DEFENSE INNOVATION UNIT EXPERIMENTAL

DIUx Commercial Solutions Opening

How-to Guide

November 30, 2016

FAST, FLEXIBLE, AND COLLABORATIVE: THE COMMERCIAL SOLUTIONS OPENING (CSO) and DIUx's APPROACH TO OTHER TRANSACTIONS (OT) FOR PROTOTYPE PROJECTS

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ACKNOWLEDGEMENTS

In May 2016, Secretary Carter charged the Defense Innovation Unit Experimental (DIUx) to "develop new partnerships with the private sector in communities in Silicon Valley and America's many other great innovation hubs" to "put commercial-based innovation in the hands of America's soldiers, sailors, airmen, and marines." Over the past six months, DIUx has achieved that mission by demonstrating we can do business faster and more effectively through our Commercial Solutions Opening (CSO), executing awards in as little as 31 days while reaching out to groundbreaking technologists across the country. This "how-to" guide shares DIUx's experience to date so that others across the Department of Defense (DoD) who are interested in creating their own CSOs can join DIUx in broadening the industrial base and accelerating innovation to the warfighter.

The success of DIUx and this guide would not be possible without the continued support of our DoD partners, especially the Army Contracting Command-New Jersey, The Office of Defense Procurement and Acquisition Policy, OUSD(AT&L), the OSD Office of the General Counsel, and the Professional Staff of the Senate and House Armed Services Committees. To them and all of our partners, we remain extremely thankful and look forward to continuing our partnership in the years to come.

This is version 1.0 of the DIUx CSO Guide. As a living document, it will be periodically updated to reflect DIUx's ongoing experience maturing this unique acquisition vehicle.

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THE COMMERCIAL SOLUTIONS OPENING (CSO) and DIUx's APPROACH TO OTHER TRANSACTIONS (OT) FOR PROTOTYPE PROJECTS

Introduction

In August 2015, Secretary of Defense Ash Carter founded the Defense Innovation Unit Experimental (DIUx) to accelerate innovation to the warfighter. In the past, government funding spurred significant technology development; today, that trend has shifted: commercial investment now propels the preponderance of ground-breaking technology development.

Much of this technology is of significant interest to the Department of Defense (DoD) (e.g., virtual reality, autonomy, cyber defense, etc.), but the high barriers to entry, including the long timelines inherent to the federal acquisition system, make the DoD an unattractive customer for some companies focused on selling to the commercial market. Rather than competing for DoD work, they often steer their business elsewhere, to commercial customers and investors who work quickly and can help them realize a larger return on investment. This requires a significant cultural shift for DoD, which is used to working with companies that have DoD as their primary - if not only - customer. For too long, the Department's monopsonistic business practices have promoted competition amongst traditional vendors and created high barriers to entry and long timelines that discourage nontraditional vendors from doing business with the DoD.

In order to access cutting-edge technology from nontraditional vendors, DoD must change the way it does business and adapt to commercial best practices, lower its barriers to entry, and transform into a more attractive customer and investor. To this end, DIUx initiated a first-of-its-kind acquisition mechanism called the Commercial Solutions Opening, or CSO. The CSO is the mechanism by which DIUx solicits solutions to problems that our warfighters are facing. Selected solutions are ultimately awarded other transactions for prototype projects (hereafter, OTs) - essentially, agreements instruments, unlike contracts, that are not bound by the Federal Acquisition Regulation (FAR). This

allows us to work with nontraditional vendors - or even traditional vendors in special cases - through a process that is fast, flexible, and collaborative. By simplifying the solicitation process and benchmarking commercial best practices, while remaining good stewards of taxpayer dollars, DIUx is opening up the DoD to a new vendor base many times larger than the vendor base the department works with today. The CSO allows us to leverage the enormous amount of commercial research and development (R&D) investment and quickly access cutting-edge technology.

DIUx opened its CSO in June 2016, and by the end of FY16, three months later, awarded 12 OTs totaling ~ $36M. These awards took an average of 59 days to complete from a company's initial submission of a solution brief to the awarded OT, with the first award being made in 31 days.

This document--a how-to guide for CSOs-- is divided into three parts. First, it outlines the general basics of OTs. Second, it details the DIUx philosophy on OTs. These are guiding principles through which DIUx designed the CSO that can easily be adopted by others as an additional tool in the acquisition toolbox. Finally, it outlines the specific CSO process leveraged by DIUx. It summarizes the authorities used in the CSO and the solicitation, evaluation and selection processes.

This document is not DoD regulation or policy. Rather, it is a combination of our lessons learned and our subsequent recommendations to other DoD organizations that wish to replicate DIUx's success by leveraging the flexibilities inherent in OTs to reach out to nontraditional vendors. It is our hope that this guide will encourage other DoD Components to not only take advantage of the flexible nature of OTs, but to also be aware of the guiding principles used by DIUx as a possible starting point to design a process that meets their particular mission - and hence broaden the defense industrial base to include more nontraditional vendors. DIUx is proud to showcase its acquisition process to encourage innovation across the acquisition community and increase the Department's ability to access cutting-edge technology from a broader industrial base.

OT Basics

An OT is best defined by what it is not, rather than what it is. An OT is a transaction (other than a contract, grant, or cooperative agreement) to which most of the laws and regulations governing federal contracts - including the FAR - do not apply.

Authority

DIUx is currently supported by the Army Contracting Command - New Jersey (ACC-NJ) to award OTs. ACC-NJ uses its delegated authority[1] under 10 U.S.C. § 2371b to enter into OTs for prototype projects on behalf of DIUx. (Note: while there are other transactions for basic, applied, or advanced research projects under 10 U.S.C. § 2371, this document only discusses DIUx's use of prototype projects under 2371b). Section 2371b provides:

[1] *See* Memorandum, Assistant Secretary of the Army for Acquisition, Logistics, and Technology, U.S. Army, to Army Contracting Command, subject: Delegation of Authority Under Section 2371b of Title 10, United States Code to Carry Out Certain Prototype Projects (11 Jul. 2016).

(a) Authority.—

(1) *Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of this title, carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.*[2]

Prior to the enactment of section 2371b, Congress authorized OTs for prototype projects through DoD Authorization Acts, with sunset provisions, as a note in 10 U.S.C. § 2371. In other words, section 845 of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103-160, as amended, authorized the use of OTs, "under the authority of section 2371 of title 10, United States Code, [to] carry out prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense."

"Other Transactions" for prototype projects are acquisition instruments that generally are not subject to the federal laws and regulations governing procurement contracts. As such, they are not required to comply with the FAR, its supplements, or laws that are limited in applicability to procurement contracts.[3] The Department has detailed a list of statutes that do not apply to OTs for prototype projects, which include the Competition in Contracting Act (CICA), the Contract Disputes Act, and the Buy American Act.[4]

According to the statutory language, "the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense" may carry out the authority under 10 U.S.C. § 2371b. Section 2371b repealed earlier authority for OTs for prototype projects under section 845, so previous delegations of OT authority under section 845 are not effective for section 2371b. To determine if a particular office has OT authority or to request it, contact the Defense Procurement and Acquisition Policy (DPAP) office, at osd.pentagon.ousd-atl.mbx.cpic@mail.mil.

Necessary Conditions

While there are many rules and regulations that OTs are not subject to, there are certain statutory criteria to award an OT:

- The proposed work is a prototype project
- The proposed work is directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be

[2] 10 U.S.C. § 2371b. (See Appendix A)
[3] *See* "Other Transactions" Guide for Prototypes, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, August 2002. (Appendix B)
[4] *Ibid*.

acquired or developed by the Department of Defense, or to improve platforms, systems, components, or materials in use by the armed forces, and

- **One** of the following conditions is met:
  - i) There is at least one nontraditional defense contractor participating to a significant extent in the prototype project
  - ii) All significant participants in the transaction, other than the Federal Government, are small businesses or nontraditional defense contractors
  - iii) At least one third of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the Federal Government
  - iv) The senior procurement executive (SPE) for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures 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

If a proposed project meets these basic conditions, then it is eligible for a prototype OT award.

Prototype OTs in excess of $50M, but less than $250M, may be executed upon the approval of a Senior Procurement Executive. Prototype OTs in excess of $250M may be executed upon the approval of the Under Secretary of Defense for Acquisition, Technology, and Logistics. More details on these approvals can be found in section 2371b.

What constitutes a prototype project?

The terms "prototype" and "prototype project" are not defined in statute or regulation. However, in 2002, the Under Secretary of Defense for Acquisition, Technology, and Logistics stated:

> *"With regard to section 845 authority, a prototype can generally be described as a physical or virtual model used to evaluate the technical or manufacturing feasibility or military utility of a particular technology or process, concept, end item, or system. The quantity developed should be limited to that needed to prove technical or manufacturing feasibility or evaluate military utility. In general, Research, Development, Test & Evaluation (RDT&E) appropriations will be appropriate for OT prototype projects.*[5]"

While this language is useful, the technology landscape has changed significantly since 2002. For example, cloud computing, analytics/machine-learning, and software-as-a-service barely existed then; today, they dominate the information technology (IT) business landscape.[6] The sale of data, in all of its forms, rather than hardware and software programs, is increasingly adopted as a business model by companies. Customers unable to adapt to these new commercial practices could be shut out of markets leveraging these technologies. Finally, technology development itself, while important, does not constitute the root competitive advantage; rather, it is the rapid iteration and commercialization that set innovators apart from traditional IT developers.

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[5] *Ibid.*

[6] *See* http://www.forbes.com/sites/louiscolumbus/2016/03/13/roundup-of-cloud-computing-forecasts-and-market-estimates-2016/#17c070c474b0

If DoD is to take advantage of this new ecosystem, it must be able to benchmark its business practices and business models from those used within the ecosystem as well as its technology. Accordingly, DIUx strongly advocates that the definition of a prototype project should accommodate these types of nontraditional business models and technologies. DIUx, in collaboration with the Office of the General Counsel (OGC) and DPAP staff, developed a working definition that meets their particular mission needs. DPAP will publish an update to the 2002 OT Guide in January 2017 to reflect recent statutory changes and will re-address the definition of a prototype. In the meantime, DIUx generally uses the below definition:

> *"A prototype project can generally be described as preliminary pilot, test, evaluation, demonstration, or agile development activity used to assess the viability, technical feasibility, application, or military utility of a technology, process, concept, end item, system, methodology, or other discrete feature. The quantity or tenure should be limited to that needed to effectively assess the prototype."*

The legislative history for section 2371b supports an expanded use of OT authority.[7] Hence, DIUx is operating with a broad definition of a prototype project and believes such a definition enables the DoD to try out all forms of commercial innovation, not just a traditional platform, hardware, or software prototype. Agile methodologies and business models form a key part of the competitive advantages of innovative companies. These companies are the very nontraditional defense contractors and small businesses Congress intends for DoD to do business with. Precisely because the laws and regulations that pertain to procurement contracts are too onerous, Congress enacted section 2371b, which is intended to provide the DoD greater flexibility to leverage such a paradigm shift. Therefore, not only would the inability to quickly acquire these business models - through and because of this authority - for prototype use in the DoD be considered mission failure by DIUx, it would, according to the authors of Congressional statute, be going against the spirit of section 2371b. DIUx believes it is imperative that DoD not impose upon itself overly-restrictive policy definitions that no longer match today's technology and business reality or are narrower than the intent of the Congress.

What is a nontraditional contractor?

A nontraditional defense contractor is 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 DoD for the procurement or transaction, any contract or subcontract for the DoD that is subject to full coverage under the cost accounting standards (CAS) prescribed pursuant to section 1502 of title 41 of the United States Code and the regulations implementing such section.[8] Full CAS coverage applies to contractor business units that either receive a single CAS-covered contract award of $50M or more or received $50M or more in net CAS-covered contracts during its preceding cost accounting period.[9]

This generally means that a nontraditional contractor is one who has not performed significant development work for the Government in the previous year. Companies whose sales to DoD are almost exclusively commercial products will often count as a nontraditional contractor. Each company should know whether or not it is a nontraditional based on the statutory definition.

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[7] H.Conf.Rep. 114-270 (Sept. 2015) pp. 702-703.
[8] 10 U.S.C. § 2302(9)
[9] 41 U.S.C. § 1502(c)

As stated earlier, absent exceptional circumstances justified by an SPE, OTs for prototype projects can be awarded to nontraditional contractors, small businesses, or traditional contractors who pay a ⅓ cost share or team with nontraditional or small business contractors for a significant portion of the proposed work. It is important to note that "significant extent" is not defined and can be appropriately determined in multiple ways; for example, it can be measured by dollar value as a percentage of the overall work or the importance of the nontraditional technical or management contribution to the overall project.

OT Philosophy

As we have noted above, OTs are more defined by what they are not than by what they are. However, with this authority comes great responsibility. From DIUx's experience, we believe it is important that other DoD participants - including the customers and the acquisition and contracting teams - have a clearly-defined process and the requisite business acumen to successfully execute OTs. Below are general guiding principles that DIUx adheres to when executing OTs via the CSO. These are not mandatory requirements, but rather lessons learned that should inform, but not dictate, other organizations' policies and processes.

Teams and Expertise

According to Joy's law, no matter who you are, most of the smartest people work for someone else. This principle is even true when it comes to DoD. We tend to stovepipe our expertise, growing experts who are incredibly skilled in niche areas, but not "jacks of all trades." Therefore, when using a CSO to acquire cutting-edge technology, DIUx believes it is critical to build a team with the right (yet broad) expertise: agreements officers who are familiar with OTs, technical experts who understand the technology being developed or acquired, business people who can negotiate commercial deals, and warfighters who live and breathe the problems that we are trying to solve.

Rather than split these functions into different organizations, DIUx uses OTs to enable improved collaboration across these functional areas, which leads to better outcomes. Building the right team with the right expertise is critical to a successful OT program. However, it is also important to empower this team to make decisions. Once the right expertise is in place, it is important to trust those members to build the project, run the process, and enact the deal. DIUx empowers teams to be business people and problem solvers, not compliance officers, and lowers approval thresholds as much as possible to minimize redundant and ineffective reviews.

Market Research

As with any acquisition, it is important to understand the scope of the market - both commercial and traditional defense. However, when scoping the nontraditional commercial marketplace, it is important to recognize that these companies are often unaware of - or unwilling to submit to - FedBizOpps.[10] Rather than hosting traditional industry days or posting Requests for Information on

[10] FedBizOpps.gov is the required point of entry for proposals under the FAR. See FAR 5.102(a)(1).

FedBizOpps, DIUx strives to engage with nontraditional communities on their terms - and the flexible nature of OTs allows this. It is important to design processes and engagements that match the intended marketplace, and to be creative in finding new and innovative solutions to DoD problems.

Acquisition Planning and Requirements: Collaborative Project Design

Under the traditional defense acquisition and contracting process, the requiring activity develops a requirement, which generally comes with specific technical performance parameters. This is then handed to the acquisition team, who develop the acquisition strategy, and then finally to the contracting team, who procures it. Unfortunately, this waterfall approach does not easily allow for modifications along the way as the product is developed. It also assumes that the buyer knows the solution they are trying to acquire before buying it.

Rather than working from a detailed requirements document and outlining a comprehensive acquisition plan initially, DIUx works with warfighters to translate their capability gaps (not necessarily a formal requirement) into problems that a non-DoD commercial audience can understand. These problems become the basis of prototype projects, which are defined and developed jointly by DIUx, the DoD customer, and the potential vendor. This collaborative approach to joint development of a prototype project allows DIUx to leverage the critical understanding of DoD problem sets resident in our warfighters along with the nontraditional technical expertise of the potential solutions on a faster and more cost-effective basis than possible under traditional requirements-based acquisitions.

Competition

Section 2371b requires that OTs should use competitive procedures to the maximum extent practicable, but does not define specific forms of competition. Additionally, the Competition in Contracting Act (CICA), which prescribes specific competition procedures, is not applicable to OTs. Therefore, DIUx uses flexibility in prescribing competitive procedures, so long as they are fair and neither arbitrary nor capricious. To reach out to nontraditional contractors, DIUx uses creative competitions that fit the norms of the nontraditional communities they are interested in engaging. The DIUx CSO uses a merit-based competition that is both transparent and fair, similar to a Broad Agency Announcement (BAA), to solicit for and evaluate proposed solutions.

Funding

In general, Research, Development, Test & Evaluation funds (RDT&E) will be appropriate for prototype OTs. However, DIUx and its DoD customers examine and analyze each project to determine the appropriate funding on a case-by-case basis. As DIUx explores the full flexibility and application of the OT mechanism, the appropriate funding for different types of prototypes, as highlighted above, continues to be an emerging and - as yet - unsettled issue. DIUx is presently engaged with OGC to resolve these issues.

Cost Sharing

As discussed above, cost sharing is required for traditional contractors under prototype OTs if there is no significant nontraditional or small business participation. However, it is important to remember that cost accounting standards are not required under OTs. This can remove the onerous (and expensive) requirement for nontraditional contractors to adopt government accounting systems. Additionally, cost shares from contractors can take the form of cash and in-kind contributions. As with all aspects of OT acquisitions, DIUx believes that negotiations should be creative to develop the best deal for both parties.

While cost-sharing is only required for traditional contractors (absent SPE justification), DIUx believes that it should be used creatively to finance and develop projects as appropriate. For example, cost-sharing could be used to combine public and private financing in OTs for development of dual-use technology. Cost-sharing could also be used to incentivize and encourage particular outcomes. DIUx believes the flexibility afforded under OTs can be used to develop creative acquisition solutions to meet unique needs.

Clauses and Negotiations

The nature of the agreement and the clauses included should be structured to accomplish the unique aims of each individual agreement. While templates may be a useful starting point, all terms and conditions of OTs are negotiable - and DIUx teams use commercial contract terms over FAR-based clauses. Commercial practices and oversight structures are also considered. DIUx uses a template OT agreement with some basic clauses to send to a prospective contractor for review. However, specific terms and conditions are negotiated with each vendor - and potentially changed based on the needs of the particular project.

Care is also be taken not to impose overly-restrictive government terms merely because they are traditionally used. Oftentimes, nontraditional companies are hesitant to work with the government because of these overly-restrictive clauses. DIUx is open to doing business on more commercial-like terms in order to work with nontraditional companies, while ensuring that the government's interests are protected.

Payment Milestones and Advance Payments

As discussed above, all terms and conditions are flexible - including milestone payments. DIUx works with companies to come up with milestone payments that incentivize the right outcomes on the project, while still providing the right funding flexibility for a nontraditional. This may often result in advance payments (payments made in advance of deliverables). Properly done, advance payments can provide the capital injection needed to take precious engineering resources off of commercial projects to dedicate to DoD work - a result that may not be possible otherwise. DIUx views advance payments as a tool to entice nontraditional companies to work with DoD, rather than as an exception.

Decision Points and Modifications

DIUx may not have all of the knowledge - or funding - to execute a full project all at once. In these situations, it may be helpful to structure the agreement in tranches. Each tranche should represent

discrete and severable work to be accomplished for a particular price. At the conclusion of that work, the government may decide to fund (or not fund) the next tranche depending upon the outcome of the initial work. These follow-on tranches may be changed depending on the outcome of the initial work, or may remain the same. Funding for additional tranches must be sent before that particular work is begun, but does not have to be there at the start of the project. This enables an agile development approach for companies, while maintaining a flexible acquisition strategy that provides an off-ramp for non-performance with minimal investment loss. So long as this work falls within the scope of the original solicitation the company applied to (but not necessarily within the original statement of work), these modifications are considered in scope and can be done without needing to reopen the work for additional competition.

Data Rights and Intellectual Property

Data rights and intellectual property are important considerations in any agreement. When designing OT prototype projects, because this work is still at the prototype stage (and not yet at the point where it needs to be sustained), DIUx is open to flexible intellectual property (IP) clauses and weighs the risks and benefits accordingly. Additionally, products acquired under OTs may be commercial products sold to commercial customers, but adapted for DoD use. As such, the valuable IP of these companies should be respected. As each situation is different, DIUx makes use of government IP attorneys and takes the specifics of each case into consideration when allocating and negotiating IP clauses rather than defaulting to a pre-conceived stance. Additionally, since many pilot projects leverage commercial products, the company is incentivized to improve the product for their commercial marketplace. If the government incentivized the creation of a separate, government-specific version, through aggressive IP clauses, it could sever the government's product from the commercial product improvements. Finally, a good best practice is to clearly identify the data rights associated with each prototype deliverable to ensure that all parties are on the same page. More information on intellectual property can be found in OSD's January 2016 white paper on intellectual property.[11]

Follow-on Production

One of the most valuable aspects of OTs is the ability to quickly move from prototype to production work. In the FY16 NDAA, Congress granted DoD the authority to award follow-on production contracts or transactions without re-competing the work, provided that the original OT was competitively awarded (all projects awarded via the DIUx CSO are competitive) and that the prototype project was successful.[12] There are no additional statutory requirements provided, including cost sharing or involvement of nontraditional contractors. As such, DIUx will be creative in designing follow-on production contracts and transactions that maximize flexibility and allow the DoD to quickly and flexibly procure and field innovation to the warfighter.

