In 1990, after many successes reforming military spending, including a Pentagon spending freeze at the height of the Cold War, POGO expanded its mandate and began investigating waste, fraud, and abuse throughout the federal government.