

THE CHALLENGING CLIMB  
TO REACH NEW HEIGHTS

## Other Transactions: A Lasting Trend or a Bubble Ready to Burst?

Jon Baker

Stephanie Crawford



# Agenda

---

- Background
- Use of OTs on the Upswing
- New 2018 DoD OT Guide
- Section 809 Panel Recommendations
- Is Increased Oversight on the Horizon?



# Background

---

## What is an Other Transaction?

- Not a procurement contract, grant, or cooperative agreement
  - Generally, not subject to the same procurement regulations and statutes – but, some still apply
- Many departments/agencies have OT authority
- 3 Types of OTs within DoD
  - Research (10 U.S.C. § 2371)
  - Prototype (10 U.S.C. § 2371b)
  - Follow-On Production (10 U.S.C. § 2371b(f))



# DoD Prototype OT Authority

---

## DoD may use prototype OT authority if:

- There is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent;
- All non-federal significant participants in the transaction are small businesses or nontraditional defense contractors;
- At least 1/3 of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government; or
- Sr. Procurement Executive determines that exceptional circumstances justify use of a transaction that provides for innovative business arrangements that
  - would not be feasible or appropriate under a contract, or
  - would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

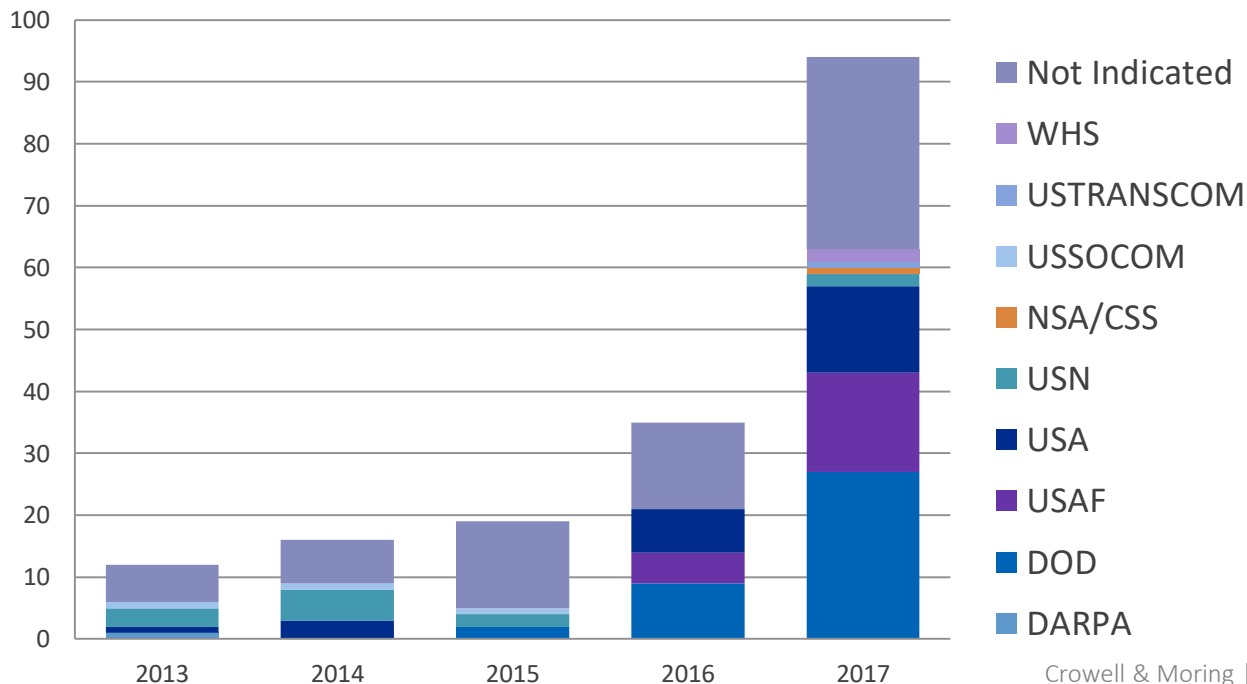
10 U.S.C. § 2371b(d)(1)(A)-(D)