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[11] https://acc.dau.mil/adl/en-US/737728/file/81303/IP%20White%20paper%20from%20osd%20Jjan%202016.pdf

[12] *See* 10 USC § 2371b(f). (See Appendix A)

Flexible and Adaptable

Section 2371b provides significant flexibility in how DoD can use OTs for prototype projects. Any organization with the delegated authority has the ability to design a process to award OTs for prototype projects to meet its particular needs. DIUx designed the CSO to work *directly* with nontraditional innovators at the speed of business. Other DoD offices have designed different processes to leverage OT authority. For example, ACC-NJ also manages several OTs awarded to consortia. The Air Force has developed a mechanism called Open Systems Acquisition (OSA), which combines ACC-NJ's consortium OT model with PlugFest industry events to acquire open architecture enterprise information systems. While this guide will only cover DIUx's CSO, DIUx encourages organizations to investigate all examples of OT application.

DIUx Example: CSO

To effectively accomplish our mission of working directly with nontraditional innovators, DIUx decided to design an alternative process that married the solicitation method popularized in Broad Agency Announcements (BAAs) with prototype OT authority. This combination allows DoD to work directly with innovators on a fast, flexible, and collaborative basis, using a phased evaluation process. While these evaluations are important, they are also brief - as speed is key, our evaluations are done in sentences and paragraphs, rather than pages and papers. Brevity, effective arguments, and key details are the hallmarks of our evaluations.

Solicitation

In order to solicit solutions from companies, DIUx posts Areas of Interest (AOIs) on its website, www.diux.mil/workwithus. These AOIs describe problems to be solved or particular technologies we are interested in, not detailed specifications and requirements. By keeping these AOIs broad, DIUx keeps ourselves open to all possible solutions from vendors. Generally, AOIs are only a few sentences to a paragraph, and explain in layman's terms (not military jargon) the problem or technology. Each AOI is posted for a certain length of time, from a week to several months. However, prior to posting an AOI, DIUx leverages its unique networks to understand the potential scope of the existing commercial market, the likely vendors who may respond, and works with this network to reach out to these communities and encourage nontraditional vendors to respond.

As an example, past AOIs posted include:

- **Multifactor Authentication**: A scalable, interoperable authentication solution to reduce reliance on passwords and smart card-based authentication across DoD system and applications. Solution must support multiple server and host-based operating systems, be immediately available and proven in a commercial environment, and must demonstrate means for operation within latent or disconnected network environments. Solution must be demonstrated in an operational environment integrated with industry standard network domain management such as Microsoft's Active Directory Domain Services.
- **Endpoint Querying Solution**: An endpoint security and management solution that executes queries and actions over millions of endpoints in near real-time. It should take a platform approach that is

scalable and flexible to accommodate changing and/or expanding network infrastructures. Accurate endpoint data should provide visibility across IT and security operations to facilitate threat detection, incident response, patch management, asset inventory, etc. Solution should be commercially available and tested in customer production networks.

- **Command, Control, and Situational Awareness:** Web-based software platform supporting defense contributions to the US Government's shaping and influence efforts. Must provide defense users the ability to visualize relevant activities and operational metrics, collaboratively plan and approve defense activities, and monitor/manage subsequent execution. Platform must be capable of processing and displaying relevant US government and publicly available information on accredited networks at various classification levels in order to support decision making. Platform must support various analytics and visualizations suitable for operations centers, individual workstations, and tablets/smart phones. Platform must provide a "plug and play" architecture so that individual data sources and/or analytics can be added or replaced based on cost, performance, and other factors. Key performance criteria include:
    - A functional prototype or higher level of maturity, with demonstrated real-world use
    - A demonstrated ability to deploy to multiple networks
    - Support for federated deployments / communications between deployed instances
    - Fine-grained user access controls, with support for PKI certificates
    - Ability to store, process, and display organizational plans, objectives, and activities
    - Ability to store, process, and display news, social media, and broadcast television content
    - Semantic-reasoning capabilities that leverage access to organizational knowledge (plans, objectives, activities, etc.) to identify additional information of interest to system users

If vendors believe they have a solution to a particular AOI, they submit a solution brief via our website. Using our website rather than FedBizOpps allows for companies to interact easily with us: the webform is simple to understand and easy to use. Solution briefs can take the form of a short paper (five pages or less) or a short slide deck (fifteen slides or less), and describe only two things: the company's technology and the company itself. At this initial stage, without a clearly defined project, we only request this basic information about a company and its technology - NOT a full proposal. This minimizes the initial amount of work potential offerors need to put forth - offerors who are often unfamiliar with writing proposals for DoD - and allows us to focus initially on the strength of the company and its technology.

Evaluation - Phase I

DIUx employs a three-phased approach to evaluate submissions to the CSO. In this initial phase, we evaluate a company's solution brief on four factors:

1) Relevance: Is the company's submission relevant to the posted AOI? (If not, the submission is not evaluated further)
2) Technical Merit: Can the company's proposed solution feasibly address the AOI?
3) Business Viability: Is the company strong enough to effectively accomplish this work?
4) Innovation: Does the solution represent a unique, innovative, or previously under-utilized solution?

The evaluation team, generally composed of problem and technical experts from DIUx and our DoD customers and led by DIUx, evaluates each submission along these four factors, but importantly, not against other solutions. Since the AOIs are broad and don't contain specific work that companies must propose to, we evaluate each solution on its own merit, rather than in comparison to other submissions. The team also has the option to request a demonstration from the company to validate the information provided in the Solution Brief. The team documents their evaluation on each of the four factors above using a phase I evaluation form.

Based on the results of the evaluation, a company will either receive a non-selection letter from the Agreements Officer providing a short summary of why the solution brief was not selected, or an invitation to continue to the next phase. The non-selection letter is generally short, and provides the basic rationale from the evaluation as to why the company was not selected.

In traditional defense contracting, companies whose proposals are not selected may request and be entitled to a full debriefing explaining why they were not selected. In our case, since DIUx only requests minimal information from a company at this initial stage (and not a full proposal), we generally will not provide significant feedback beyond the letter. However, if companies are not selected further along in the process, as described below, correspondingly more information is provided as to the basis for this non-selection.

Pitch - Phase II

The second phase of the CSO process is the pitch. Benchmarking from commercial best practices, this step mirrors the way a start-up would pitch to a venture capital firm for funding or a vendor would attempt to secure a contract from another commercial firm. Upon a favorable phase I evaluation, the DIUx lead schedules time for the company to come in and pitch to DIUx leadership. The DoD customer, DIUx, and ACC-NJ are all present at the pitch, either in person, via videoconference, or phone. During the pitch, the company discusses its technology and potential projects in more detail, while the customer and DIUx discuss potential use cases and project structures with the company. During the pitch, the company is also expected to present and discuss rough order of magnitude (ROM) cost and schedule. Order of magnitude is key here - since we still have yet to define the scope of the project, the company cannot be expected to propose a specific cost and schedule. However, based on the company's projects with other customers, we should be able to understand at a high level how much this technology or development should cost ($500K or $5M?) and how long it would take to implement (six months or three years?).

Following the pitch, the evaluation team re-evaluates the company on the phase I criteria (technology, company, etc.) as well as three additional factors:

1) Cost: Does the ROM cost meet the government's allocated budget?
2) Schedule: Does the ROM schedule meet the government's timeline?
3) Data Rights: Are there any data rights issues that we should be cognizant of moving forward?

If the evaluation team recommends moving forward, ACC-NJ will issue a Request for Prototype Proposal (RPP) to the company, inviting it to submit a proposal. If the evaluator does not recommend

moving forward, DIUx schedules a call with the company to explain why we are not moving forward. Generally, the DIUx project lead will execute this call.

The evaluation team can decide to move forward with 0-n of the submissions received, and in fact, DIUx encourages our DoD customers to select more than one approach to prototype. Rather than down-selecting to one approach before prototypes are built or delivered, the selection of multiple prototypes or approaches allows the DoD to try out different options before ultimately settling on the best one(s).

Finally, DIUx does not reimburse companies for any costs incurred traveling to pitch. Instead, DIUx always offers the option to pitch via telephone or videoconference should a company not wish to travel.

Kick-offs - Collaborative Design

Once an RPP is issued, DIUx schedules a kick-off meeting with the company, the DoD customer, and the agreements officer (AO). At this meeting, the DoD team first explains the proposal process to the vendor. As many of these companies have never worked with the government before, we explain the nature of an OT, what should be in the proposal, and how the negotiation process works.

Additionally, the government team will provide an initial model OT to the company. This document provides the government's opening position for negotiations with the company, and allows them to become familiar with the base terms and conditions of the agreement as they develop their proposal. Before providing this to the company, DIUx, ACC-NJ, and the DoD customer review the model OT and add or subtract clauses as necessary to fit this particular project. Considerations include the allocation of intellectual property rights and any OPSEC or classification concerns. Thus, the baseline OT provided to the company represents the government's going-in position for negotiations.

The most important function of the kick-off meeting is to introduce the concept of collaborative design. Whereas most government solicitations require little to no contact between the offeror and customer, and feature a detailed Statement of Work (SOW) or Performance Work Statement (PWS) that a company must propose to, the CSO enables a very different approach. Rather than the government developing the SOW, the vendor develops the SOW in collaboration with DIUx and the DoD customer. This collaboration between the problem owners (DoD) and the solution owners (the company) results in a prototype project and scope that is best designed to meet the needs of both parties. This is a fundamentally different approach from traditional government contracting - but this collaboration results in increased communication and better outcomes for all parties involved. During this process, the government team and the company team can hash out different ideas, send drafts of the proposal and SOW back and forth, and collaborate until a mutually-beneficial project design is agreed upon.

An important part of this collaboration is designing the payment milestones and/or tranches of the project. First, a contractor may prefer larger project payments up-front to meet investor deadlines or to pay for heavy capital expenditures, among other reasons. The government team works together with the company to design payment milestones that mirror commercial practices, meet the cash flow

needs of the company, and incentivize the right project outcomes. Second, the CSO process often proves too fast for the government's slow budgeting and programming system. In many cases, we have worked with customers who have some initial funding, but must wait months or even years to get the bulk of funding for a project. In other cases, the customer may want to start with just an initial segment of work to determine if the contractor can perform as expected. Rather than waiting for all of a customer's funding to be available, or funding an entire project scope all at once, we often "tranche" a contract into discrete buckets of work and individually fund them. These tranches can be outlined and priced out at the initial award, or added later.

Proposal - Phase III

At this point in the CSO process, the final SOW has been designed collaboratively by DIUx, the DoD customer, and the company to provide the best solution. Accordingly, we do not evaluate the proposal for technical merit, for all concerns should have been addressed during the drafting of the proposal/SOW. Instead, a final written recommendation is made by the evaluation team that the company and proposal meet the statutory requirements for an OT award.

The information included in this recommendation is later used by the agreements officer in their Determination and Findings (D&F) to justify award of the OT.

Additionally, the evaluation team performs an analysis to ensure that the proposed price is acceptable to the government. There is neither the requirement that a price meet the FAR-based standard of fair and reasonable, nor is there a requirement to use common government price analysis tools. While it is important to make sure that the government is not overpaying for a particular project, DIUx balances that consideration with a need to move at speed, work within industry (not government) norms, and balance price against other variables. Accordingly, the evaluation team will write a final cost evaluation that notes which price analysis methods were used and provides a rationale as to why the proposed price is in the best interest of the government.

Some price analysis methods used include published or provided price lists, previous contract prices (commercial or government), parametric or cost estimation, similar-item comparison, expert technical analysis, subject matter expertise on nontraditional methods, or potential return on investment. Generally, it is a combination of these methods, along with requested information from the company, that allow the evaluation team and agreements officer to determine that a price is acceptable.

Negotiations and Awards

Once the final evaluation is complete, the agreements officer will negotiate the terms and conditions of the OT with the company. Often, this is a short and simple process - the company may be willing to sign the baseline OT without any changes. More often than not, they will have clarifying questions and want to tweak a few clauses. On some rare occasions, significant changes have been requested. Regardless, the government team (led by the agreements officer) will work to negotiate the best deal for both parties. In the rare case of significant changes, the project cost and evaluation are adjusted to consider the changed terms.

Once the terms and conditions are finalized, the agreements officer will put together a Determination and Findings (D&F) using the phase III evaluation described above, obtain the concurrence of legal and approval of the Principal Assistant Responsible for Contracting (PARC) who holds the OT authority, and then sign and award the OT.

OT Modifications

During the execution of the prototype project, we may want to modify the scope of the OT. This is generally driven by technical changes, new or additional use cases, or new information. DIUx believes flexibility is the key to the success of OTs. So long as the scope changes are within the original AOI solicitation that the company applied to (not within the original SOW, as often this is what must be changed), the government team (led by the agreements officer) and the contractor work together to outline the proposed changes and modify the OT accordingly.

Follow-on Production

As of this publication, DIUx has not yet completed the first of its initial prototype projects, and hence has not had the opportunity to use the new, powerful follow-on production authority. However, at the conclusion of these projects, we plan to memorialize how the prototype project was competitive (solicited via the CSO) and why the project was (or was not) successful. This memorialization will then serve as the basis from which DIUx (and other DoD Components using OTs) can leverage the follow-on production authority outlined in 2371b without additional competition. This guide is a living document, and will be updated upon further execution of these authorities by DIUx or further guidance from Congress, DPAP, or OGC.

Systems

To carry out its unique mission, DIUx uses the very same task management, document storage and collaboration, and customer relationship management software that is used by most Venture Capital Funds and technology firms. The use of these or other commercial best-of-breed systems to manage workflow allows us to collaborate more effectively with each other and to communicate better with nontraditional companies.

Conclusion

The CSO and OTs have allowed DIUx to demonstrate to nontraditional companies and the DoD alike that the military can move at the speed of business. While it is important to be good stewards of taxpayer dollars, we must also be careful not to sacrifice project results and incur opportunity costs for the sake of removing all project risk via involved process. For the sake of accelerating innovation into the hands of the warfighter, and therefore increasing the mission effectiveness of our fighting forces, people should be informed, empowered, and trusted to take reasonable risks in the piloting of innovative technology. DoD must move at the pace of commercial innovation or risk being left behind not only by the commercial marketplace, but by our adversaries as well.

Additional Information

For additional information, please contact:

DIUx:
CSOquestions@diux.mil

ACC-NJ:
usarmy.pica.acc.mbx.diuxcso@mail.mil

DPAP:
osd.pentagon.ousd-atl.mbx.cpic@mail.mil

Appendices

Appendix A: 10 U.S.C. § 2371b (2016)
Appendix B: AT&L OT Guide (2002)
Appendix C: DIUx CSO White Paper (2016)

Appendix A: 10 U.S.C. § 2371b (2016)

10 U.S. Code § 2371b - Authority of the Department of Defense to carry out certain prototype projects

(a)Authority.—

(1)

Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of this title, carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

(2) The authority of this section—

(A)may be exercised for a prototype project that is expected to cost the Department of Defense in excess of $50,000,000 but not in excess of $250,000,000 (including all options) only upon a written determination by the senior procurement executive for the agency as designated for the purpose of section 1702(c) of title 41, or, for the Defense Advanced Research Projects Agency or the Missile Defense Agency, the director of the agency that—

(i)

the requirements of subsection (d) will be met; and

(ii)

the use of the authority of this section is essential to promoting the success of the prototype project; and

(B)may be exercised for a prototype project that is expected to cost the Department of Defense in excess of $250,000,000 (including all options) only if—

(i)the Under Secretary of Defense for Acquisition, Technology, and Logistics determines in writing that—

(I)

the requirements of subsection (d) will be met; and

(II)

the use of the authority of this section is essential to meet critical national security objectives; and

(ii)

the congressional defense committees are notified in writing at least 30 days before such authority is exercised.

(3)

The authority of a senior procurement executive or director of the Defense Advanced Research Projects Agency or Missile Defense Agency under paragraph (2)(A), and the authority of the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (2)(B), may not be delegated.

(b)Exercise of Authority.—

(1)

Subsections (e)(1)(B) and (e)(2) of such section 2371 shall not apply to projects carried out under subsection (a).

(2)

To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out projects under subsection (a).

(c)Comptroller General Access to Information.—

(1)

Each agreement entered into by an official referred to in subsection (a) to carry out a project under that subsection that provides for payments in a total amount in excess of $5,000,000 shall include a clause that provides for the Comptroller General, in the discretion of the Comptroller General, to examine the records of any party to the agreement or any entity that participates in the performance of the agreement.

(2)

The requirement in paragraph (1) shall not apply with respect to a party or entity, or a subordinate element of a party or entity, that has not entered into any other agreement that

provides for audit access by a Government entity in the year prior to the date of the agreement.

(3)

(A)

The right provided to the Comptroller General in a clause of an agreement under paragraph (1) is limited as provided in subparagraph (B) in the case of a party to the agreement, an entity that participates in the performance of the agreement, or a subordinate element of that party or entity if the only agreements or other transactions that the party, entity, or subordinate element entered into with Government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under this section or section 2371 of this title.

(B)

The only records of a party, other entity, or subordinate element referred to in subparagraph (A) that the Comptroller General may examine in the exercise of the right referred to in that subparagraph are records of the same type as the records that the Government has had the right to examine under the audit access clauses of the previous agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

(4)

The head of the contracting activity that is carrying out the agreement may waive the applicability of the requirement in paragraph (1) to the agreement if the head of the contracting activity determines that it would not be in the public interest to apply the requirement to the agreement. The waiver shall be effective with respect to the agreement only if the head of the contracting activity transmits a notification of the waiver to Congress and the Comptroller General before entering into the agreement. The notification shall include the rationale for the determination.

(5)

The Comptroller General may not examine records pursuant to a clause included in an agreement under paragraph (1) more than three years after the final payment is made by the United States under the agreement.

(d)Appropriate Use of Authority.—

(1) The Secretary of Defense shall ensure that no official of an agency enters into a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section unless one of the following conditions is met:

(A)

There is at least one nontraditional defense contractor participating to a significant extent in the prototype project.

(B)

All significant participants in the transaction other than the Federal Government are small businesses or nontraditional defense contractors.

(C)

At least one third of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the Federal Government.

(D)

The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures 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.

(2)

(A)

Except as provided in subparagraph (B), the amounts counted for the purposes of this subsection as being provided, or to be provided, by a party to a transaction with respect to a prototype project that is entered into under this section other than the Federal Government do not include costs that were incurred before the date on which the transaction becomes effective.

(B) Costs that were incurred for a prototype project by a party after the beginning of negotiations resulting in a transaction (other than a contract, grant, or cooperative agreement) with respect to the project before the date on which the transaction becomes effective may be counted for purposes of this subsection as being provided, or to be provided, by the party to the transaction if and to the extent that the official responsible for entering into the transaction determines in writing that—

(i)

the party incurred the costs in anticipation of entering into the transaction; and

(ii)

it was appropriate for the party to incur the costs before the transaction became effective in order to ensure the successful implementation of the transaction.

(e)Definitions.—In this section:

(1)

The term "nontraditional defense contractor" has the meaning given the term under section 2302(9) of this title.

(2)

The term "small business" means a small business concern as defined under section 3 of the Small Business Act (15 U.S.C. 632).

(f)Follow-on Production Contracts or Transactions.—

(1)

A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction.

(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 of this title, if—

(A)

competitive procedures were used for the selection of parties for participation in the transaction; and

(B)

the participants in the transaction successfully completed the prototype project provided for in the transaction.

(3)

Contracts and transactions entered into pursuant to this subsection may be awarded using the authority in subsection (a), under the authority of chapter 137 of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

(g)Authority To Provide Prototypes and Follow-on Production Items as Government-furnished Equipment.—

An agreement entered into pursuant to the authority of subsection (a) or a follow-on contract or transaction entered into pursuant to the authority of subsection (f) may provide for

prototypes or follow-on production items to be provided to another contractor as Government-furnished equipment.

(h)Applicability of Procurement Ethics Requirements.—

An agreement entered into under the authority of this section shall be treated as a Federal agency procurement for the purposes of chapter 21 of title 41.

Appendix B: AT&L OT Guide (2002)

"OTHER TRANSACTIONS" (OT)

GUIDE

FOR PROTOTYPE PROJECTS

UNDER SECRETARY OF DEFENSE

FOR

ACQUISITION, TECHNOLOGY AND LOGISTICS

THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

ACQUISITION, TECHNOLOGY AND LOGISTICS

21 Dec 2000

FOREWORD

This Guide provides a framework that should be considered and applied, as appropriate, when using "other transaction" authority for prototype projects directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department. There are some mandatory requirements included in the Guide that are evident by the prescriptive language used.

This Guide supercedes the following memorandums:

1) USD(AT&L) memorandum , "10 U.S.C. 2371, Section 845, Authority to Carry Out Certain Prototype projects," December 14, 1996.
2) USD(AT&L)/DDP memorandum, "Assignment of Instrument Identification Numbers and Collection of Common Data Elements for Section 845 Other Transactions (Report Control Symbol DD-A&T(AR)2037)," October 16, 1997.
3) USD(AT&L)/DDP memorandum, "Financial and Cost Aspects of Other Transactions for Prototype Projects," October 23, 1998.
4) USD(AT&L)/DDP memorandum, "Comptroller General Access on Certain "Other Transaction" Agreements for Prototype Projects," June 7, 2000.
5) USD(AT&L) memorandum, "Section 803 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 - "Other Transaction" Authority for Prototype Projects," December 6, 2000.

Send recommended changes to the Guide through your agency's POC to:

Director, Defense Procurement
3060 Defense Pentagon
Washington, DC 20301-3060

/signed/

J. S. Gansler

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TABLES

DL1. DEFINITIONS

DL1.1. Administrative Agreements Officer. An Administrative Agreements Officer has authority to administer OTs for prototype projects and, in coordination with the Agreements Officer, make determinations and findings related to the delegated administration functions. If administrative functions are retained by the contracting activity, the Agreements Officer serves as the Administrative Agreements Officer.

DL1.2. Agency. Agency means any of the military departments or defense agencies with authority to award OTs for prototype projects.

DL1.3. Agency level Head of the Contracting Activity. The Agency level Head of the Contracting Activity is the Head of the Contracting Activity within the Agency that has been delegated overall responsibility for the contracting function within the Agency. For the military departments this includes ASA(ALT)/SAAL-ZP, ASN(RDA)ABM and SAF/AQC.

DL1.4. Agreements Officer. An individual with authority to enter into, administer, or terminate OTs for prototype projects and make related determinations and findings.

DL1.5. Awardee. Any business unit that is the direct recipient of an OT prototype agreement.

DL1.6. Business unit. Any segment of an organization, or an entire business organization which is not divided into segments.

DL1.7. Contracting activity. Contracting activity means an element of an agency designated by the agency head and delegated broad authority regarding acquisition functions. It also means elements designated by the director of a defense agency which has been delegated contracting authority through its agency charter.

DL1.8. Cost-based procurement contract. A cost-based procurement contract is a procurement contract that is subject to the provisions of Part 31 of the Federal Acquisition Regulation (FAR), Cost Accounting Standards (CAS), or was awarded after the submission of cost or pricing data.

DL1.9. Cost-type OT. Cost-type OTs include agreements where payments are based on amounts generated from the awardee's financial or cost records or that require at least one third of the total costs to be provided by non-federal parties pursuant to statute. This includes interim and final milestone payments that may be adjusted for actual costs incurred.

DL1.10. Fixed-price type OT. Fixed-price type OTs include agreements where payments are not based on amounts generated from the awardee's financial or cost records.

DL1.11. Head of the contracting activity (HCA). The HCA includes the official who has overall responsibility for managing the contracting activity.

DL1.12. Key Participant. A key participant is a business unit that makes a significant

contribution to the prototype project. Examples of what might be considered a significant contribution include supplying new key technology or products, accomplishing a significant amount of the effort, or in some other way causing a material reduction in the cost or schedule or increase in performance.

DL1.13. Nontraditional Defense contractor. A business unit that has not, for a period of at least one year prior to the date of the OT agreement, entered into or performed on (1) any contract that is subject to full coverage under the cost accounting standards prescribed pursuant to section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 422) and the regulations implementing such section; or (2) any other contract in excess of $500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency that is subject to the Federal Acquisition Regulation.

DL1.14. Procurement contract. A procurement contract is a contract awarded pursuant to the Federal Acquisition Regulation.

DL1.15. Project Manager. Project Manager is the government manager for the prototype project.

DL1.16. Segment. One of two or more divisions, product departments, plants, or other subdivisions of an organization reporting directly to a home office, usually identified with responsibility for profit and/or producing a product or service.

DL1.17. Senior Procurement Executive. The following individuals:

Department of the Army - Assistant Secretary of the Army (Acquisition, Logistics and Technology);

Department of the Navy - Assistant Secretary of the Navy (Research, Development and Acquisition);

Department of the Air Force - Assistant Secretary of the Air Force (Acquisition).

The directors of defense agencies who have been delegated authority to act as senior procurement executive for their respective agencies.

DL1.18. Subawardee. Any business unit of a party, entity or subordinate element performing effort under the OT prototype agreement, other than the awardee.

INTRODUCTION

"Other transactions" is the term commonly used to refer to the 10 U.S.C. 2371 authority to enter into transactions other than contracts, grants or cooperative agreements. The Department currently has temporary authority to award "other transactions" (OTs) in certain circumstances for prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department.

"Other Transactions" for prototype projects are acquisition instruments that generally are not subject to the federal laws and regulations governing procurement contracts. As such, they are not required to comply with the Federal Acquisition Regulation (FAR), its supplements, or laws that are limited in applicability to procurement contracts.

This acquisition authority**,** when used selectively, is a vital tool that will help the Department achieve the civil and military integration that is critical to reducing the cost of defense weapon systems. This authority provides the Department an important tool that should be used wisely. In accordance with statute, this authority may be used only when:

(A) there is at least one nontraditional defense contractor participating to a significant extent in the prototype project; or

(B) no nontraditional defense contractor is participating to a significant extent in the prototype project, but at least one of the following circumstances exists:

(i) at least one third of the total cost of the prototype project is to be paid out of funds provided by the parties to the transaction other than the federal government.

(ii) the senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a procurement contract.

Agreements Officers and Project Managers are encouraged to pursue competitively awarded prototype projects that can be adequately defined to establish a fixed-price type of agreement and attract nontraditional defense contractors participating to a significant extent.

The Guide is intended to provide a framework for the Agreements Officer, Project Manager and other members of the government team to consider and apply, as appropriate, when structuring an OT agreement for a prototype project. However, there are some mandatory requirements included in the Guide that are evident by the prescriptive language used. Individuals using this authority should have a level of responsibility, business acumen, and judgment that enables them to operate in this relatively unstructured environment. These individuals are responsible for negotiating agreements that appropriately reflect the risks undertaken by all parties to the agreement, incorporate good business sense and appropriate safeguards to protect the government's interest.

C1. CHAPTER 1

INTRODUCTORY INFORMATION

C1.1 BACKGROUND

C1.1.1. General. 10 U.S.C. 2371 authorizes award of transactions other than contracts, grants or cooperative agreements. Awards made pursuant to this authority are commonly referred to as "other transaction" (OT) agreements. There are two types of commonly used OTs.

C1.1.2. "Other Transactions" for Prototype Projects. These types of OTs are authorized by Department of Defense (DoD) Authorization Acts with sunset provisions and are found in the U.S. Code as a Note in 10 U.S.C. 2371. Section 845 of Public Law 103-160, as amended, authorizes the use of OTs, under the authority of 10 U.S.C. 2371, under certain circumstances for prototype projects directly relevant to weapons or weapon systems proposed to be acquired or developed by the DoD. This type of OT is treated by DoD as an acquisition instrument, commonly referred to as an "other transaction" for a prototype project or a section 845 "other transaction".

C1.1.3. "Other Transactions" Not Covered by this Guide. This guide does not apply to OTs used to carry out basic, applied or advanced research projects in accordance with 10 U.S.C. 2371. For example, the authority of 10 U.S.C. 2371 currently is used to award Technology Investment Agreements (TIAs) in instances where the principal purpose is stimulation or support of research.

C1.1.4. Focus of this Guide. This guide focuses on OTs for prototype projects.

C1.2. STATUTORY DIRECTION ON THE USE OF AUTHORITY

C1.2.1. Directly relevant. Prototype projects must be directly relevant to weapons or weapon systems proposed to be acquired or developed by the DoD.

C1.2.2. Appropriate Use. This authority may be used only when:

(A) there is at least one nontraditional defense contractor participating to a significant extent in the prototype project (see definitions and C1.5.1); or

(B) no nontraditional defense contractor is participating to a significant extent in the prototype project, but at least one of the following circumstances exists:

(i) at least one third of the total cost of the prototype project is to be paid out of funds provided by the parties to the transaction other than the federal government.

(ii) the senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a procurement contract.

C1.2.3. Competition. To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out prototype projects under this authority (see section C2.1.3.1.6.).

C1.2.4. No Duplication. To the maximum extent practicable, no transaction entered into under this authority provides for research that duplicates research being conducted under existing programs carried out by the DoD.

C1.2.5. Comptroller General Access. OTs for prototype projects that provide for total government payments in excess of $5,000,000 must include a clause that provides for Comptroller General access to records (see section C2.15.).

C1.2.6. Annual Reporting. A report must be submitted to Congress each year on the use of OT authority (see section C3.1.1.).

C1.2.7. Permissive Language in 10 U.S.C. 2371. The authority may be exercised without regard to section 31 U.S.C. 3324 regarding advance payments, however see section C2.17.3. A transaction may include a clause that requires payments to any department or agency of the federal government as a condition for receiving support under an OT and provides for separate support accounts (see C2.4.). Participants may also protect certain information (see C2.5.).

C1.3 INDIVIDUAL AUTHORITY

C1.3.1. Agency authority. Section 845 of Public Law 103-160, as amended, authorizes the Director of Defense Advanced Research Projects Agency (DARPA), the Secretaries of the Military Departments, and any other official designated by the Secretary of Defense to enter into transactions (other than contracts, grants or cooperative agreements) under the authority of 10 U.S.C. 2371 for certain prototype projects. The Secretary of Defense has delegated authority and assigned responsibilities to the Undersecretary of Defense (Acquisition, Technology & Logistics). The USD(AT&L) has designated the Directors of the Defense Agencies as having the authority to use section 845 OTs. USD(AT&L) expects that any delegation to use this authority will be to officials whose level of responsibility, business acumen, and judgment enable them to operate in this relatively unstructured environment.

C1.3.2. Agreements Officer authority. Agreements Officers for prototype projects must be warranted contracting officers with a level of responsibility, business acumen, and judgment that enables them to operate in this relatively unstructured environment. Agreements Officers may bind the government only to the extent of the authority delegated to them as contracting officers.

C1.3.3. Administrative Agreements Officer authority. Administrative Agreements Officers for prototype projects must be warranted contracting officers with a level of responsibility, business acumen, and judgment that enables them to operate in this relatively unstructured environment. Their authority is limited to the functions delegated to them by the Agreements Officer and the terms of the agreement.

C1.3.4. Points of Contact. Points of contact (POC) referred to throughout this Guide or for information regarding prototype OTs can be found at the Director, Defense Procurement's (DDP) Home Page at http://www.acq.osd.mil/dp (under Defense Systems Procurement Strategies) and in the DoD Deskbook at Http://web2.deskbook.osd.mil/default.asp?tasklist.asp (under Special Interest Items, "Section 845 Other Transaction Authority").

C1.4. LEGISLATIVE AUTHORITY.

"Other Transactions" for Prototype Projects are instruments that are generally not subject to the federal laws and regulations governing procurement contracts. As such, they are not required to comply with the Federal Acquisition Regulation (FAR), its supplements, or laws that are limited in applicability to procurement contracts, such as the Truth in Negotiations Act and Cost Accounting Standards (CAS). Similarly, OTs for prototype projects are not subject to those laws and regulations that are limited in applicability to grants and cooperative agreements. A list of statutes that apply to procurement contracts, but that are not necessarily applicable to OTs for prototype projects is at Appendix 1. The list is provided for guidance only, and is not intended to be definitive. To the extent that a particular requirement is a funding or program requirement or is not tied to the type of instrument used, it would generally apply to an OT, e.g., fiscal and property laws. Each statute must be looked at to assure it does or does not apply to a particular funding arrangement using an OT. Use of OT authority does not eliminate the applicability of all laws and regulations. Thus, it is essential that counsel be consulted when an OT will be used.

C1.5. REASONS TO USE AUTHORITY.

C1.5.1. Nontraditional defense contractor. It is in the DoD's interest to tap into the research and development being accomplished by nontraditional defense contractors, and to pursue commercial solutions to defense requirements. One justifiable use of this authority is to attract nontraditional defense contractors that participate to a significant extent in the prototype project. These nontraditional defense contractors can be at the prime level, team members, subcontractors, lower tier vendors, or "intra-company" business units; provided the business unit makes a significant contribution to the prototype project (i.e., is a key participant). Examples of what might be considered a significant contribution includes supplying new key technology or products, accomplishing a significant amount of the effort, or in some other way causing a material reduction in the cost or schedule or increase in the performance. The significant contribution expected of the nontraditional defense contractor(s) must be documented in the agreement file, typically in the agreement analysis (see C2.1.4.1.). The involvement of nontraditional defense contractors that participate to a significant extent in the prototype project will be tracked as a metric via the DD 2759 and addressed in the statutorily required report to Congress (see sections C2.2 and C3.1).

C1.5.2. Other benefit to the government. If a nontraditional defense contractor is not participating to a significant extent in the prototype project then either (i) at least one third of the total cost of the prototype project is to be paid out of funds provided by the parties to the transaction other than the federal government, or (ii) the senior procurement executive (SPE) for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or

appropriate under a procurement contract. Generally, the government should not mandate cost-sharing requirements for defense unique items, so use of OT authority that invokes cost-sharing requirements should be limited to those situations where there are commercial or other benefits to the awardee. Any justification for the use of OTA based on exceptional circumstances must be approved by the SPE in accordance with agency procedures and fully describe the innovative business arrangements or structures, the associated benefits, and explain why they would not be feasible or appropriate under a procurement contract. The reason for using OTA will be tracked as a metric via the DD 2759 and addressed in the statutorily required report to Congress (see sections C2.2 and C3.1).

C1.6. SCOPE OF PROTOTYPE PROJECTS

OT prototype authority may be used only to carry out prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department. As such, any resulting OT awards are acquisition instruments since the government is acquiring something for its direct benefit. Terms such as "support or stimulate" are assistance terms and are not appropriate in OT agreements for prototype projects. Prototype projects could include prototypes of weapon systems, subsystems, components, or technology. With regard to section 845 authority, a prototype can generally be described as a physical or virtual model used to evaluate the technical or manufacturing feasibility or military utility of a particular technology or process, concept, end item, or system. The quantity developed should be limited to that needed to prove technical or manufacturing feasibility or evaluate military utility. In general, Research, Development, Test & Evaluation (RDT&E) appropriations will be appropriate for OT prototype projects. Low Rate Initial Production quantities are not authorized to be acquired under prototype authority.

C1.7. GOVERNMENT TEAM COMPOSITION

C1.7.1. Composition. A small, dedicated team of experienced individuals works best. The agency needs to get the early participation of subject matter experts such as general counsel, payment and administrative offices to advise on agreement terms and conditions. The role of Defense Contract Management Agency (DCMA), Defense Finance & Accounting Services (DFAS) and Defense Contract Audit Agency (DCAA) should be decided up front.

C1.7.2. DCMA. Selected DCMA field offices are designated to administer OTs. If administration is to be delegated to DCMA, refer to Section 10 of the DoD CAS Component directory to determine the appropriate administration location. The DCMA POCs can be found at “http://www.DCMA.mil”. Click on “site index”, “CAS Component Directory”, and “Section 10”. DCMA can provide assistance in determining the appropriate DFAS payment office.

C1.7.3. DCAA. As discussed in various sections of this Guide, DCAA is able to provide financial advisory services to support the Agreements Officer in awarding and administering these agreements. DCAA acts in an advisory capacity only and can provide assistance in the pre-award phase, during agreement performance, and at the completion of the agreement during the closeout phase. DCAA has assigned liaison auditors to selected DCMA field offices designated to administer OTs.

C2. CHAPTER 2

ACQUISITION PLANNING AND AGREEMENT EXECUTION

C2.1. ACQUISITION PLANNING

C2.1.1. General.

C2.1.1.1. Essential Ingredient. Acquisition planning for both the prototype project and any expected follow-on activity is an essential ingredient of a successful prototype project. Prototype projects should include a team approach as previously discussed. Early and continued communication among all disciplines, including legal counsel, will enhance the likelihood of a successful project.

C2.1.1.2. Appropriate Safeguards. OT for Prototype authority provides flexibility to negotiate terms and conditions appropriate for the acquisition, without regard to the statutes or regulations governing a procurement contract. It is essential that OT agreements incorporate good business sense and appropriate safeguards to protect the government's interest. This includes assurances that the cost to the government is reasonable, the schedule and other requirements are enforceable, and the payment arrangements promote on-time performance. It is the Agreements Officer's responsibility to ensure the terms and conditions negotiated are appropriate for the particular prototype project and should consider expected follow-on program needs.

C2.1.1.3. Skill and Expertise. The Agreements Officer should not view previously issued other transactions as a template or model. A model has purposely not been developed, so as not to undermine the purpose of the authority. This guide has been developed to assist the Agreements Officer in the negotiation and administration of OT agreements. The Agreements Officers should rely on their skill and experience instead of relying on templates. The Agreements Officer should consider typical FAR procedures and clauses, commercial business practices, as well as OT agreements; but ultimately is responsible for negotiating clauses that appropriately reflect the risk to be undertaken by all parties on their particular prototype project. If a policy or procedure, or a particular strategy or practice, is in the best interest of the government and is not specifically addressed in this guide, nor prohibited by law or Executive Order, the government team should not assume it is prohibited. The Agreements Officer should take the lead in encouraging business process innovations and ensuring that business decisions are sound.

C2.1.1.4. Flexibility. In light of the legislated conditions associated with use of OTA for prototype projects, Agreements Officers are encouraged to structure acquisition strategies and solicitations that provide the flexibility to award a procurement contract should conditions not support use of an OT.

C2.1.1.5. Agreement. The nature of the agreement and applicable terms and conditions should be negotiated based on the technical, cost and schedule risk of the prototype project, as well as the contributions, if any, to be made by the awardee or non-federal participants to the

agreement. Some commercial entities have indicated reluctance to do business with the government, citing concerns in areas such as cost accounting standards, intellectual property, and audit. Agreements Officers should consider whether the prototype project's performance requirements can be adequately defined and a definitive, fixed price reasonably established for the agreement. When prototype projects are competitively awarded and the risks of the project permit adequate definition of the effort to accommodate establishing a definitive, fixed-price type of agreement, then there typically would be no need to invoke cost accounting standards or audit. This is not true if an agreement, though identifying the government funding as fixed, only provides for best efforts or potential adjustment of payable milestones based on amounts generated from financial or cost records. If the prototype effort is too risky to enter into a definitive, fixed-price type of agreement or the agreement requires at least one third of the total costs to be provided by non-federal parties pursuant to statute, then accounting systems become more important and audits may be necessary. The government should make every attempt to permit an entity to use its existing accounting system, provided it adequately maintains records to account for federal funds received and cost sharing, if any. In addition, when audits may be necessary, the Agreements Officer has the flexibility to use outside independent auditors in certain situations and determine the scope of the audits. Additional guidance on accounting systems, audit access and intellectual property are provided in later sections. It is critical that the Agreements Officer carefully consider these areas when negotiating the agreement terms and conditions.

C2.1.1.6. Competition. The Defense Authorization Acts authorizing OTs for prototype projects require that competitive procedures be used "to the maximum extent practicable" (see C2.1.3.1.6).

C2.1.1.7 Approvals. The acquisition strategy and the resulting OT agreement, must be approved no lower than existing agency thresholds associated with procurement contracts, provided this is at least one level above the Agreements Officer. Exceptions can be made to this approval level, when approved by the Agency level Head of the Contracting Activity. The approving official must be an official whose level of responsibility, business acumen, and judgment enables operating in this relatively unstructured environment. The format and approving official will be specified by agency procedures. However, approval to use OT authority must be obtained from the SPE when use is justified by exceptional circumstances (see C1.5.2.)

C2.1.1.8. Coding. Other Transactions for prototype projects must identify the 9th position of the award number as a "9". The other positions of the award number and modifications will be assigned the same as procurement contracts.

C2.1.2. Market Research. Market research is an integral part of the development of the acquisition strategy. The research needs to be done early in the acquisition planning process. A key reason to use OT authority is to attract nontraditional defense contractors to participate to a significant extent in the prototype project. In order to attract these companies, the government team should accomplish research of the commercial marketplace and publicize its project in venues typically used by the commercial marketplace. Some potential means of finding commercial sources could include specific catalogs, product directories, trade journals, seminars,

professional organizations, contractor briefings, in-house experts, and vendor surveys.

C2.1.3 Acquisition Strategy.

C2.1.3.1. General. The complexity and dollar value of the prototype project will determine the amount of documentation necessary to describe the project's acquisition strategy and the need for updates as significant strategy changes occur. As a minimum, an acquisition strategy for a prototype project should generally address the areas in this section. If a prototype project is covered by the DoD 5000.2-R, it must also comply with the acquisition strategy requirements specified therein.

C2.1.3.1.1. Consistency with Authority**.** A programmatic discussion of the effort that substantiates it is a prototype project directly relevant to weapons or weapon systems proposed to be acquired or developed by the DoD.

C2.1.3.1.2. Rationale for Selecting Other Transaction Authority**.** OTA for prototype projects may only be used in those circumstances addressed in section C1.2.2. If appropriate, the strategy should provide for potential award of a contract should conditions not support use of an OT. The acquisition strategy must identify and discuss the reason the OTA is being proposed. If use of OTA is expected to attract nontraditional defense contractors that will participate to a significant extent, the strategy should address how this will be accomplished. If cost-sharing is the reason, the strategy should explain the commercial or other perceived benefits to the non-federal participants. If exceptional circumstances exist, those must be documented and approved as addressed in section C1.5.2. After negotiations, the agreement analysis should address the actual scenario negotiated supporting use of the authority (see C2.1.4.1.) and the reason the authority is used must also be clear in the report for Congress (see C3.1.1.).

C2.1.3.1.3. Technical description of the program. This section should discuss the program's major technical events and the planned testing schedule.

C2.1.3.1.4. Management description of the program. This section should discuss the project's management plan, including the program structure, composition of the government team, and the program schedule.