# Use of OTs on the Upswing

New DoD Prototype OTs,  
FY 2013-2017

By Funding Agency



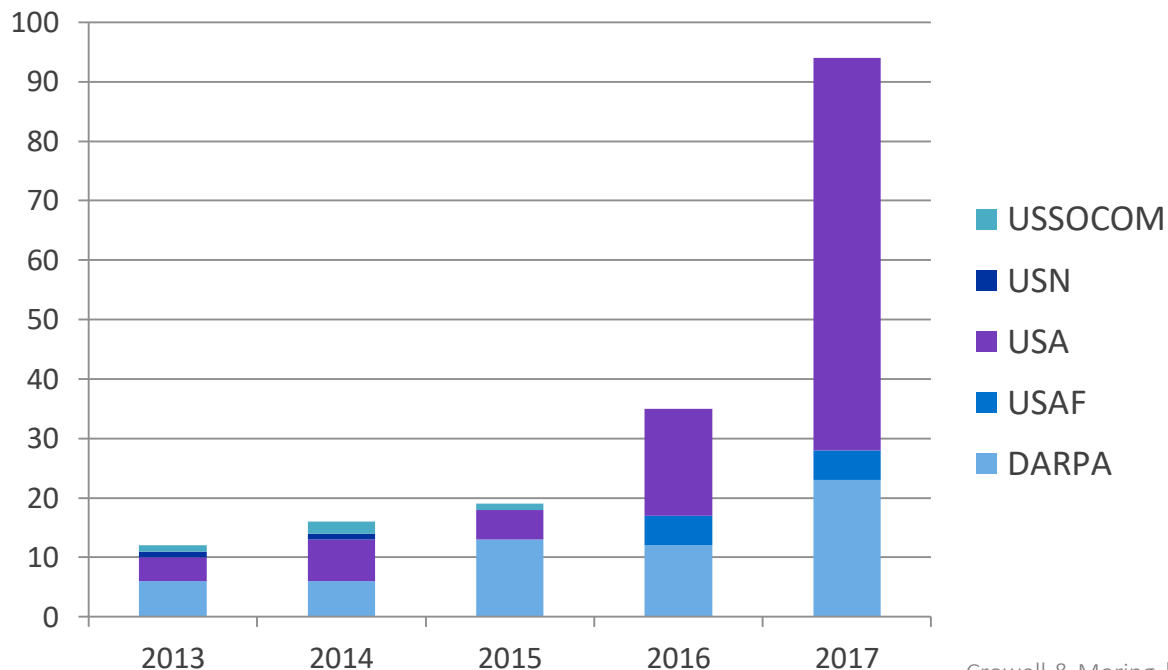
Source Data: CRS, DoD Use of Other Transaction Authority,  
Feb. 22, 2019



# Use of OTs on the Upswing

New DoD Prototype OTs,  
FY 2013-2017

By Contracting Agency



Source Data: CRS, DoD Use of Other Transaction Authority,  
Feb. 22, 2019



# New 2018 DoD OT Guide

Selection and  
Negotiation of  
Terms

Intellectual  
Property  
Considerations



## OTHER TRANSACTIONS GUIDE

Office of the Under Secretary of Defense  
for Acquisition and Sustainment

November 2018  
Version 1.0

OT Myths and  
Facts

Planning for  
Follow-On  
Activities



# New DoD OT Guide

## Addressing Common Myths, Examples

- ***An OT is not a contract.***
  - **FALSE.** Not a procurement contract but a valid and enforceable agreement that satisfies all of the required elements of a contract (offer, acceptance, consideration, authority, legal purpose, and meeting of the minds). Must be signed by person with authority to bind federal government (i.e. an Agreements Officer).
- ***Because CICA does not apply, competition is not a consideration.***
  - **FALSE.** Both OT statutes require the use of competitive procedures to the maximum extent practicable. The scope of the competition is subject to agency discretion. To award a sole source follow-on production OT, the solicitation for original OT must have been competitive and provide for award of follow-on.
- ***Anyone in DoD can issue an OT.***
  - **FALSE.** Limited to Directors of the Defense Agencies, the Directors of Field Activities with contracting authority, the Commanding Officers of Combatant Commands with contracting authority and the Director of the Defense Innovation Unit. DARPA and the MDA have their own OT authorities.