C2.1.3.1.5. Risk Assessment. The section should include a cost, technical and schedule risk assessment of the prototype project and plans for mitigating the risks. The risks inherent in the prototype project and the capability of the sources expected to compete should be a factor in deciding the nature and terms and conditions of the OT agreement.

C2.1.3.1.6. Competition. The acquisition strategy should address the expected sources or results of market research, the prototype source selection process, the nature and extent of the competition for the prototype project and any follow-on activities. It is important to consider, during prototype planning, the extent and ability for competition on follow-on activities. For the prototype project, consider using standard source selection procedures or devise a more streamlined approach that ensures a fair and unbiased selection process. A source selection authority should be identified. If competitive procedures are not used for the prototype

project, or only a limited competition is conducted, the strategy should explain why.

C2.1.3.1.7. Nature of the agreement**.** There is not one type of OT agreement for prototype projects. This section should discuss the nature of the agreement (i.e. cost-reimbursement features, fixed price features, or a hybrid), how the price will be determined to be fair and reasonable, and how compliance with the terms and conditions will be verified. Agreements Officers are encouraged to consider whether the prototype project can be adequately defined to establish a fixed-price type of agreement. The precision with which the goals, performance objectives, and specifications for the work can be defined will largely determine whether a fixed-price can be established for the agreement. A fixed-price type of agreement should not be awarded unless the project risk permits realistic pricing and the use of a fixed-price type of agreement permits an equitable and sensible allocation of project risk between the government and the awardee. Agreements Officers should not think they have a fixed-price type of OT if an agreement, though identifying the government funding as fixed, only provides for best efforts or provides for milestone payments to be adjusted based on amounts generated from financial or cost records.

C2.1.3.1.8. Terms and Conditions. This section should explain the key terms and conditions planned for the solicitation and generally should address: protests, changes, termination, payments, audit requirements, disputes, reporting requirements, government property, intellectual property, technology restrictions (i.e. foreign access to technology), and flow-down considerations. Other important clauses unique to the project should also be discussed. The discussion should explain why the proposed terms and conditions provide adequate safeguards to the government and are appropriate for the prototype project.

C2.1.3.1.9. Follow-On Activities. The acquisition strategy for a prototype project should address the strategy for any follow-on activities, if there are follow-on activities anticipated. The follow-on strategy could include addressing issues such as life cycle costs, sustainability, test and evaluation, intellectual property requirements, the ability to procure the follow-on activity under a traditional procurement contract, and future competition.

C2.1.4. Negotiated Agreement and Award

C2.1.4.1. Agreement Analysis. Each agreement file must include an agreement analysis. The agreement analysis must affirm the circumstances permitting use of OTA (see C1.2.2.) and explain the significant contributions expected of the nontraditional defense contractors, the cost-share that will be required, or the exceptional circumstances approved by the SPE; or identify where this supporting information can be found in the agreement file. The analysis must also address the reasonableness of the negotiated price and key terms and conditions. Like the acquisition strategy, the agreement analysis should describe each negotiated key agreement clause and explain why the proposed terms and conditions provide adequate safeguards to the government and are appropriate for the prototype project.

C2.1.4.2. Report Requirements. The approving official for the award will review the Congressional report submission (see C3.1.1. and Appendix 2) and the DD 2759 (see C3.1.2. and Appendix 3) prior to approving the agreement for award. The DD 2759 and Congressional

report submission will be submitted to the agency POC within 10 days of award.

C2.2 METRICS

C2.2.1. General. Metrics are collected in two ways on OTA for prototype projects: (1) via the DD 2759 (see C3.1.2 and Appendix 3) and (2) in prototype project submissions for the statutorily required report to Congress (see C3.1.1. and Appendix 2).

C2.2.2. Nontraditional Defense Contractor. All prototype projects must collect information on the prime awardee and non-traditional defense contractors that participate to a significant extent in the prototype project (see C1.5.1.). The DD 2759 requires that all prime awardees be identified to one of the below categories:

1 – Non-profit (e.g., Educational Institution, Federally Funded Research & Development Center, federal, state, or local government organizations, other non-profit organizations)

2 - Traditional contractor (not a nontraditional defense contractor)

3 - Nontraditional defense contractor (see definitions).

The DD 2759 is also used to collect the business unit names and addresses of all nontraditional defense contractors that participate to a significant extent in the prototype project. If the prime is the only nontraditional defense contractor, then the prime must participate to a significant extent in the prototype project, or one of the other circumstances set forth in C1.2.2.(B) must exist justifying use of OTA.

C2.2.3. Non-Federal Funds and Percent of Cost-Share. The report to Congress and DD 2759 will report on the government and non-federal amounts. If a nontraditional defense contractor is not participating to a significant extent in the prototype project and the reason for using OTA is based on cost-share, the non-federal amounts must be at least one-third of the total cost of the prototype project.

C2.2.4. Exceptional Circumstances. If a nontraditional defense contractor is not participating to a significant extent in the prototype project and the reason for using OTA is based on SPE-approved exceptional circumstances (see C1.5.2), this will be addressed in the report to Congress and the DD 2759.

C2.2.5. Other Information. The DD 2759 reporting requirement will be used to collect information on competition and other items that may also be used to assess OTA experience.

C2.2.6. Other Metrics. The team is encouraged to establish and track any other metrics that measure the value or benefits directly attributed to the use of the OT authority. Ideally these metrics should measure the expected benefits from a cost, schedule, performance and supportability perspective. If an Agreements Officer or Project Manager establish other metrics that could be used across the board to measure the value or benefits directly attributed to the use of the OT authority, these metrics should be identified as a "Best Practice" in accordance with C3.2.3. procedures.

C2.3 INTELLECTUAL PROPERTY

C2.3.1. General.

C2.3.1.1. As certain intellectual property requirements normally imposed by the Bayh-Dole Act (35 U.S.C. 202-204) and 10 U.S.C. 2320-21 do not apply to Other Transactions, Agreements Officers can negotiate terms and conditions different from those typically used in procurement contracts. However, in negotiating these clauses, the Agreements Officer must consider other laws that affect the government's use and handling of intellectual property, such as the Trade Secrets Act (18 U.S.C. 1905); the Economic Espionage Act (18 U.S.C. 1831-39); the Freedom of Information Act (5 U.S.C. 552); 10 U.S.C. 130; 28 U.S.C. 1498; 35 U.S.C. 205 and 207-209; and the Lanham Act, partially codified at 15 U.S.C. 1114 and 1122.

C2.3.1.2. Intellectual property collectively refers to rights governed by a variety of different laws, such as patent, copyright, trademark, and trade secret laws. Due to the complexity of intellectual property law and the critical role of intellectual property created under prototype projects, Agreements Officers, in conjunction with the Program Manager, should obtain the assistance of Intellectual Property Counsel as early as possible in the acquisition process.

C2.3.1.3. The Agreements Officer should assess the impact of intellectual property rights on the government's total life cycle cost of the technology, both in costs attributable to royalties from required licenses, and in costs associated with the inability to obtain competition for the future production, maintenance, upgrade, and modification of prototype technology. In addition, insufficient intellectual property rights hinder the government's ability to adapt the developed technology for use outside the initial scope of the prototype project. Conversely, where the government overestimates the intellectual property rights it will need, the government might pay for unused rights and dissuade new business units from entering into an Agreement. Bearing this in mind, the Agreements Officer should carefully assess the intellectual property needs of the government.

C2.3.1.4. In general, the Agreements Officer should seek to obtain intellectual property rights consistent with the Bayh-Dole Act (35 U.S.C. 201-204) for patents and 10 U.S.C. 2320-21 for technical data, but may negotiate rights of a different scope when necessary to accomplish program objectives and foster government interests. The negotiated intellectual property clauses should facilitate the acquisition strategy, including any likely production and follow-on support of the prototyped item, and balance the relative investments and risks borne by the parties both in past development of the technology and in future development and maintenance of the technology. Due to the complex nature of intellectual property clauses, the clauses should be incorporated in full text. Also, the Agreements Officer should consider the effect of other forms of intellectual property (*e.g.*, trademarks, registered vessel hulls, etc.), that may impact the acquisition strategy for the technology.

C2.3.1.5. The Agreements Officer should ensure that the disputes clause included in the agreement can accommodate specialized disputes arising under the intellectual property clauses, such as the exercise of intellectual property march-in rights or the validation of restrictions on

technical data or computer software.

C2.3.1.6. The Agreements Officer should consider how the intellectual property clauses applicable to the awardee flow down to others, including whether to allow others to submit any applicable intellectual property licenses directly to the government.

C2.3.1.7. Where the acquisition strategy relies on the commercial marketplace to produce, maintain, modify, or upgrade the technology, there may be a reduced need for rights in intellectual property for those purposes. However, since the government tends to use technology well past the norm in the commercial marketplace, the Agreements Officer should plan for maintenance and support of fielded prototype technology when the technology is no longer supported by the commercial market and consider obtaining at no additional cost a paid-up unlimited license to the technology.

C2.3.1.8. The Agreements Officer should consider restricting awardees from licensing technology developed under the Agreement to domestic or foreign firms under circumstances that would hinder potential domestic manufacture or use of the technology. The Agreements Officer must also be aware that export restrictions prohibit awardees from disclosing or licensing certain technology to foreign firms.

C2.3.1.9. Additional Matters. The Agreements Officer should consider including in the intellectual property clauses any additional rights available to the government in the case of inability or refusal of the private party or consortium to continue to perform the Agreement. It may also be appropriate to consider negotiating time periods after which the government will automatically obtain greater rights (for example, if the original negotiated rights limited government's rights for a specified period of time to permit commercialization of the technology).

C2.3.2. Rights in Inventions and Patents.

C2.3.2.1. The Agreements Officer should negotiate a patents rights clause necessary to accomplish program objectives and foster the government's interest. In determining what represents a reasonable arrangement under the circumstances, the Agreements Officer should consider the government's needs for patents and patent rights to use the developed technology, or what other intellectual property rights will be needed should the agreement provide for trade secret protection instead of patent protection.

C2.3.2.2. The agreement should address the following issues:

C2.3.2.2.1. Definitions. It is important to define all essential terms in the patent rights clauses, and the Agreements Officer should consider defining a subject invention to include those inventions conceived or first actually reduced to practice under the Agreement.

C2.3.2.2.2. Allocation of Rights. The Agreements Officer should consider allowing the participant to retain ownership of the subject invention while reserving, for the government, a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on

behalf of the United States the subject invention throughout the world. In addition, the agreement should address the government's rights in background inventions (*e.g.*, inventions created prior to or outside the agreement) that are incorporated into the prototype design and may therefore affect the government's life cycle cost for the technology.

C2.3.2.2.3. March-in Rights. The Agreements Officer should consider negotiating government march-in rights in order to encourage further commercialization of the technology. While the march-in rights outlined in the Bayh-Dole Act may be modified to best meet the needs of the program, only in rare circumstances should the march-in rights be entirely removed.

C2.3.2.2.4. Disclosure/Tracking Procedures. The Agreements Officer may consider changing the timing of submission of the disclosures, elections of title, and patent applications.

C2.3.2.2.5. Option for Trade Secret Protection. The Agreements Officer may consider allowing subject inventions to remain trade secrets as long as the government's interest in the continued use of the technology is protected. In making this evaluation, the Agreements Officer should consider whether allowing the technology to remain a trade secret creates an unacceptable risk of a third party patenting the same technology, the government's right to utilize this technology with third parties, and whether there are available means to mitigate these risks outside of requiring patent protection.

C2.3.2.2.6. Additional Considerations. The Agreement Officer should consider whether it is appropriate to include clauses that address Authorization and Consent, Indemnity, and Notice and Assistance:

C2.3.2.2.6.1. Authorization and Consent. Authorization and consent policies provide that work by an awardee under an agreement may not be enjoined by reason of patent infringement and shifts liability for such infringement to the government (see 28 U.S.C. 1498). The government's liability for damages in any such suit may, however, ultimately be borne by the awardee in accordance with the terms of a patent indemnity clause (see 2.3.2.2.6.3). The agreement should not include an authorization and consent clause when both complete performance and delivery are outside the United States, its possessions, and Puerto Rico.

C2.3.2.2.6.2. Notice and Assistance. Notice policy requires the awardee to notify the Agreements Officer of all claims of infringement that come to the awardee's attention in connection with performing the agreement. Assistance policy requires the awardee, when requested, to assist the government with any evidence and information in its possession in connection with any suit against the government, or any claims against the government made before suit has been instituted that alleges patent or copyright infringement arising out of performance under the agreement.

C2.3.2.2.6.3. Indemnity. Indemnity clauses mitigate the government's risk of cost increases caused by infringement of a third-party owned patent. Such a clause may be appropriate if the supplies or services used in the prototype technology developed under the agreement normally are or have been sold or offered for sale to the public in the commercial open market, either with or without modifications. In addition, where trade secret protection is

allowed in lieu of patent protection for patentable subject inventions, a perpetual patent indemnity clause might be considered as a mechanism for mitigating the risks described in C2.3.2.2.5 above. The agreement should not include a clause whereby the government expressly agrees to indemnify the awardee against liability for infringement.

C2.3.3. Rights in Technical Data and Computer Software

C2.3.3.1. As used in this section, "Computer software" means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation. "Computer software documentation" means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software. "Technical data" means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

C2.3.3.2. Technical Data Rights and Computer Software Rights refer to a combined copyright, know-how, and/or trade secret license that defines the government's ability to use, reproduce, modify, release, and disclose technical data and computer software. The focus of license negotiations often centers around the government's ability to release or disclose outside the government. In addition, computer software licenses require additional consideration because restrictions may impact the government's use, maintenance, and upgrade of computer software used as an operational element of the prototype technology.

C2.3.3.3. The Agreement should address the following issues:

C2.3.3.3.1. Definitions. The Agreements Officer should ensure that all essential terms are defined, including all classes of technical data and computer software, and all categories of applicable license rights. Where the terms "technical data," "computer software," "computer software documentation," or other standard terms used in the DFARS are used in the agreement, and this prototype technology is likely to be produced, maintained, or upgraded using traditional procurement instruments, these terms must be defined the same as used in the DFARS in order to prevent confusion.

C2.3.3.3.2. Allocation of Rights. The agreement must explicitly address the government's rights to use, modify, reproduce, release, and disclose the relevant technical data and computer software. The government should receive rights in all technical data and computer software that is developed under the agreement, regardless of whether it is delivered, and should receive rights in all delivered technical data and computer software, regardless of whether it was developed under the agreement.

C2.3.3.3.3. Delivery Requirements. While not required to secure the government's rights in the technical data and computer software, if delivery of technical data, computer

software, or computer software documentation is necessary, the Agreements Officer should consider the delivery medium, and for computer software, whether that includes both executable and source code. In addition, the Agreements Officer should consider including an identification list detailing what technical data and computer software is being delivered with restrictions.

C2.3.3.3.4. Restrictive Legends. The Agreements Officer should ensure that the Agreement requires descriptive restrictive markings to be placed on delivered technical data and computer software for which the government is granted less than unlimited rights. The agreement should address the content and placement of the legends, with special care to avoid confusion between the classes of data defined by the agreement and the standard markings prescribed by the DFARS. In addition, the agreement should presume that all technical data and computer software delivered without these legends is delivered with unlimited rights.

C2.3.3.3.5. Special Circumstances. The agreement should account for certain emergency or special circumstances in which the government may need additional rights, such as the need to disclose technical data or computer software for emergency repair or overhaul.

C2.3.3.3.6. The Agreements Officer should also account for commercial technical data and commercial computer software incorporated into the prototype. As compared to non-commercial technical data and computer software, the government typically does not require as extensive rights in commercial technical data and software. However, depending on the acquisition strategy, the government may need to negotiate for greater rights in order to utilize the developed technology.

C2.4. RECOVERY OF FUNDS

C2.4.1. Title 10 U.S.C. 2371(d) provides that an OT for a prototype project may include a clause that requires a person or other entity to make payments to the DoD, or any other department or agency of the Federal government, as a condition for receiving support under the OT. The amount of any such payment received by the Federal government may be credited to the appropriate account established on the books of the U.S. Treasury Department by 10 U.S.C. 2371(d). The books of the Treasury include separate accounts for each of the military departments and various agencies for this purpose.

C2.4.2. The intent of the authority to recover and reinvest funds is to provide the Federal government an opportunity to recoup some or all of its investment when government funds were used to develop products that have applications outside the government. The recouped funds can then be reinvested into other prototype projects. The Agreements Officer should consider if there are expected applications beyond the government, and whether it is appropriate to include a clause for recovery of funds. Agreements Officers should contact their agency's POC if this authority will be used.

C2.4.2.1. Amounts so credited will be available for the same period that other funds in such accounts are available. Payments received under an agreement should be credited to currently available appropriation accounts, even if the funds that were obligated and expended under the agreement were from fiscal-year appropriations no longer available for obligation.

Amounts credited to each currently available appropriation account are available for the same time period as other funds in that account.

C2.4.2.2. Amounts so credited will be available for the same purpose that other funds in such accounts are available (i.e., prototype projects directly relevant to weapons or weapon systems proposed to be acquired or developed by the DoD).

C2.5 PROTECTION OF CERTAIN INFORMATION FROM DISCLOSURE AND APPROPRIATE SECURITY REQUIREMENTS

C2.5.1. Specifically Exempted Information. Certain types of information submitted to the Department in a process having the potential for award of an OT are exempt from disclosure requirements of 5 U.S.C. 552 (the Freedom of Information Act-FOIA) for a period of five years from the date the Department receives the information. Specifically, 10 U.S.C. 2371(i), as amended, provides that disclosure of this type of information is not required, and may not be compelled, under FOIA during that period if a party submits the information in a competitive or noncompetitive process having the potential for an award of an other transaction. Such information includes the following:

C2.5.1.1. A proposal, proposal abstract, and supporting documents.

C2.5.1.2. A business plan submitted on a confidential basis.

C2.5.1.3. Technical information submitted on a confidential basis.

C2.5.2. Notice to Offerors. The Agreements Officer should include a notice in solicitations that requires potential offerors to mark business plans and technical information that are to be protected for five years from FOIA disclosure with a legend identifying the documents as being submitted on a confidential basis.

C2.5.3. Generally Exempted Information. The types of information listed above may continue to be exempted, in whole or in part, from disclosure after the expiration of the five-year period if it falls within an exemption to the FOIA such as trade secrets and commercial or financial information obtained from a person and privileged or confidential.

C2.5.4. Security Requirements. DoD security management and handling requirements outlined in regulations such as DoD 5200.1-R and DoD 5400.7-R apply to prototype other transactions.

C2.6. CONSORTIA/JOINT VENTURES

C2.6.1. Legally responsible entity. Agreements Officers should ensure that an OT for a prototype project is entered into with an entity that is legally responsible to execute the agreement. That entity may be a single contractor, joint venture, consortium (or a member thereof), or a traditional prime/sub relationship.

C2.6.2. Deciding how to execute. Agreements Officers should be aware of the risks associated with entering into an agreement with a member on behalf of a consortium that is not a legal entity, i.e., not incorporated. Agreements Officers should review the consortium's Articles of Collaboration with legal counsel to determine whether they are binding on all members with respect to the particular project at issue. After having done so, Agreements Officers should, in consultation with legal counsel, determine the best way to execute the agreement; either with one member as responsible for the entire agreement, with all members or with one member on behalf of the consortium.

C2.7. CONSIDERATION OF PROTECTIONS PROVIDED IN LAW

As the Appendix 1, List of Inapplicable Statutes, indicates many of the statutory protections pertaining to a procurement contract do not apply to OTs. Though not applicable, the Agreements Officer is not precluded from and should consider applying the principles or provisions of any inapplicable statute that provides important protections to the government, the participants or participants' employees. For example, the Agreements Officer should not typically award an OT to a company or individual that is suspended or debarred. The Agreements Officers may also want to consider whether whistleblower protections should be included in the agreement, especially if the prime awardee is a company that typically does business with the DoD.

C2.8. AGREEMENT FUNDING

C2.8.1. Funding Restrictions. Examples of laws not applicable to OTs include the Buy American Act (41 U.S.C. 10a-d) and the Berry Amendment (10 U.S.C. 2241 note). However, Agreements Officers should consult with legal counsel to determine the applicability of funding restrictions (e.g., prohibitions on the use of funds for certain items from foreign sources) found in appropriations acts to this particular prototype project.

C2.8.2. Funding Requirements. Acquisition funding requirements are applicable to prototype OTs and are contained in agency fiscal regulations. No Agreements Officer or employee of the government may create or authorize an obligation in excess of the funds available, or in advance of appropriations (Anti-Deficiency Act, 31 U.S.C. 1341), unless otherwise authorized by law.

C2.8.3. Limits on Government Liability. When agreements provide for incremental funding or include cost-reimbursement characteristics, the Agreements Officer should include appropriate clauses that address the limits on government obligations.

C2.9. PROTESTS

The GAO protest rules do not apply to OTs for prototype projects. Solicitations that envision the use of an OT should stipulate the offerors' rights and procedures for filing a protest with the agency, using either the agency's established agency-level protest procedure or an OT-specific procedure.

C2.10. FLOW DOWN

The Agreements Officer should consider which of the OT clauses the awardee should be required to flow down to participants of the agreement. In making this decision, the Agreements Officer should consider both the needs of the government (e.g., audits) and the protections (e.g., intellectual property) that should be afforded to all participants.

C2.11. PRICE REASONABLENESS

C2.11.1. Data Needed. The government must be able to determine that the amount of the agreement is fair and reasonable. The Agreements Officer may require the awardees to provide whatever data are needed to establish price reasonableness, including commercial pricing data, market data, parametric data, or cost information. However, the Agreements Officer should attempt to establish price reasonableness through other means before requesting cost information. If cost information is needed to establish price reasonableness, the government should obtain the minimum cost information needed to determine that the amount of the agreement is fair and reasonable.

C2.11.2. Advisory Services. DCAA, acting in an advisory capacity, is available to provide financial advisory services to the Agreements Officer to help determine price reasonableness. DCAA can provide information on the reasonableness of the proposed cost elements and any proposed contributions, including non-cash contributions. DCAA can also assist in the pre-award phase by evaluating the awardee's proposed accounting treatment and whether the awardee's proposed accounting system is adequate to account for the costs in accordance with the terms of the agreement.

C2.12. ALLOWABLE COSTS

C2.12.1. General. This section applies only when the agreement uses amounts generated from the awardee's financial or cost records as the basis for payment (e.g., interim or actual cost reimbursement including payable milestones that provide for adjustment based on amounts generated from the awardee's financial or cost records) or requires at least one third of the total costs to be provided by non-federal parties pursuant to statute.

C2.12.2. Use of Funds. The agreement should stipulate that federal funds and the OT awardee’s cost sharing funds, if any, are to be used only for costs that a reasonable and prudent person would incur in carrying out the prototype project.

C2.12.3. Allowable Costs Requirements. In determining whether to include some or all of the allowable cost requirements contained in the Cost Principles (48 CFR Part 31), the Agreements Officer should consider the guidance contained in the section entitled "Accounting Systems".

C2.13. ACCOUNTING SYSTEMS

C2.13.1. General. This section applies only when the agreement uses amounts generated

from the awardee's financial or cost records as the basis for payment (e.g., interim or actual cost reimbursement including payable milestones that provide for adjustment based on amounts generated from the awardee's financial or cost records) or requires at least one third of the total costs to be provided by non-federal parties pursuant to statute. In these cases, the Agreements Officer should consider including a clause that requires the awardee to consider key participants accounting system capabilities when a key participant is contributing to the statutory cost share requirement or is expected to receive payments exceeding $300,000 that will be based on amounts generated from financial or cost records.

C2.13.2. System Capability. When structuring the agreement, the Agreements Officer must consider the capability of the awardee's accounting system. Agreements should require that adequate records be maintained to account for federal funds received and cost-sharing, if any.

C2.13.2.1. The Agreements Officer should not enter into an agreement that provides for payment based on amounts generated from the awardee's financial or cost records if the awardee does not have an accounting system capable of identifying the amounts/costs to individual agreements/contracts. This is normally accomplished through a job order cost accounting system, whereby the books and records segregate direct costs by agreement/contract, and includes an established allocation method for equitably allocating indirect costs among agreements/contracts. However, any system that identifies direct costs to agreements/contracts and provides for an equitable allocation of indirect costs is acceptable.

C2.13.2.2. When the awardee has a system capable of identifying the amounts/costs, the agreement should utilize the awardee's existing accounting system to the maximum extent practical. The agreement should include a clause that documents the basis for determining the interim or actual amounts/costs, i.e., what constitutes direct versus indirect costs and the basis for allocating indirect costs. Agreements that impose requirements that will cause an awardee to revise its existing accounting system are discouraged.

C2.13.2.3. When the business unit receiving the award is not performing any work subject to the Cost Principles (48 CFR Part 31) and/or the Cost Accounting Standards (48 CFR Part 99) at the time of award, the Agreements Officer should structure the agreement to avoid incorporating the Cost Principles and/or CAS requirements, since such an incorporation may require the awardee to revise its existing accounting system.

C2.13.2.4. When the business unit receiving the award is performing work that is subject to the Cost Principles and/or CAS requirements, then the awardee will normally have an existing cost accounting system that complies with those requirements. In those cases, the Agreements Officer should consider including those requirements in the agreement unless the awardee can demonstrate that the costs of compliance outweigh the benefits (e.g., the awardee is no longer accepting any new CAS and/or FAR covered work, the agreement does not provide for reimbursement based on amounts/costs generated from the awardee's financial or cost records, the work will be performed under a separate accounting system from that used for the CAS/FAR covered work).

C2.13.4. DCAA. DCAA is available to provide information on the status of the awardee's

accounting system or to respond to any questions regarding accounting treatment to be used for the other transaction.

C2.14. AUDIT. NOTE: This section summarizes draft audit policy. It authorizes use of outside Independent Public Accountants (IPAs) in certain circumstances, without prior approval from the DoD Office of the Inspector General (OIG), for awards through September 30, 2004. Given the potential impact this could have on the public, this policy will be publicized in the Federal Register for public comment. The proposed policy is described below and should be used in the interim, to the maximum extent practicable, to assist the Agreements Officer in understanding when audit access is needed and in structuring access clauses. If the Agreements Officer encounters problems caused by this proposed policy, the Agreements Officer should identify the problems and offer suggested changes to the Agency POC (see C3.2.3.) for consideration in drafting the final guidance. The Agreements Officer may also contact the DCAA or DDP financial/audit POCs for advice in implementing this section.

C2.14.1. General. This section applies only when an agreement uses amounts generated from the awardee's financial or cost records as the basis for payment (e.g., interim or actual cost reimbursement including payable milestones that provide for adjustment based on amounts generated from the awardee's financial or cost records) or requires at least one third of the total costs to be provided by non-federal parties pursuant to statute. In such circumstances, Agreements Officers should include appropriate audit access clauses in the agreement. Some sample clauses are provided at Appendix 5. Agreements Officers may use these clauses or tailor them, but should structure clauses that are consistent with the guidance in this section. In addition, Agreements Officers should require the awardee to insert an appropriate audit access clause in awards to key participants that contribute to the statutory cost share requirement or are expected to receive payments exceeding $300,000 that will be based on amounts generated from financial or cost records. Unless otherwise permitted by the Agreements Officer, the sample clauses in Appendix 5 should be altered by the awardee only as necessary to identify properly the contracting parties and the Agreements Officer.

C2.14.2. Frequency of Audits. Audits of agreements will normally be performed only when the Agreements Officer determines it is necessary to verify awardee compliance with the terms of the agreement.

C2.14.3. Means of accomplishing any required audits.

C2.14.3.1. Single Audit Act. The provisions of the Single Audit Act (Public Law 104-156, dated 5 July 1996) should be followed when the awardee or key participant is a state government, local government, or nonprofit organization whose federal procurement contracts and financial assistance agreements are subject to that Act. The Single Audit Act is implemented by OMB Circular A-133, "Audits of Institutions of Higher Education and Other Nonprofit Institutions," and DoD Directive 7600.10, "Audits of State and Local Governments, Institutions of Higher Education, and Other Nonprofit Institutions." The Single Audit Act is intended to minimize duplication of audit activity and provides for the use of independent public accountants, to conduct annual audits of state or local governments and educational or other nonprofit institutions.

C2.14.3.2. Business Units Currently Performing on Procurement Contracts subject to the Cost Principles or Cost Accounting Standards. DCAA should be used to perform any necessary audits if, at the time of agreement award, the awardee or key participant is a business unit that is performing a procurement contract subject to the Cost Principles (48 CFR Part 31) and/or Cost Accounting Standards (48 CFR Part 99) and is not subject to the Single Audit Act. Any decision to not use DCAA in such cases must be approved by the DoD OIG prior to awarding an agreement that provides for the possible use of an outside auditor. When such cases arise, Agreements Officers should contact the Assistant Inspector General for Auditing. Ms. Pat Brannin of the OIG can provide assistance and can be reached at 703-604-8802 or by e-mail at pbrannin@dodig.osd.mil.

C2.14.3.3. Business Units Not Currently Performing on Procurement Contracts subject to the Cost Principles or Cost Accounting Standards. DCAA or a qualified outside IPA may be used for any necessary audits if, at the time of agreement award, the awardee or key participant is a business unit that is not performing a procurement contract subject to the Cost Principles or Cost Accounting Standards, and is not subject to the Single Audit Act. An outside IPA should be used only when there is a statement in the Agreements Officer's file that the business unit is not performing a procurement contract subject to the Cost Principles or Cost Accounting Standards at the time of agreement award, and will not accept the agreement if the government has access to the business unit's records. Agreements Officer should grant approval to use an outside IPA in these instances and provide a Part 3 input to the congressional report submission (see C3.2.1.) that identifies, for each business unit that is permitted to use an IPA: the business unit's name, address and the expected value of its award. The IPA will be paid by the awardee or key participant, and those costs will be reimbursable under the agreement based on the business unit's established accounting practices and subject to any limitations in the agreement. The Agreements Officer, with advice from the OIG, will be responsible for determining whether IPA audits have been performed in accordance with Generally Accepted Government Auditing Standards.

C2.14.3.3.1. Necessary Provisions. The audit clause should include the following provisions when the use of an outside IPA is authorized:

1) The audit shall be performed in accordance with Generally Accepted Government Auditing Standards (GAGAS).

2) The Agreements Officer's authorized representative shall have the right to examine the IPA's audit report and working papers for a specified period of time (normally three years) after final payment, unless notified otherwise by the Agreements Officer.

3) The IPA shall send copies of the audit report to the Agreements Officer and the Assistant Inspector General (Audit Policy and Oversight) [AIG(APO)], 400 Army Navy Drive, Suite 737, Arlington, VA 22202.

4) The IPA shall report instances of suspected fraud directly to the DoDIG.

5) When the Agreements Officer determines (subject to appeal under the disputes clause of the agreement) that the audit has not been performed within twelve months of the date requested by the Agreements Officer, or has not been performed in accordance with GAGAS or other pertinent provisions of the agreement (if any), the government shall have the right to require corrective action by the awardee or key participant, and if warranted, at no additional cost to the Government. The awardee or key participant may take corrective action by having the IPA correct any deficiencies identified by the Agreements Officer, by having another IPA perform the audit, or by electing to have a Government representative perform the audit. If corrective action is not taken, the Agreements Officer shall have the right to take one or more of the following actions:

(a) Withhold or disallow a percentage of costs until the audit is completed satisfactorily;

(b) Suspend performance until the audit is completed satisfactorily; and/or

(c) Terminate the agreement.

6) If it is found that the awardee or key participant was performing a procurement contract subject to Cost Principles (48 CFR Part 31) and/or Cost Accounting Standards (48 CFR Part 99) at the time of agreement award, the Agreements Officer, or an authorized representative, shall have the right to audit sufficient records of the awardee to ensure full accountability for all government funding or to verify statutorily required cost share under the agreement. The awardee or key participant shall retain such records for a specified period of time (normally three years) after final payment, unless notified otherwise by the Agreements Officer.

C2.14.3.3.2. Awardee Responsibilities. Agreements should require the awardee to include the "Necessary Provisions" in agreements with key participants that receive total payments exceeding $300,000 that are based on amounts generated from cost or financial records or contribute towards statutory cost share requirements and provide for use of an IPA. In such cases, the awardee should be required to provide written notice, identifying the business unit name and address and expected value of award, to the Agreements Officer. However, where the awardee and key participant agree, the key participant may provide the information directly to the Agreements Officer.

C2.14.4. Scope of required audits. The Agreements Officer should coordinate with the auditor regarding the nature of any review to be conducted. The Agreements Officer may request a traditional audit, where the auditor determines the scope of the review. The Agreements Officer may also request a review of specific cost elements. While the auditor also determines the scope of these reviews, the reviews are limited to those cost elements specified by the Agreements Officer (e.g., request a review of only the direct labor costs). The Agreements Officer may also request another type of review called agreed-upon procedures. Under this review, the Agreements Officer not only specifies the cost elements to be reviewed, but also specifies the procedures to be followed in conducting that review (e.g., verify the costs claimed to the awardee's General Ledger and Job Cost Ledger).

C2.14.5. Length and extent of access.

C2.14.5.1. Agreements should provide for the Agreements Officer's authorized representative to have direct access to sufficient records to ensure full accountability for all government funding or statutorily required cost share under the agreement (or in the case where an outside IPA is used--IPA audit reports and working papers) for a specified period of time (normally three years) after final payment, unless notified otherwise by the Agreements Officer.

C2.14.5.2. In accordance with statute, if the agreement gives the Agreements Officer or other DoD component official access to a business unit records, the DoDIG and GAO get the same access to those records.

C2.15 COMPTROLLER GENERAL ACCCESS

Section 801 of the National Defense Authorization Act for Fiscal Year 2000 establishes a requirement that an OT for a prototype project that provides for payments in a total amount in excess of $5,000,000 include a clause that provides Comptroller General access to records. Section 804 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 provides clarification that limits access in certain situations. Because this is a mandatory requirement that has a substantial impact on the public, the rules implementing this law were published in the Federal Register and are codified in Part 3 of Section 32 of the Code of Federal Regulations, Subtitle A, Chapter I. The Final Rule implementing sections 801 and 804 was published in the Federal Register on November 15, 2001 and is effective for solicitations issued on or after December 17, 2001. The policy is reflected in Appendix 4 of this Guide.

C2.16. COST SHARING

C2.16.1. When Applicable. One authorized reason to use OT authority for prototype projects is if a nontraditional Defense contractor is not participating to a significant extent in the prototype project and at least one third of the total cost of the prototype project is to be paid out of funds provided by the parties to the transaction other than the Federal government (see section C1.5.1). However, the government should not generally mandate cost-sharing requirements for Defense unique items so use of OT authority that invokes cost-sharing requirements should typically be limited to those situations where there are commercial or other benefits to the awardee.

C2.16.2. Limitations on Cost-Sharing. When a nontraditional Defense contractor is not participating to a significant extent in the prototype project and cost-sharing is the reason for using OT authority, then the non-Federal amounts counted as provided, or to be provided, by the business units of an awardee or subawardee participating in the performance of the OT agreement may not include costs that were incurred before the date on which the OT agreement becomes effective. Costs that were incurred for a prototype project by the business units of an awardee or subawardee after the beginning of negotiations, but prior to the date the OT agreement becomes effective may be counted as non-Federal amounts if and to the extent that the Agreements Officer determines in writing that (1) the awardee or subawardee incurred the costs in anticipation of entering into the OT agreement; and (2) it was appropriate for the

awardee or subawardee to incur the costs before the OT agreement became effective in order to ensure the successful implementation of the OT agreement. As a matter of policy, these limitations on cost-sharing apply any time cost-sharing may be recognized when using OT authority for prototype projects.

C2.16.3. Nature of cost-share. The Agreements Officer should understand and evaluate the nature of the cost share. Cost sharing should generally consist of labor, materials, equipment, and facilities costs (including allocable indirect costs).

C2.16.3.1. Awardees that have cost-based procurement contracts may treat their cost share as a direct effort or as Independent Research and Development (IR&D). IR&D is acceptable as cost sharing, even though it may be reimbursed by the government through other awards. It is standard business practice for all for-profit firms, including commercial companies, to recover R&D costs (which for procurement contracts is recovered as IR&D) through prices charged to their customers. Thus, the Cost Principles (48 CFR Part 31) allow a for-profit firm that has cost-based procurement contracts to recover through those contracts an allocable portion of the IR&D costs.

C2.16.3.2. Any part of the cost share that includes an amount for a fully depreciated asset should be limited to a reasonable usage charge. In determining the reasonable usage charge, the Agreements Officer should consider the original cost of the asset, total estimated remaining useful life at the time of negotiations, the effect of any increased maintenance charges or decreased efficiency due to age, and the amount of depreciation previously charged to procurement contracts and subcontracts. In determining the amount of cost sharing, the agreement should not count, as part of the awardee's cost share, the cost of government-funded research, prior IR&D, or indirect costs that are not allocable to the "other transaction."

C2.16.4. Accounting treatment. The Agreements Officer should have a clear understanding of the awardee's accounting treatment for cost share. While the Agreements Officer should not include any provisions that would require the awardee to use a specific method of cost charging (i.e., direct or IR&D), the awardee may have procurement contracts subject to the CAS that could be affected by an awardee's inconsistent accounting treatment. If an awardee accounts for some of the costs incurred under the agreement as direct effort and other costs as IR&D, the contractor will be in noncompliance with CAS 402 relative to its CAS-covered procurement contracts. Thus, if the awardee is using IR&D as its cost share and is performing a CAS-covered procurement contract at the time of agreement award, the Agreements Officer should request the awardee to disclose how it intends to treat the government cost share of the agreement (i.e., as IR&D or as direct effort). If the awardee states that it intends to treat the government cost share as direct effort, the Agreements Officer must notify the cognizant Administrative Contracting Officer (ACO). The cognizant ACO can be identified by querying the DCMA website that matches contractors with their ACOs. The website can be accessed through the DCMA home page: http://www.dcma.mil (click on "Find a Contract Admin Team") or by going directly to the query website: http://laxwebors1.dcmdw.dla.mil/srk/owa/alerts.pb_query

C2.16.5. Equity when sharing costs. Generally the government's payments or financing

should be representative of its cost share as the work progresses, rather than front loading government contributions. Other transactions that require cost sharing should generally provide for adjustment of government or private sector investment or some other remedy if the other party is not able to make its required investment. Such other transactions should address the procedures for verifying cost share contributions, the conditions that will trigger an adjustment and the procedures for making the adjustment.

C2.16.6. Financial reporting. Other transactions that use amounts generated from the awardee's financial or cost records as the basis for payment, or require at least one third of the total costs to be provided by non-federal parties pursuant to statute, should require financial reporting that provides appropriate visibility into expenditures of government funds and expenditures of private sector funds and provide for appropriate audit access (see C2.14).

C2.17. PAYMENTS

C2.17.1. General.

C2.17.1.1. Profit or fee is permitted for awardees of OTs for prototype projects; but generally should not be permitted on projects that are cost-shared.

C2.17.1.2. There is no one means of providing payments for OTs. The agreement must identify clearly the basis and procedures for payment. Consider the following in drafting the agreement payment clauses:

C2.17.1.2.1. Are payments based on amounts generated from the awardee's financial or cost records? In determining whether the agreement should provide for reimbursement based on the awardee's financial or cost records, the Agreement Officer should consider the guidance contained in the section entitled "Accounting Systems".

C2.17.1.2.2. Are the payment amounts subject to adjustment during the period of performance?

C2.17.1.2.3. If the payments can be adjusted, what is the basis and process for the adjustment?

C2.17.1.2.4. What are the conditions and procedures for final payment and agreement close-out?

C2.17.1.2.5. Is an interim or final audit of costs needed?

C2.17.2. Payable Milestones. There is not one uniform clause or set of procedures for payable milestones. Payable milestone procedures vary, depending on the inherent nature of the agreement.

C2.17.2.1. Fixed payable milestones. This is the preferred form of payable milestone. Agreements with fixed price characteristics may contain payable milestone clauses that do not

provide for adjustment based on amounts generated from the awardee's financial or cost records. In these cases, this fact should be clear in the agreement and the negotiated payable milestone values should be commensurate with the estimated value of the milestone events.

C2.17.2.2. Adjustable payable milestones. Alternatively, agreements may provide for payable milestones to be adjusted based on amounts generated from the awardee's financial or cost records. When this is the case, the agreement must address the procedures for adjusting the payable milestones, including consideration of the guidance contained in the section entitled "Accounting Systems". Payable milestones should be adjusted as soon as it is reasonably evident that adjustment is required under the terms of the agreement.

C2.17.3. Advance Payments. Generally, the government should avoid making advance payments to the OT awardee.

C2.17.3.1. Requirement to establish an interest bearing account. If advance payments are authorized, the agreement should require the OT awardee to maintain funds in an interest-bearing account unless one of the following applies:

C2.17.3.1.1 the OT awardee receives less than $120,000 in Federal awards per year;

C2.17.3.1.2. the best reasonably available interest bearing account would not expect to earn interest in excess of $250 per year on such cash advances;

C2.17.3.1.3. the depository would require an average or minimum balance so high that it would not be feasible within the expected cash resources for the project.

C2.17.3.1.4. or the advance payments are made one time to reduce financing costs for large up-front expenditures and the funds will not remain in the awardee's account for any significant period of time.

C2.17.3.2 Interest earned. The interest earned should be remitted annually to the Administrative Agreements Officer. The Administrative Agreements Officer shall forward the funds to the responsible payment officer, for return to the Department of the Treasury's miscellaneous receipts accounts.

C2.17.4. Provisional Indirect Rates on Interim Payments

When the agreement provides for interim reimbursement based on amounts generated from the awardee's financial or cost records, any indirect rates used for the purpose of that interim reimbursement should be no higher than the awardee's provisionally approved indirect rates, when such rates are available.

C2.18. PROPERTY

C2.18.1. General. The government is not required to, and generally should not, take title to property acquired or produced by a private party signatory to an OT except property the agreement identifies as deliverable property. In deciding whether or not to take title to property under an other transaction, the government should consider whether known or future efforts may be fostered by government ownership of the property.