# 809 Panel Recommendations

---

## Recommendation 81: Clarify and expand authority to use OT Agreements for Production

- Allow Senior Acquisition Executives to approve use of production OT in the following scenarios:
  1. The production OT is being used to rapidly field an existing technology.
  2. The prototype project has not been successfully completed.
  3. Competitive procedures were not used to award the prototype project.
  4. Follow-on production where prototype agreement does not specify.
- Clarify whether follow-on production transactions with traditional defense contractors require a 1/3 cost share
- Maintain authority to determine whether prototype project complete at lowest possible level within DoD.



# Increased Oversight on the Horizon?

---

## Most Likely.

- 2019 NDAA
- February 2019 Congressional Research Service OTA Report
- Recent Cases



# 2019 NDAA

---

## New DoD Reporting Requirements on OTs

- Report on Defense Innovation Unit identifying, amongst other things:
  - the number of nontraditional and traditional contractors with OTs from DIU initiatives
  - the number of innovations “delivered into the hands of the warfighter”
- DoD Budget Display includes OT program element
- Collection and reporting on DoD use of OTs, including organizations, quantities, amounts, purpose, description, status, highlights



# 2019 Congressional Research Service Report on DoD Use of OTs

CRS February 2019 OT Report identifies risks, lack of data, and questions scope of OT authority.

- **“Potential Risks”**

- Diminished oversight
- Exemption from laws & regulations designed to protect USG and taxpayer interests
- Perceived lack of transparency in how OTs are being employed

- **Lack of authoritative data on OTs**

- Cost sharing
- Competitions
- Time to execution

- **Possibility of a centralized OT office**

## Issues for Congress

- **How far should OT authority extend?**
  - Do benefits outweigh concerns?
  - Curtail, extend, or maintain authorities?
- **What data may be beneficial to Congress in evaluating OTs?**
- **Should an innovation lab or Center of Excellence be established for OTs?**



# Recent OT Litigation

---

## GAO defining its jurisdiction over OTs.

- *Oracle America, Inc.*, B-416061, May 31, 2018,
  - GAO held it had jurisdiction to hear protests alleging agency is “improperly using its [OT] authority”
  - OT must provide for production OT, reference in solicitation is insufficient
  - Prototype is complete when the project, as defined in the initial OT **and** OT modifications, is complete
- *Blade Strategies, LLC*, B-416752, Sept. 24, 2018
  - Must protest use of OTA before submitting initial proposal
- *ACI Technologies, Inc.*, B-417011, Jan. 17, 2019,
  - GAO willing to evaluate whether scope of work reasonably within definition of prototype
  - GAO appears willing to evaluate whether solicited OT research work is duplicative of research already being conducted by DoD, if sufficient factual information provided
- *MD Helicopters, Inc.*, B-417379, Apr. 4, 2019
  - Absent any allegation of improper use of statutory OTA to acquire goods or services that should be acquired via a procurement contract, GAO has no jurisdiction over the protest



# Data References

**Table 1. Annual New DOD Prototype Agreements, FY2013-FY2017**

depicted by funding agency

	2013	2014	2015	2016	2017
DARPA	1	—	—	—	—
Dept. of Defense	—	—	2	9	27
Dept. of the Air Force	—	—	—	5	16
Dept. of the Army	1	3	—	7	14
Dept. of the Navy	3	5	2	—	2
NSA/CSS	—	—	—	—	1
U.S. Special Operations Command	1	1	1	—	—
U.S. Transportation Command	—	—	—	—	1
Washington Headquarters Services	—	—	—	—	2
Not Indicated	6	7	14	14	31
<b>Total</b>	<b>12</b>	<b>16</b>	<b>19</b>	<b>35</b>	<b>94</b>

Source: CRS, DoD Use of Other Transaction Authority, Feb. 22, 2019



# Data References

**Table 2. Annual New DOD Prototype Agreements, FY2013-FY2017**  
depicted by contracting agency

	2013	2014	2015	2016	2017
DARPA	6	6	13	12	23
Dept. of the Air Force	—	—	—	5	5
Dept. of the Army	4	7	5	18	66
Dept. of the Navy	1	1	—	—	—
U.S. Special Operations Command	1	2	1	—	—
<b>Total</b>	<b>12</b>	<b>16</b>	<b>19</b>	<b>35</b>	<b>94</b>



# Contact Information

---

**Jon Baker**

[jbaker@crowell.com](mailto:jbaker@crowell.com)

202.624.2641

**Stephanie Crawford**

[scrawford@crowell.com](mailto:scrawford@crowell.com)

202.624.2811