C2.18.2. Requirements and Guidance - Government Title. If the government takes title to property or furnishes government property, then the property is subject to statutes pertaining to the treatment and disposition of government property and a property clause must be included in the agreement. The property clause must be consistent with the Federal Property and Administrative Services Act and, as a minimum, should address the following:

C2.18.2.1. A list of property to which the government will obtain title;

C2.18.2.2. Whether the awardee or the government is responsible for maintenance, repair, or replacement;

C2.18.2.3. Whether the awardee or the government is liable for loss, theft, destruction of, or damage to the property;

C2.18.2.4. Whether the awardee or the government is liable for loss or damage resulting from use of the property; and

C2.18.2.5. The procedures for accounting for, controlling, and disposing of the property. (When the awardee is a company that does not traditionally do business with the government, the company's commercial property control system should generally be used to account for government property.)

C2.18.3. Additional Government-Furnished Property Requirements. The other transaction agreement should specify:

C2.18.3.1. What guarantees (if any) the government makes regarding the property's suitability for its intended use, the condition in which the property should be returned, and any limitations on how or the time the property may be used; and

C2.18.3.2. A list of property the government will furnish for the performance of the agreement.

C2.18.4. Cost-Sharing Considerations. When the private party signatory has title to property that will be factored into the signatory's cost share amount, the private party signatory and the government must agree on the method for determining the value of the property.

C2.19. CHANGES

C2.19.1. Method of change. The agreement should address how changes will be handled. The Agreements Officer should consider whether the government should have the right to make

a unilateral change to the agreement, or whether all changes should be bilateral. The fact that unilateral changes may lead to disputes and claims, particularly in agreements with fixed-priced characteristics, should be considered.

C2.19.2. Need for unilateral change. The government may need the right to make a unilateral change to the agreement to ensure that critical requirements are met. If a significant cost contribution is not expected from the OT awardee, then the government should normally retain its right to make a unilateral change. The awardee should be entitled to an equitable adjustment for any unilateral change that caused an increase or decrease in the cost of, or the time required for, performance.

C2.19.3. Accounting Systems. In determining the method to be used to compute the amount of the equitable adjustment (monies due as a result of a change), the Agreement Officer should consider the guidance contained in the section entitled, Accounting Systems.

C2.20. DISPUTES

C2.20.1. Process. Although OTs are not subject to the Contract Disputes Act, an OT dispute can be the subject of a claim in the Court of Federal Claims. Agreement Officers should ensure each OT addresses the basis and procedures for resolving disputes.

C2.20.2. Alternate Disputes Resolution (ADR). Agreements Officers should seek to reduce the risk of costly litigation by negotiating disputes clauses which maximize the use of ADR when possible and appropriate. Agreements Officers should consult with the ADR Specialist in their organization for assistance in crafting ADR clauses.

C2.21. TERMINATION

C2.21.1. Basis for termination. Agreements Officers should consider termination clauses (both for convenience or for cause) in light of the circumstances of the particular OT prototype project. A unilateral government termination right is appropriate. In cases in which there is an apportionment of risk allocation and cost shares, it could be appropriate to allow an awardee termination right as well. Such a termination could occur in instances in which an awardee discovers that the expected commercial value of the prototype technology does not justify continued investment or the government fails to provide funding in accordance with the agreement. Termination clauses should identify the conditions that would permit terminations and include the procedures for deciding termination settlements. Two examples of procedures for deciding termination amounts include (1) providing for no payment beyond the last completed payable milestone or (2) recognizing that the termination settlement costs are subject to negotiation. The latter procedure must be used when the agreement requires that at least one third of the total costs to be provided by non-federal parties pursuant to statute.

C2.21.2. Remedies. Agreements Officers should consider whether the government should be provided the opportunity to terminate for cause, tailoring clauses to discourage defaults in line with the agreement's overall allocations of risk. When agreements provide the government the right to terminate for cause or provide the awardee the right to terminate, the

agreement should address what remedies are due to the government. For example, it may be appropriate to require recoupment of the government's investment or to obtain unlimited or government purpose license rights to intellectual property created during performance that are necessary to continue a prototype project.

C2.21.3. Accounting Systems. If termination settlement costs are expected to be the subject of negotiation based on amounts generated from the awardee's financial or cost records, then the Agreements Officer should consider the guidance contained in the sections entitled Allowable Costs, Accounting Systems and Audit.

C2.21.4. Caution. If the Agreements Officer is attempting to establish a fixed-price type of agreement, the awardee should not typically have the right to terminate. If the Agreements Officer decides there are reasons to provide the awardee the right to terminate, then termination settlements should be limited to the payable milestone amount of the last completed milestone.

C2.22. AWARDEE REPORTING

C2.22.1. Performance Reporting. The awardee is responsible for managing and monitoring each prototype project and all participants. The solicitation and resulting agreement should identify the frequency and type of performance reports necessary to support effective management. Effective performance reporting addresses cost, schedule and technical progress. It compares the work accomplished to the work planned and the actual cost and explains any variances. There is not a "one-size-fits-all" approach. There could be little, if any, performance reporting required if the agreement price is fixed and financing is provided by fixed payable milestones. However, if this is not the case, performance reporting will be necessary.

C2.22.1.1. Teaming arrangements. If an awardee is teaming with other companies (e.g., consortium, joint venture) for the prototype project, the Agreements Officer should consider if performance reporting on all team members would be appropriate.

C2.22.1.2. DoD 5000.2-R earned value requirements. Prototype projects that meet the dollar criteria or risk management considerations discussed in DoD 5000.2-R, must follow the earned value management systems guidance therein unless a waiver is obtained as specified in the DoD 5000.2-R. When cost performance reporting is required, the Project Manager is encouraged to seek appropriate experts to advise on the elements of performance management visibility and tailor the report to obtain only the information needed for effective management control.

C2.22.1.3. DoD 5000.2-R requirements for cost summary reports. When a prototype project may evolve into a major defense acquisition program, it is advisable for the prototype Project Manager to contact the Cost Analysis Improvement Group (CAIG) Executive Secretary. The CAIG is responsible for collecting actual costs of prototype systems and for using these cost data in their statutory role of developing independent cost estimates for our acquisition executives. If the CAIG concludes there is no other available source of relevant cost information, a summary cost report may be required. The agreement should provide for delivery of an appropriate cost summary report if the program and OT agreement meet the criteria

contained in section 6.4.1. of the DoD 5000.2-R. Such a cost report would generally be in OT awardee-specified format and provide data in a product-oriented structure. The report would be submitted to the contractor Cost Data Report Project Office located at 1111 Jefferson Davis Highway, Suite 500, Arlington, Virginia.

C2.22.2. Technical Report. DoD Instruction 3200.14 requires the agency to deliver a technical report to the Defense Technology Information Center (DTIC) upon completion of research and engineering projects. A SF 298 "Report Documentation Page" is established for that purpose. Agreements should include a requirement for the OT awardee to provide the appropriate information to the Agreements Officer so the agency is able to submit required reports to DTIC.

C2.22.3. Link to Payment. Agreements Officers, in consultation with the Project Manager, should consider whether reports required of the OT awardee are important enough to warrant establishment of line items or separate payable milestones or if report requirements should be incorporated as a part of a larger line item or payable milestone. In either case, an appropriate amount should be withheld if a report is not delivered.

C2.23. ADMINISTRATION

C2.23.1. Documentation. It is vital that Administrative Agreements Officers receive all pertinent documentation to ensure the effective administration of the agreement.

C2.23.2. Corrective action. It is the Administrative Agreements Officer's responsibility to ensure that all terms and conditions of the agreement are being satisfied. If the OT awardee has failed to comply with any term of the agreement, the Administrative Agreements Officer must take timely, appropriate action to remedy the situation.

C2.24. AGREEMENT CLOSE-OUT

The DCMA One Book includes procedures on close-out; it can be found at http://www.DCMA.mil. The One Book is listed under "Policy/Processes." Closeout, Chapter 10.2, is under Section 10.0, Contract Closeout Services. Guidance that will facilitate agreement close-out is provided throughout this guide, in areas such as audit requirements, cost sharing, payments, property, patents, and OT awardee reports.

C3. CHAPTER 3

GOVERNMENT PROTOTYPE PROJECT REPORTING REQUIREMENTS

C3.1. Reports required for all prototype projects. The report submissions identified in this section are the Department's means of explaining the value to the government of the OT acquisition tool. Electronic formats for these reports can be found at http://www.acq.osd.mil/dp (under Defense Systems Procurement Strategies). Table C3.T1 provides a summary of reports the Agreements Officer and Project Manager are responsible for preparing and identifies when these reports must be prepared and submitted to the Agency POC.

Reports Required for all Prototype Other Transactions

Reports	Freq	Prepare	Approving Official	Submit	To	Final Destination
Input to Report to Congress	1 X (unless recoup)	Prior to Award	IAW Agency procedures	Within 10 days of award	Agency POC	DDP & Congress
DD 2759		With each obligation or deobligation	IAW Agency procedures	Within 10 days of action	Agency POC & DIOR	Agency POC

Table C3.T1

C3.1.1 Report to Congress. Title 10, U.S.C. 2371(h) requires a report be submitted to Congress each year by December 31st for awards made in the preceding fiscal year, pursuant to this authority. This includes, for prototype projects that use this authority, all initial awards, new prototype projects added to existing agreements, and options exercised or new phases awarded . RCS #DD-A-T(A)1936 has been assigned to this annual report requirement. **This guide changes the procedures for submitting the report. Each Agreements Officer must prepare a report submittal for the prototype project prior to awarding the prototype project.** The format and instructions for preparing this report are provided at Appendix 2. It is imperative that the reason justifying use of OTA (see C1.5 and C2.1.3.1.2) be addressed in the answers to the questions regarding how the use of an OT is expected to contribute to a broadening of the technology and industrial base and foster new relationships and practices that support national security. This report will be approved in accordance with agency procedures, no lower then the agreement approval level. The approved report will be submitted to your agency POC within 10 days of award. For prototype projects awarded in FY 2001, prior to the effective date of this guide, the Agreements Officer must submit the report to the agency POC within 60 days of the effective date of the guide. The agency POC will forward report submissions through the Agency level Head of the Contracting Activity to the Director, Defense Procurement (DDP) by October 31st. If the agreement provides for recoupment of government funds (see C2.4), the amount recouped must be reported to your Agency POC in the fiscal year recouped, for inclusion in Part II of the annual Report to Congress (see Appendix 2).

C3.1.2. Data Collection. A DD 2759 has been established to collect information on section 845 prototype project awards. Agreements Officers must complete the DD 2759 at the time of award and each time funds are obligated or deobligated on the agreement. **The DD 2759 dated Oct 1997 is superceded by the DD 2759 dated Dec 2000 and should no longer be used. However, for prototype projects awarded prior to FY 2001, any additional obligations should be reported using the new DD 2759, but do not need to complete the new data fields (Data Elements 14 & 36).** Section 845 OTs should not be reported in the Defense Contract Action Data System (DCADS) using the DD Form 350. The DD 2759 information collection has been assigned Report Control Symbol #DD-A&T(AR)2037. The Agreements Officer must forward DD 2759s to the agency POCs and DIOR within 10 days of the agreement action. Agreements Officers must submit a DD 2759 dated Dec 2000, with all data fields completed, within 60 days after the effective date of this guide, for prototype projects awarded in FY 2001, prior to the effective date of this guide. A DD 2759 is provided at Appendix 3 and electronically. Instructions for preparing DD Form 2759s are provided at Appendix 3. Until the time an operational automated database is established, the agencies will maintain key DD 2759 information in an excel spreadsheet and submit the agency information with the Congressional Report submissions.

C3.2. Other reporting requirements, when appropriate. This section is intended to summarize in one place all other reports or notices that the Agreements Officer and Project Manager may be required to submit.

C3.2.1. Use of IPA. If the agreement provides for the use of an outside IPA pursuant to C2.14.3.3, then the Agreements Officer must supplement the Congressional report submission with a Part III input (see C3.1.1. and Appendix 2). Generally, this should be known for the awardee and key participants at the time of award and be submitted with your Part I input for the Congressional report to the Agency POC within 10 days of award. However, if use of an outside IPA is authorized for key participants after award, then the Part III submission should be submitted to the Agency POC within 10 days after this becomes known. The Part III inputs will not be forwarded to Congress, but will be provided to the OIG. The OIG has agreed to an annual notification instead of requiring pre-approval in each instance where an IPA will be used.

C3.2.2. Comptroller General Access

C3.2.3.1. Notification of Waiver. The CFR (see Appendix 4) requires notification of a waiver to the requirement for Comptroller General access be provided to the Committees on Armed Services of the Senate and the House of Representatives, the Comptroller General, and the Director, Defense Procurement before entering into the agreement.

C3.2.3.2. Impact of Access Requirements. The CFR (see Appendix 4) requires the HCA to notify the Director, Defense Procurement of situations where there is evidence that the Comptroller General Access requirement caused companies to refuse to participate or otherwise restricted the Department's access to companies that typically do not do business with the Department.

C3.2.3. Best Practices. The Agreements Officer and Project Manager are encouraged to submit to the agency POCs at any time, lessons learned from negotiation or agreement execution

that could benefit other Agreements Officers and Project Managers or areas they feel need further guidance. The agency POCs will ensure these lessons learned or recommendations for further guidance get passed on either through informal interdepartmental working groups or formally to DDP.

APPENDIX 1
STATUTES INAPPLICABLE TO "OTHER TRANSACTIONS"

This list of statutes that apply to procurement contracts, but that are not necessarily applicable to OTs for prototype projects is provided for guidance only, and is not intended to be definitive. To the extent that a particular requirement is a funding or program requirement or is not tied to the type of instrument used, it would generally apply to an OT, e.g., fiscal and property laws. Each statute must be looked at to assure it does or does not apply to a particular funding arrangement using an OT.

1. Sections 35 U.S.C. 202-204 of the Bayh-Dole Act, –which prescribes government's rights in patentable inventions made with government funds.

2. Competition in Contracting Act, Pub. L. No. 98-369 (1984), as amended - Promotes the use of competitive procurement procedures and prescribes uniform government-wide policies and procedures regarding contract formation, award, publication, and cost or pricing data (truth in negotiations). See DoD coverage generally at chapter 137 of title 10, United States Code, particularly sections 2301-2305.

3. Contract Disputes Act, Pub. L. No. 95-563 (1987), as amended, 41 U.S.C. 601 et seq. - Provides for the resolution of claims and disputes relating to government contracts.

4. Procurement Protest System, Subtitle D of Competition in Contracting Act, Pub. L. No. 98-369 (1984), 31 U.S.C. 3551 et seq. - Provides statutory basis for procurement protests by interested parties to the Comptroller General.

5. Public Law 85-804, 50 U.S.C. 1431-1435, Extraordinary contractual relief - Authorizes such remedies to contractors as formalization of informal commitments, amendments without consideration, and correction of mistakes, and permits indemnification for unusually hazardous risks.

6. 10 U.S.C. 2207. Expenditure of appropriations: limitation - Permits termination of contracts upon a finding that the contractor has offered or given gratuities to obtain a contract.

7. 10 U.S.C. 2306. Kinds of contracts - Prohibits use of cost-plus-a-percentage-of-cost system of contracting; requires a covenant against contingent fees paid to obtain contracts; limits fee amount on virtually all cost-type contracts.

8. 10 U.S.C. 2313. Examination of records of contractor - Provides agency and GAO access to contractors facilities to audit contractor and subcontractor records and gives the DCAA subpoena authority. (Section 801 of the National Defense Authorization Act for Fiscal Year 2000, Public Law 106-65, does provide for GAO access as addressed in C2.14 and Appendix 4.)

9. 10 U.S.C. 2320, Rights in Technical Data and 10 U.S.C. 2321, Validation of proprietary data restrictions - Prescribes government and contractor rights to technical data.

10. 10 U.S.C. 2353. Contracts: acquisition, construction, or furnishing of test facilities and equipment (to R&D contractors).

11. 10 U.S.C. 2354. Contracts: indemnification provisions - Indemnification authority against unusually hazardous risks for R&D contractors.

12. 10 U.S.C. 2393. Prohibition against doing business with certain offerors - Prohibition with respect to solicitation of offers and contract awards to contractors that have engaged or are suspected to have engaged in criminal, fraudulent, or seriously improper conduct.

13. 10 U.S.C. 2408. Prohibition on persons convicted of defense-contract related felonies and related criminal penalty on defense contractors - Generally, convicted felons precluded from working in a managerial capacity on DoD contracts.

14. 10 U.S.C. 2409. Contractor Employees: protection from reprisal for disclosure of certain information. Whistle blower protection to contractor employees.

15. 31 U.S.C. 1352. Limitation on the use of appropriated funds to influence certain Federal contracting and financial transactions - Prohibits use of funds to influence or attempt to influence government officials or members of Congress in connection with the award of contracts, grants, loans, or cooperative agreements.

16. Antikickback Act of 1986, 41 U.S.C. 51-58 - Prohibits kickbacks in connection with government contracts; provides civil and criminal penalties.

17. Procurement Integrity Act, section 27 of the Office of Federal Procurement Policy Act, 41 U.S.C. 423 - Imposes civil, criminal, and administrative sanctions against individuals who inappropriately disclose or obtain source selection information or contractor bid and proposal information.

18. Service Contract Act, 41 U.S.C. 351 et seq., Walsh Healey Act, 41 U.S.C. 35-45; Fair Labor Standards Act, 29 U.S.C. 201-219 - Provide protections for contractor employees.

19. Drug-Free Workplace Act of 1988, 41 U.S.C. 701-707 - Applies to contracts and grants.

20. Buy American Act, 41 U.S.C. 10a-d. Provides preferences for domestic end products in production.

21. Berry Amendment, 10 U.S.C. 2241 note - Provides that no part of any appropriation is available to procure certain items of food, clothing, natural fiber products or other items that are not manufactured in the U.S.

APPENDIX 2
ANNUAL REPORT TO CONGRESS

Explanation of the Format for submission of data

Format Part I - Individual Inputs for Report to Congress

Format Part II - Summary of Prior Year Agreements with Funds Recouped During the Current Fiscal Year

Guidelines to Assist in Answering Part I Questions

Format Part III - Use of Independent Public Accountants pursuant to OT Guide, section C2.14.3.3.

EXPLANATION

Part I: Title 10, U.S.C. 2371(h) requires a report be submitted to Congress each year by December 31st for awards made in the preceding fiscal year, pursuant to this authority. This includes, for prototype projects that use this authority, all initial awards, new prototype projects added to existing agreements, and options exercised or new phases awarded. Individual agreement summaries should not exceed 2 pages. **Formatted examples are available electronically at** http://www.acq.osd.mil/dp **(under Defense Systems Procurement Strategies) and have all the settings properly implemented**. Follow those examples for guidance on submission. Format settings are described below for clarification. **Each agency should compile all Part I individual reports on prototype projects into one word document, with page breaks separating each prototype project.**

Page settings:
Use Portrait page orientation. Right, Left, Top and Bottom margins are set to 1.0 inch, Header and Footer are set to .5 inch from edge. Times New Roman 10 pitch for all text.

Header and Footer: Content is preset and may be modified by OSD – Do not change these.

Body of each report: Part I will be the individual report submissions. For this part:
Headings will be preceded by a blank line, terminate with a colon and be in bold. Apply Title Case (each key word starts with a capital) to data text of the following headings: Type of Transaction, Title, Awarding Office, and Awardee. Text data for all other heading will be in sentence case. Put two spaces between the heading colon and the data that is entered. The data entry for each heading is not to be bolded or italicized. Be sure to delete the italicized instruction/informational content provided within the sample.

Data for the following headings should be on the same line as the heading: Agreement Number, Type of Agreement, Title, Awarding Office, Awardee (do not include the awardee's address or locale unless needed for differentiation, i.e. University of California, Irvine), Effective Date, Estimated Completion or Expiration Date, U.S. Government Dollars, Non-Government Dollars, Dollars returned to Government Account. If additional lines are needed, indent the subsequent line(s) of text to meet the beginning point for prior line of data entry. Dollar fields should be in whole dollars without cents (not in $K) and every heading should have an entry – even if it's $ 0. Put one space between the $ and the first numeral.

Data entry for the following fields will be on the line immediately after the heading and will not be indented: Technical Objectives …, both Extent to which … questions, and the Other Benefits … question.

Part II: Any Prototype Other Transactions that were reported in previous year Congressional reports that recouped funds during this reporting year are to be listed in a separate table. Provide the Agreement Number, Year the agreement was entered into and the amount of the recoupment. **Each agency should submit one word document for all Part II prototype reported.**

PART I SAMPLE REPORT FORMAT *(Delete this title in your submission, as well as all italicized instructions below.)*

Agreement Number: XXXXX-XX-X-XXXX *(The ninth position of all prototype OTs will be coded "9".)*

Type of Agreement: Other Transaction for Prototype

Title: Next Generation Electrical Architecture *(provide a short title describing the research or prototype project)*

Awarding Office: US Army Tank-Automotive and Armaments Command (TACOM), AMSTA-CM-CLGC
(identify the military department or defense agency and the buying office)

Awardee: Boom Electronics, Inc. *(entry is in Title Case do not use address)*

Effective Date: 29 Sep 1999 *(entry is ## Aaa ####)*

Estimated Completion or Expiration Date: 30 Sep 2001

U. S. Government Dollars: $ 2,285,000 *(entry is $ ###,### - If zero use $ 0 - identify the total dollar value of expected government contributions to the agreement)*

Non-Government Dollars: $ 2,665,000 *(identify the total dollar value of expected non-government contributions to the agreement - if the reason authority is used is cost-sharing, then this amount must represent one third of the total dollars)*

Dollars Returned to Government Account: $ 0 *(identify the amount of any payments made to the federal government in accordance with 10 U.S.C. 2371(d))*

Technical objectives of this effort including the technology areas in which the project was conducted:
The technical objectives of this effort… *(describe the technical objectives and the technology areas being proven by the agreement).*

Extent to which the cooperative agreement or other transaction has contributed to a broadening of the technology and industrial base available for meeting Department of Defense needs:
The use of an other transaction agreement has … *(Discuss how the use of an other transaction agreement has contributed to a broadening of the technology and industrial base available for meeting DoD needs. The Guidelines in this Appendix can assist you in responding to this question. If the reason OTA is used is because non-traditional defense contractors are participating to a significant extent, then the answer to this question should identify who these non-traditional defense contractors are, what significant contribution they are making, and address how the use of OTA facilitated their participation.)*

Extent to which the cooperative agreement or other transaction has fostered within the technology and industrial base new relationships and practices that support the national security of the USA:
The use of an other transaction agreement has … *(Discuss how the use of an other transaction agreement has fostered new business relationships or practices that support the national security of the United States. Again, the Guidelines in this Appendix can assist you in responding to this question. If the reason OTA is used is based on cost-sharing or exceptional circumstances then the details then that reason should be explicitly stated in answering this question, and explained fully as discussed in the Guidelines to this Appendix.)*

Other benefits to the DOD through use of this agreement:
The use of an other transaction has resulted in additional benefits, not addressed above… *(This is an optional field that can be completed if there are other benefits that warrant reporting beyond those addressed above. If there are no other benefits to be reported, then delete this header in your report submission.)*

PART II SAMPLE REPORT FORMAT *(Delete this title in your submission, as well as all examples shown in the table below.)*

Funds recouped during FY XXXX *(Fill in the appropriate fiscal year)*

Agreement number:	Fiscal Year of Agreement:	Dollar amount returned in FY XXXX
N66604-99-9-3006	1999	$20,000
MDA972-95-9-0051	1995	$8,675
	Total:	$28,675

GUIDELINES TO ASSIST IN ANSWERING PART I QUESTIONS

Extent the other transaction has contributed to a broadening of the technology and industrial base available for meeting DoD needs: *(Focus on how use of an other transaction makes a difference. Consider:)*

- Did the use of the OT result in nontraditional defense contractors participating to a significant extent in the prototype project that would not otherwise have participated in the project? If so:
  - Identify the nontraditional defense contractors and explain why they would not typically participate if a procurement contract was used? For example, are they business units that normally accept no business with the government, that do business only through OTs or contracts for commercial items, or that limit their volume of Federal contracts to avoid a threshold at which they would have to comply with cost accounting standards or some other government requirement?
  - Were there provisions of the OT or features of the award process that enabled their participation? If so, explain specifically what they were.
- What are the significant contributions expected as a result of the nontraditional defense contractor's participation (e.g., supplying new key technology or products, accomplishing a significant amount of the effort, or in some other way causing a material reduction in the cost or schedule or increase in performance. Please be specific and explain how this contributes to a broadening of the technology and industrial base available to DoD?
- Did the Department gain access to technology areas or commercial products that would not be possible under a procurement contract? If so, identify these areas and explain how the use of the OT facilitated the access.
- Are there any other benefits of the use of the OT that you perceive helped the Department broaden the technology or industrial base available to DoD? If so, wha t were they, how do they help meet defense objectives, what features of the OT or award process enable us to realize them and why could they not have been realized using a procurement contract? Please be specific.

Extent the other transaction has fostered within the technology and industrial base *new relationships and practices* that support the national security of the United States: *(Focus on what is different because we are able to use an other transaction. Consider:)*

- Was OTA used in a circumstance where at least one third of the total funds of the prototype project are provided by the non-federal parties to the agreement? If so, state that this was the reason the authority was used and identify the percentage of funds being provided by non-federal parties to the agreement.
- Was use of OTA based on an SPE determination that exceptional circumstances justify the use of an OT that provides for innovative business arrangements or structures that would not be feasible or appropriate under a procurement contract? If so, state this is the reason the authority was used and fully describe the innovative business arrangements or structures, the associated benefits, and explain why they would not be feasible or appropriate under a procurement contract.
- Did the use of the OT result in the establishment of new relationships between the government and industry or among for-profit business units, among business units of the same firm, or between business units and nonprofit performers that will help us get better technology in the future? If so:
  - Explain the nature of the new relationships.
  - Explain why it is believed that these new relationships will help us get better technology in the future.
  - Were there provisions of the OT or features of the award process that enabled the creation of the new relationships? If so, explain specifically what they were and why these relationships could not have been created using a procurement contract.
- Did the use of the OT permit traditional government contractors to use new business practices in the execution of the prototype project that will help DoD get better technology, get new technology more quickly, or get it less expensively? If so:
  - Who are those contractors and what are the new business practices?
  - What are the specific benefits expected from the use of these new practices?
  - Were there provisions of the OT or features of the award process that enabled the use of these new practices? If so, specifically what are they and why these practices could not have been used if the award

had been made using a procurement contract?

Other benefits to the DoD of the use of this agreement: *(Are there any other benefits associated with the use of an OT beyond those addressed in the previous questions? If so:)*

- What are those benefits? How will they help meet defense objectives?
- Where there provisions of the OT or features of the award process that attributed to these benefits? If so, specifically what are they and why these benefits could not be achieved with a procurement contract?
- Can the benefits directly attributed to the use of the OTA be quantified?

PART III SAMPLE FORMAT

Agreement Number: XXXXX-XX-X-XXXX (The ninth position of all prototype OTs will be coded "9".)

Title: Next Generation Electrical Architecture *(provide a short title describing the research or prototype project)*

Awarding Office: US Army Tank-Automotive and Armaments Command (TACOM), AMSTA-CM-CLGC
(identify the military department or defense agency and the buying office)

Agreements Officer: John Doe *(provide the name of the Agreements Officer)*

Phone Number: xxx-xxx-xxxx *(provide the commercial phone number for the Agreements Officer)*

Business units that are not currently performing on procurement contracts subject to the Cost Principles (48 CFR Part 31) or Cost Accounting Standards (48 CFR Part 99) and will not accept an agreement that provides for government access to its records. ***(See OT Guide, section C2.14.3.3. Include the following information on each business unit that has been permitted to use an Independent Public Accountant for any needed audits.)***

Business Unit Name: ABC Company

Business Unit Address: 2000 Commercial Plaza
Houston, TX XXXXX

Estimated Amount of this business units efforts: $

REPORT OF OTHER TRANSACTIONS FOR PROTOTYPE PROJECTS

REPORT CONTROL SYMBOL: DD-AT&L(AR)2037

1. TYPE OF REPORT	2. REPORT NUMBER	3. CONTRACTING OFFICE CODE	4. NAME OF CONTRACTING OFFICE
0 Original 1 Cancelling 2 Correcting			

5. AGREEMENTS OFFICER a. NAME *(Last, First, Middle Initial)*	b. TELEPHONE *(Include Area Code)*	6. PIIN	7. MODIFICATION NUMBER

8. ACTION DATE *(YYYYMMDD)*	9. COMPLETION DATE *(YYYYMMDD)*	10. DUNS NUMBER	11. CAGE CODE	12. CONSORTIUM AGREEMENT Y Yes N No

13. AWARDEE INFORMATION

a. NAME	b. ADDRESS *(Street, City, State and ZIP Code)*	c. TYPE OF ENTITY 1 - Non-Profit 2 - Traditional Contractor 3 - Nontraditional Defense Contractor

14. SIGNIFICANT NONTRADITIONAL DEFENSE CONTRACTORS *(Continue on additional sheets if necessary)*

a. NAME	b. ADDRESS *(Street, City, State and ZIP Code)*

15. AWARDEE TYPE OF BUSINESS

A Small Disadvantaged Business Performing in U.S.
B Other Small Business Performing in U.S.
C Large Business Performing in U.S.
L Foreign Concern/Entity
M Domestic Firm Performing Outside U.S.
T Historically Black Colleges and Universities
U Minority Institutions
V Other Educational
Z Other Nonprofit

16. WOMAN-OWNED BUSINESS

Y Yes
N No
U Unknown

17. TIN	18. PARENT TIN	19. PARENT NAME

20. PRINCIPAL PLACE OF PERFORMANCE

a. CITY OR PLACE CODE	b. STATE OR COUNTRY CODE	c. CITY OR PLACE AND STATE OR COUNTRY NAME

21. PLACE OF MANUFACTURE	22. COUNTRY OF ORIGIN CODE	23. PROTOTYPE PROJECT a. NAME	b. COSSI Y Yes N No
A U.S. B Foreign			

24. PRINCIPAL PRODUCT OR SERVICE

a. FSC OR SVC CODE	b. DOD CLAIMANT PROGRAM CODE	c. PROGRAM, SYSTEM OR EQUIPMENT CODE	d. SIC/NAICS CODE	e. NAME/DESCRIPTION

25. TYPE OF OBLIGATION	26. TOTAL DOLLARS	27. TYPE OF ACTION	28. CREDITED PAYMENTS
1 Obligation 2 Deobligation		A Initial Award B Out of Scope Change C Funding Action D Within Scope Change F Termination G Cancellation H Exercise of an Option	Y Yes N No

29. TYPE OF INSTRUMENT	30. FINANCING	31. PARTICIPANT COST-SHARE a. AMOUNT	b. PERCENT
J Fixed-Price Type of Agreement U Cost-Type of Agreement W Other	A Progress Payments D Unusual Progress Payments or Advance Payments E Commercial Financing F Payable Milestones Z Not Applicable		

32. TOTAL AMOUNT OF AGREEMENT	33. EXTENT COMPETED	34. NUMBER OF OFFERORS SOLICITED	35. NUMBER OF OFFERS RECEIVED	36. REASON JUSTIFYING USE OF OTA
	A Competed Action C Follow-on to Competed Action D Not Competed	1 One 2 More than One		A Nontraditional Defense Contractor(s) B Cost-Sharing C SPE Determination

DD FORM 2759TEST, DEC 2000 PREVIOUS EDITION IS OBSOLETE.

APPENDIX 3
INSTRUCTIONS FOR DD 2759TEST FORM
FOR REPORTING OF SECTION 845 OTHER TRANSACTION ACTIONS

The DD 2759 dated Oct 1997 is superceded by the DD 2759 dated Dec 2000 and should no longer be used. Prototype projects awarded prior to FY 2001 that report additional obligations should use the new DD 2759, but do not need to complete the new data fields (Data Elements 14 & 36). Agreements Officers must submit a DD 2759 dated Dec 2000, with all data fields completed, within 60 days after the effective date of this guide, for any new prototype project awarded in FY 2001, prior to the effective date of this guide.

Each military department and defense agency must collect the common data elements for every Section 845 other transaction obligation or deobligation in accordance with the instructions specified herein. The awarding office must collect the data for covered actions issued on its behalf by the contract administration office. This information must be collected at the time of the obligation or deobligation and submitted to the agency POC within 10 days of the agreement action. DD Form 2759TEST has been developed to collect this information.

The Directorate for Information Operations and Reports (DIOR) is the focal point for establishing a central unclassified database. Until this is accomplished, the information must be forwarded to your agency POC in hard copy or electronic format, in accordance with agency procedures. Also submit a copy to DIOR. If possible, electronic submittal is encouraged. Data for Special Access programs that use this authority must be collected in accordance with current agency guidance on Special Access programs. Until the time an operational automated database is established, the agencies will maintain key DD 2759 information in an excel spreadsheet.

Most data elements are similar to DD Form 350 blocks and the attached narrative includes a cross-reference to instructions in the Defense Federal Acquisition Regulation (DFARS) 253.204-70 in parentheses(). To the extent the DD Form 350 instructions in the DFARS are applicable, they should be used to complete the data fields. Instructions are provided in brackets[ ] for new data elements or selection choices and for data elements where the DFARS instructions are clearly not applicable.

If the obligation action is a funding action or other within scope change or for a prototype project, then only data elements 1-11, 13, 25-27 and 31-32 must be completed; provided the information that would be entered in the other data elements remains unchanged from previous submissions. If it becomes evident after award that there are significant changes in key participants, then the key participants information should be updated on the next DD 2759 action.

DIOR Address: Washington Headquarters Services
Directorate of Information Operations and Reports (DIOR)
Attn: Mr. Ray Morris, Suite 1204 703-604-4572
1215 Jefferson Davis Highway e-mail: morrisr@dior.whs.mil
Arlington, VA 22202

Common Data Elements for "Section 845 Other Transactions"

1. Type of Report (A1)
0 Original
1 Cancelling
2 Correcting

2. Report Number (A2)

3. Contracting Office Code (A3)

4. Name of Contracting Office (A4)

5. Agreements Officer
5a. Name
5b. Commercial Telephone Number

6. Procurement Instrument Identification Number (B1A) [The PIIN should be assigned in accordance with DFARS 204.7001. The ninth position will be coded "9"]

7. Modification Number (B2)

8. Action Date (YYYYMMDD) (B3)

9. Completion Date (YYYYMMDD) (B4)

10. DUNS Number (B5A) [Enter the 9-position Data Universal Numbering System (DUNS) number for the business unit receiving the award. This number is obtained from the awardee. If the agreement is awarded to a Consortium, a DUNS number identifying the consortium should be obtained from the awardee and entered here.]

11. CAGE Code (B5C) [If the agreement is awarded to a consortium, identify the CAGE number associated with the lead company at the time of the reported action.]

12. Consortium Agreement
Y Yes
N No
[Yes should be selected if the agreement is awarded to a Consortium where two or more companies share the responsibility for performance. No should be selected if the agreement is awarded to one awardee with overall responsibility for performance.]

13. Awardee Information [Enter information on the business unit receiving the award. If the agreement is awarded to a consortium that is not a legal entity, identify the lead company at the time of the reported action here and report on the lead company in data elements 15-18.]

13a. Name

13b. Address (Street, City, State, Zip Code)

13c. Type of Entity [Identify whether the awardee is either:
1 - Non-Profit (e.g. Educational Institution, FFRDC, government organizations, or other non-profit)
2 - Traditional contractor (i.e., not a nontraditional defense contractor)
3 - Nontraditional defense contractor (see OT Guide Definitions section)

14. Significant Nontraditional Defense Contractors. [Use a separate sheet of bond paper if necessary. Enter all nontraditional defense contractors that participate to a significant extent in the prototype project (see OT Guide, section C1.5.1.). This block should be updated if additional nontraditional contractors that participate to a significant extent are identified during performance.]

14a. Name

14b. Address *(Street, City, State, Zip Code)*

15. Awardee Type of Business (D1)

A Small Disadvantaged Business Performing in U.S.
B Other Small Business Performing in U.S.
C Large Business Performing in U.S.
L Foreign Concern/Entity
M Domestic Firm Performing Outside U.S.
T Historically Black Colleges & Universities
U Minority Institutions
V Other Educational
Z Other Nonprofit

16. Woman-Owned Business (D6)

Y Yes
N No
U Unknown

17. TIN (Taxpayer Identification Number)(B5F)

18. Parent TIN (B5G)

19. Parent Name (B5H)

20. Principal place of performance

20a. City or Place Code (B6A)

20b. State or Country Code (B6B)

20c. City or Place and State or Country Name (B6C)

21. Place of Manufacture (C13A)

A U.S.
B Foreign

22. Country of Origin Code (C13B)

23. Prototype Project

23a. Name [Provide a five word name of the project].

23b. COSSI

Y Yes
N No

[Answer Yes, if the project is awarded as a result of the Commercial Operations & Support Savings Initiative (COSSI); if not, answer No.]

24. Principal Product or Service

24a. FSC or SVC Code (B12A)

24b. DoD Claimant Program Code (B12B)

24c. Program, System or Equipment Code (B12C)

24d. SIC/NAICS Code (B12D) [Use the Standard Industrial Classification Code until it is replaced by the North American Industry Classification System Code.]

24e. Name/Description (B12E)

25. Type of Obligation (B7)

1 Obligation
2 Deobligation

26. Total Dollars (B8) [This refers to dollars obligated or deobligated by this action.]

27. Type of Action (B13-like)

A Initial award
B Out of scope change
C Funding action
D Within scope change [select code D for any "within scope" change not covered by other codes]
F Termination [select code F for a complete or partial termination, for

whatever reason]
G Cancellation
H Exercise of an Option

28. Credited Payments

Y Yes
N No

[Statutorily required reporting element, if applicable. 10 U.S.C. 2371(d) allows an OT to require payment to the Department as a condition of receiving support under an OT and permits any such payment to be credited to support accounts (see OT Guide section C2.4). Enter yes if your agreement provides for such a condition.]

29. Type of Instrument (C5)

J Fixed-Price Type of Agreement [see Definitions section]

U Cost- Type of Agreement [see Definitions section]

W Other [select this code for hybrid or some other type of agreement]

30. Financing (C12-like)

A Progress Payments [select code A if a FAR 52.232-16 like-clause is incorporated into the agreement]
D Unusual Progress Payments or Advance Payments [select code D if advance payments or progress payments other than A are incorporated into the agreement]
E Commercial Financing [select code E if the agreement provides for commercial-like financing payments]
F Payable Milestones [select code F if any form of milestone or performance-event payments are incorporated into the agreement]
Z Not Applicable [select code Z if none of the above codes apply (e.g., a cost-reimbursement agreement)]

31. Participant Cost-Share

31a. Amount [If a nontraditional defense contractor is not participating to a significant extent in the prototype project and the reason OTA is used is based on a cost-sharing requirement, then the amount of non-federal cost share must be at least one third of the total cost of the prototype project. If the agreement does not provide for cost sharing, report $0. If the agreement provides for participant cost-sharing, then identify the total estimated amount or value of the participant's cost-sharing.]

31b. Percentage (XX%) [If participant cost-sharing applies, identify the participant's cost share percentage of the total agreement amount.]

32. Total Amount of Agreement [Identify the total value of the agreement, including both government and participant contributions. Do not include in this total options that have not been exercised.]

33. Extent Competed (C3)

A Competed Action [select code A if competitive procedures were used]
C Follow-on to Competed Action
D Not Competed

34. Number of Offerors Solicited (C6)

1 One
2 More than One

35. Number of Offers Received (C7)

36. Reason Justifying Use of OTA

A Nontraditional defense contractor(s) [select code A if reason is based on the significant participation of at least one non-traditional defense

contractor]

B Cost-Sharing [select code B if the reason is not code A and is based on one-third of funds provided by non-federal parties to the agreement]

C SPE determination [select code C if the reason is not code A and is based on SPE determination of exceptional circumstances]

[See section C1.5 of the OT Guide for further discussion regarding reasons for using OTA for prototype projects.]

APPENDIX 4
COMPTROLLER GENERAL ACCESS

Implementation of statutory requirements regarding Comptroller General access to records is codified in Part 3 of Section 32 of the Code of Federal Regulations, Subtitle A, Chapter 1.

PART 3 — TRANSACTIONS OTHER THAN CONTRACTS, GRANTS, OR COOOPERATIVE AGREEMENTS FOR PROTOTYPE PROJECTS

3.4 Policy

(a) A clause must be included in solicitations and agreements for prototype projects awarded under authority of 10 U.S.C. 2371, that provide for total government payments in excess of $5,000,000 to allow Comptroller General access to records that directly pertain to such agreements.

(b) The clause referenced in paragraph (a) of this section will not apply with respect to a party or entity, or subordinate element of a party or entity, that has not entered into any other contract, grant, cooperative agreement or "other transaction" agreement that provides for audit access by a government entity in the year prior to the date of the agreement. The clause must be included in all agreements described in paragraph (a) of this section in order to fully implement the law by covering those participating entities and their subordinate elements which have entered into prior agreements providing for Government audit access, and are therefore not exempt. The presence of the clause in an agreement will not operate to require Comptroller General access to records from any party or participating entity, or subordinate element of a party or participating entity, which is otherwise exempt under the terms of the clause and the law.

(c)(1) The right provided to the Comptroller General in a clause of an agreement under paragraph (a) of this part, is limited as provided by subparagraph (c)(2) of this part in the case of a party to the agreement, an entity that participates in the performance of the agreement, or a subordinate element of that party or entity, if the only cooperative agreements or "other transactions" that the party, entity, or subordinate element entered into with government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under 10 U.S.C. 2371 or Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Pub.L. 103-160; 10 U.S.C. 2371 note).

(c)(2) The only records of a party, other entity, or subordinate element referred to in subparagraph (c)(1) of this part that the Comptroller General may examine in the exercise of the right referred to in that subparagraph, are records of the same type as the records that the government has had the right to examine under the audit access clauses of the previous cooperative agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

(d) The head of the contracting activity (HCA) that is carrying out the agreement may waive the applicability of the Comptroller General access requirement if the HCA determines it would not be in the public interest to apply the requirement to the agreement. The waiver will be effective

with respect to the agreement only if the HCA transmits a notification of the waiver to the Committees on Armed Services of the Senate and the House of Representatives, the Comptroller General, and the Director, Defense Procurement before entering into the agreement. The notification must include the rationale for the determination.

(e) The HCA must notify the Director, Defense Procurement of situations where there is evidence that the Comptroller General Access requirement caused companies to refuse to participate or otherwise restricted the Department's access to companies that typically do not do business with the Department.

(f) In no case will the requirement to examine records under the clause referenced in paragraph (a) of this section apply to an agreement where more than three years have passed after final payment is made by the government under such an agreement.

(g) The clause referenced in paragraph (a) of this section, must provide for the following:

(1) The Comptroller General of the United States, in the discretion of the Comptroller General, shall have access to and the right to examine records of any party to the agreement or any entity that participates in the performance of this agreement that directly pertain to, and involve transactions relating to, the agreement.

(2) Excepted from the Comptroller General access requirement is any party to this agreement or any entity that participates in the performance of the agreement, or any subordinate element of such party or entity, that, in the year prior to the date of the agreement, has not entered into any other contract, grant, cooperative agreement, or "other transaction" agreement that provides for audit access to its records by a government entity.

(3)(A) The right provided to the Comptroller General is limited as provided in subparagraph (B) in the case of a party to the agreement, any entity that participates in the performance of the agreement, or a subordinate element of that party or entity if the only cooperative agreements or "other transactions" that the party, entity, or subordinate element entered into with government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under 10 U.S.C. 2371 or Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Pub.L. 103-160; 10 U.S.C. 2371 note).

(B) The only records of a party, other entity, or subordinate element referred to in subparagraph (A) that the Comptroller General may examine in the exercise of the right referred to in that subparagraph are records of the same type as the records that the government has had the right to examine under the audit access clauses of the previous agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

(4) This clause shall not be construed to require any party or entity, or any subordinate element of such party or entity, that participates in the performance of the agreement, to create or

maintain any record that is not otherwise maintained in the ordinary course of business or pursuant to a provision of law.

(5) The Comptroller General shall have access to the records described in this clause until three years after the date the final payment is made by the United States under this agreement.

(6) The recipient of the agreement shall flow down this provision to any entity that participates in the performance of the agreement.

APPENDIX 5
SAMPLE AUDIT ACCESS CLAUSES

An audit access clause is needed when an agreement uses amounts generated from the awardee's financial or cost records as the basis for payment (e.g., interim or actual cost reimbursement including payable milestones that provide for adjustment based on amounts generated from the awardee's financial or cost records) or requires at least one third of the total costs to be provided by non-federal parties pursuant to statute. Provided in this Appendix are sample clauses the Agreements Officers may use or tailor, but audit access clauses should be consistent with the guidance in section C2.14 of the OT Guide.

Sample 1: Clause for awardees {insert name, if desired} that have a contract, grant, or cooperative agreement subject to the Single Audit Act:

> The awardee shall comply with all aspects of the Single Audit Act.

Sample 2: Clause for awardees {insert name, if desired} that are not subject to the Single Audit Act but have a contract subject to Cost Principles and/or Cost Accounting Standards:

> The Agreements Officer, or an authorized representative, shall have the right to examine or audit the awardee records during the period of the agreement and for three years after final payment, unless notified otherwise by the Agreements Officer. The Agreements Officer, or an authorized representative, shall have direct access to sufficient records to ensure full accountability for all government funding or to verify statutorily required cost share under the agreement.

Sample 3: Clause for awardees {insert name, if desired} that are not subject to the Single Audit Act, do not have a procurement contract subject to Cost Principles (48 CFR Part 31) and/or Cost Accounting Standards (48 CFR Part 99), and refuse to accept Government access to their records:

> The Agreements Officer shall have the right to request an examination or audit of the awardee's records during the period of the agreement and for three years after final payment, unless notified otherwise by the Agreements Officer. The audits will be conducted by an Independent Public Accountant (IPA), subject to the following conditions:
>
> 1) The audit shall be performed in accordance with Generally Accepted Government Auditing Standards (GAGAS).
>
> 2) The Agreements Officers' authorized representative shall have the right to examine the IPA's audit report and working papers for three years after final payment, unless notified otherwise by the Agreements Officer.
>
> 3) The IPA shall send copies of the audit report to the Agreements Officer and the

Assistant Inspector General (Audit Policy and Oversight) [AIG(APO)], 400 Army Navy Drive, Suite 737, Arlington, VA 22202.

4) The IPA shall report instances of suspected fraud directly to the DoDIG.

5) When the Agreements Officer determines (subject to appeal under the disputes clause of the agreement) that the audit has not been performed within twelve months of the date requested by the Agreements Officer, or has not been performed in accordance with GAGAS or other pertinent provisions of the agreement (if any), the government shall have the right to require corrective action by awardee. The awardee may take corrective action by having the IPA correct any deficiencies identified by the Agreements Officer, by having another IPA perform the audit, or by electing to have the government perform the audit. If corrective action is not taken, the Agreements Officer shall have the right to take one or more of the following actions:

(a) Withhold or disallow a percentage of costs until the audit is completed satisfactorily;

(b) Suspend performance until the audit is completed satisfactorily; and/or

(c) Terminate the agreement.

6) If it is found that the awardee was performing a procurement contract subject to Cost Principles (48 CFR Part 31) and/or Cost Accounting Standards (48 CFR Part 99) at the time of agreement award, the Agreements Officer, or an authorized representative, shall have the right to audit sufficient records of the awardee to ensure full accountability for all government funding or to verify statutorily required cost share under the agreement. The awardee shall retain such records for three years after final payment, unless notified otherwise by the Agreements Officer.

Sample 4: Clause for All Awardees for flowing down requirements:

The awardee shall flow down the applicable audit access requirements, when key participants contribute towards statutory cost share requirements or will receive total payments exceeding $300,000 that are based on amounts generated from cost or financial records, and request audits of key participants when the Agreements Officer advises that audits are necessary. The Agreements Officer will provide sample audit access clauses to the awardee. Unless otherwise permitted by the Agreements Officer, the awardee shall alter the sample clauses only as necessary to identify properly the contracting parties and the Agreements Officer.

The awardee shall provide a statement to the Agreements Officer when a business unit meets the conditions for use of an Independent Public Accountant (other than pursuant to the Single Audit Act) for any needed audits. The statement shall include the business unit's name,

address, expected value of its award, and state that the business unit is not currently performing on a procurement contract subject to the Cost Principles (48 CFR Part 31) and/or Cost Accounting Standards (48 CFR Part 99) and refuses to accept Government access to its records. Where the awardee and key participant agree, the key participant may provide this statement directly to the Agreements Officer.

Appendix C: DIUx CSO White Paper (2016)

Commercial Solutions Opening (CSO)

Office of the Secretary of Defense
Defense Innovation Unit (Experimental)

SECTION 1 - INTRODUCTION

1.1 Background and Authority

The *2014 Quadrennial Defense Review* (QDR) established innovation as a central line of effort in the national defense strategy of the United States. Asymmetric technological capabilities enabling the U.S. to maintain a decisive military advantage over its adversaries and peer competitors are steadily eroding. Globalization has contributed significantly to a renaissance in commercial innovation fueled by venture capital investment that far exceeds the research and development budget of the Department of Defense (DoD). As a result, the global technology 'water line' has risen faster than DoD's ability to outpace it alone. More so, rogue nations and non-state actors have gained ready access to new technology leading to an advancement in their offensive capabilities. Consequently, the Secretary of Defense launched the Defense Innovation Unit (Experimental), or DIUx, in order to accelerate the development, procurement and integration of commercially-derived disruptive capabilities to regain our nation's technological lead and enabling a third offset strategy.

Under the authority of 10 U.S.C. 2371b, DIUx is interested in awarding funding agreements (agreements) to nontraditional and traditional defense contractors to carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces. The information provided in this Commercial Solutions Opening (CSO) is intended to ensure that to the maximum extent practicable, competitive procedures are used when entering into agreements to carry out these prototype projects.

1.2 CSO Procedure

This CSO is seeking proposals for innovative, commercial technologies that accelerate attainment of asymmetric defense capabilities. In this context, innovative means any new technology, process, or business practice, or any new application of an existing technology, process, or business practice that contributes to the sustainment of global peace and U.S. national security.

This is an open (available for 5 years), two-step (solution brief/demonstration followed by proposal) CSO. This CSO is considered a competitive process. Solution briefs shall be submitted as specified in Section 3, Part A of this CSO. The Government will evaluate solution briefs against the criteria stated in this announcement. Those Companies whose solution briefs are evaluated to be of merit may, if funding is available, be invited to submit a formal proposal following the instructions provided in Section 3, Part B of this CSO. If the Company's solution

brief is identified for funding during this period, they will be invited to submit a formal proposal following the instructions provided in Section 3, Part B of this CSO. The Government may also invite Companies to demonstrate their technology following a solution brief review. The Government does not anticipate paying Companies for demonstrations.

The Government may engage in discussions with Companies to include discussions during the development of the formal proposal.

The Government may add additional topics of interest at any time. Interested Companies are encouraged to frequently check the CSO for updates.

A prototype can generally be described as a physical or virtual model used to evaluate the technical or manufacturing feasibility or military utility of a particular technology or process, concept, end item or system. The quantity developed should be limited to that needed to prove technical or manufacturing feasibility or evaluate military utility. This CSO will result in the award of prototype projects, which include not only commercially-available technologies fueled by commercial or strategic investment, but also concept demonstrations, pilots, and agile development activities that can incrementally improve commercial technologies or concepts for defense application.

Benefits of the CSO process and OTAs include:

- A streamlined application process requiring only minimal corporate and technical information
- Fast track evaluation timelines for solution briefs; with notification made, in most cases, within 30 calendar days of topic closure
- Negotiable payment terms
- Capital is non-dilutive
- All intellectual property (IP) rights are negotiable and the Government does not plan to own any IP
- Direct feedback from operators, customers and users within the DoD to help product teams develop and hone product design and functionality
- Potential follow-on funding for promising technologies and sponsorship of user test cases for prototypes and possible follow-on production.

SECTION 2 - DEFINITIONS

"Other Transaction for Prototype Projects" refers to this type of Other Transaction Agreement (OTA). This type of OTA is authorized by 10 U.S.C. 2371b for prototype projects directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the DoD, or for the improvement of platforms, systems, components, or materials in use by the armed forces. This type of OTA is treated by DoD as an acquisition instrument, commonly referred to as an "other transaction" for a prototype project or a Section 2371b "other transaction".

"Prototype" can generally be described as a physical or virtual model used to evaluate the technical or manufacturing feasibility or military utility.

"Nontraditional Defense Contractor" means as the term is defined in section 2302(9) of title 10, United States Code. With respect to applicable authority, 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. This includes all small business concerns under the criteria and size standards in Title 13, Code of Federal Regulations, part 121 (13 CFR 121).

"Innovative" means--

(1) any new technology, process, or method, including research and development; or

(2) any new application of an existing technology, process, or method.

SECTION 3 - GUIDELINES FOR PREPARATION AND SUBMISSION OF SOLUTION BRIEFS AND PROPOSALS

The purpose of the solution brief is to identify innovative solutions for the Department and preclude effort on the part of the Company whose proposed work is not of interest to the Government. Accordingly, Companies are encouraged to submit solution briefs following the instructions detailed below (Part A). While proposal instructions for any follow-on complete proposal are detailed below (Part B) the Government will provide specific proposal instructions in the invitation to submit a full proposal. An invitation from the Government Agreements Officer to submit a complete proposal, which includes a statement of work and a cost proposal, does not guarantee that the submitting organization will be awarded funding. Solution briefs should specifically identify the focused topic(s) category listed on the CSO website. This info will be posted on the DIUx website, diux.mil/workwithus. In general, companies will be notified within 30 calendar days after the topic area of interest has closed whether or not their solution brief is of interest at this time.

Guidelines for Solution Brief Submissions:

1) It is generally desired that active R&D is underway for concepts submitted under this CSO. Active R&D includes analytical studies and laboratory studies to physically validate the analytical predictions of separate elements of the technology, as well as software engineering and development.

2) The costs of preparing and submitting solution briefs are not considered an allowable direct charge to any contract or agreement.

3) Unnecessarily elaborate brochures or proposals are not desired.

4) Use of a diagram(s) or figure(s) to depict the essence of the proposed solution is strongly encouraged.

5) Multiple solution briefs addressing different topic areas may be submitted by the same organization; however, each solution brief may only address one concept based on the stated Government topic area of interest. Companies may submit solution briefs at any time during the 5-year announcement period.

6) The period of performance for any solution brief or proposal submitted under this CSO should generally be no greater than 24 months.

7) Technical data with military application may require appropriate approval, authorization, or license for lawful exportation.

8) All solution briefs shall be unclassified. Solution briefs containing data that is not to be disclosed to the public for any purpose or used by the Government except for evaluation purposes shall include the following sentences on the cover page:

"This solution brief includes data that shall not be disclosed outside the Government, except to non-Government personnel for evaluation purposes, and shall not be duplicated, used, or disclosed -- in whole or in part -- for any purpose other than to evaluate this submission. If, however, an agreement is awarded to this Company as a result of -- or in connection with -- the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent agreed upon by both parties in the resulting agreement. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]"

Each restricted data sheet should be marked as follows:
"Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal."

9) Foreign-Owned businesses may be a submitter alone or through some form of teaming arrangement with one or more United States-owned businesses. However, the ability to obtain an agreement based upon a submission may depend upon the ability of the Foreign Owned business to obtain necessary clearances and approvals to obtain proscribed information.

10) Questions regarding the objectives or preparation of the solution brief should be addressed to CSOquestions@diux.mil.

11) Submissions must be submitted electronically via the DIUx website: diux.mil/workwithus.

SECTION 3 PART A: SOLUTION BRIEF PREPARATION
(STEP 1 OF THE 2-PART CSO PROCESS)

The Solution Brief Preparation Step of this CSO is a two-phase process. In Phase 1, Submitter's solution brief should not exceed five pages using 12-point font. Alternatively, solution briefs may take the form of slides, which should not exceed fifteen. These limits are not requirements, but strong recommendations.

PHASE 1 SOLUTION BRIEF CONTENT

Title Page (does not count against page limit)

Company Name, Title, Date, Point of Contact Name, E-Mail Address, Phone, and Address.

Executive Summary (one page)

Provide an executive summary of the technology.

Technology Concept

Describe the unique aspects of your technology and the proposed work as it relates to the topic area of interest. Identify whether the effort includes the pilot or demonstration of existing commercial technology (identified as commercially ready and viable technology), or the development of technology for potential defense application. If development or adaptation is proposed, identify a suggested path to mature the technology. Identify aspects which may be considered proprietary.

Company Viability

Provide a brief overview of the company. Provide a summary of current fundraising to date or a summary of the top line (gross sales/revenues). Provide a summary of product commercialization and go-to-market strategy.

PHASE 1 SOLUTION BRIEF BASIS OF EVALUATION

Individual solution briefs will be evaluated without regard to other submissions received under this announcement. The Government will aim to complete the Phase I evaluation of solution briefs within 30 calendar days of the closing of the submittal period and notify the Company of the status.

Phase 1 Solution briefs shall be evaluated on the basis of the technical merit of the proposed concept, i.e., the feasibility of the proposed solution to address the topic area of interest. The

Government will further evaluate the relevancy of the proposed concept/technology/solution to the topic area of interest and the degree to which the proposed concept provides an innovative, unique and/or previously under-utilized capabilities. Finally, the Government will evaluate the strength of the company and business viability of the proposed solution. The Government may elect to use external market research in the evaluation of a company's viability.

Additional technical evaluation criteria specific to a particular project may be used. In these instances, the additional criteria will be posted with the topic area of interest on the DIUx website.

Upon review of a solution brief, the Government may elect to invite a company into Phase 2 of the Solution Brief Step. In Phase 2, Companies will be invited to pitch and/or demonstrate their technology in person or request additional information from the Company.

PHASE 2 SOLUTION BRIEF CONTENT

In Phase 2, information may be provided to the Government during the in-person pitch/demonstration and/or in a written submission. The pitch should provide more details on the technical and business viability of the proposed solution submitted in phase one. Regardless of format, the Phase 2 Solution Brief must also address:

Estimated Price/Schedule

Provide a rough order of magnitude price and notional schedule for how this concept could be tested within the DoD.

Defense Utility

Operational Impact – if known, describe how the DoD will be impacted by your technology. Explain the beneficial impacts and quantify them as appropriate. Detail who the operational users of the technology are expected to be or could be.

Prototype

State how this effort fits the CSO definition of a prototype, and which one of the following best applies for this prototype project:

- There is significant participation by a small business or nontraditional defense contractor; or
- At least one third of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the Federal Government.

Data Rights Assertions

The solution brief will identify any intellectual property involved in the effort and associated restrictions on the Government's use of that intellectual property.

In addition to these required areas, the Government may request the Company provide additional information/detail with respect to the Technology Concept information provided in the Phase 1 Solution Brief.

PHASE 2 SOLUTION BRIEF BASIS OF EVALUATION

Individual solution briefs will be evaluated without regard to other submissions received under this announcement. The Government will aim to complete review of Phase 2 solution briefs within 30 calendar days of the in-person pitch/demonstration and/or receipt of additional written information, whichever is later, and notify the Company if they are invited to submit a full proposal or if their technology is not of interest to the Government at this time.

Phase 2 Solution Briefs shall be evaluated on the following factors:

1) The proposed concept is directly relevant to enhancing DoD mission effectiveness
2) A rough order of magnitude (ROM) price is acceptable
3) A notional schedule is acceptable
4) There is significant nontraditional and/or small business participation, or the company is prepared to provide a 1/3 cost share (see definitions, section two)
5) The proposed concept qualifies as a prototype effort
6) The potential impact of data rights assertions

In addition to the above factors, if additional information is provided by the Company in its Phase 2 Solution Brief with respect to the areas evaluated in Phase 1 (Technical merit of the proposed concept, , the relevancy of the proposed concept to the topic area of interest, the degree to which the proposed concept provides innovative/unique and/or previously under-utilized capabilities, and the strength of the company and business viability of the proposed solution) the Phase 2 Evaluation will include these factors.

SECTION 3, PART B: PROPOSAL PREPARATION
(STEP 2 OF THE 2-PART CSO PROCESS)

When invited to do so by the Government, a Company may develop and submit a full proposal. Companies may discuss ideas and details of the proposal during the proposal writing process with the Government. Each proposal submitted shall consist of two sections: Section 1 shall provide the technical proposal and Section 2 shall address the price/cost/schedule portions of the proposal.

Proposals containing data that is not to be disclosed to the public for any purpose or used by the Government except for evaluation purposes shall include the following sentences on the cover page:

> "***This proposal includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed -- in whole or in part -- for any purpose other than to***

evaluate this proposal. If, however, an agreement is awarded to this Company as a result of -- or in connection with -- the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent agreed upon by both parties in the resulting agreement. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]"

Each restricted data sheet should be marked as follows:
"Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal."

Include documentation proving your ownership of or possession of appropriate licensing rights to all patented inventions (or inventions for which a patent application has been filed) that will be utilized under your proposal for DIUx. If a patent application has been filed for an invention that your proposal utilizes, but the application has not yet been made publicly available and contains proprietary information, you may provide only the patent number, inventor name(s), assignee names (if any), filing date, filing date of any related provisional application, and a summary of the patent title, together with either: (1) a representation that you own the invention, or (2) proof of possession of appropriate licensing rights in the invention.

Provide a good faith representation that you either own or possess appropriate licensing rights to all other intellectual property that will be utilized under your proposal for DIUx. Additionally, proposers shall provide a short summary for each item asserted with less than unlimited rights that describes the nature of the restriction and the intended use of the intellectual property in the conduct of the proposed research.

Section 1, Technical Proposal

Title Page

Company Name, Title, Point of Contact Name, Date, E-Mail Address, Phone, and Address and any subcontractors or team members. Include an abstract which provides a concise description of the proposal.

Propose a Technical Approach

Describe the background and objectives of the proposed work, the approach, deliverables, and the resources needed to execute it. Include the nature and extent of the anticipated results. Include ancillary and operational issues such as certifications, algorithms, and any engineering/software development methodologies to be used. This proposal must include a Statement of Work (SOW) identifying the work to be performed and the deliverables. Provide a detailed project schedule that outlines the various phases of work to be accomplished within 24 months. You may refer to the solution brief that prompted this proposal request, but do not duplicate it.

Government Support Required

Identify the type of support, if any, the Company requests of the Government in general such as facilities, equipment, data, and information or materials.

Section 2, Price Proposal

The Company shall propose the total price to complete the prototype project and shall provide any other data or supporting information as the parties agree is necessary for the determination of a fair and reasonable price.

BASIS FOR PROPOSAL REVIEW

Proposals will be evaluated as they are received through a Government subject matter expert panel. Proprietary information will be protected from potential competitors. Proposals will be reviewed under the following criteria:

1) The degree to which the proposal is relevant to disruptive defense capabilities, including the degree to which it enhances and / or accelerates innovative development contributing toward third offset strategies.

2) Technical merit of the proposal with an emphasis on innovative solutions.

3) Realism and adequacy of the proposal performance schedule

4) Realism and reasonableness of the price

SECTION 4 - AWARDS

Upon favorable review and available funds, the Government may choose to make an award. Awards will be fixed price and will be made using Other Transaction Agreements (OTAs). OTAs allow federal agencies to implement faster and streamlined methods and do not carry all the requirements of traditional Federal Acquisition Regulation-based procurement contracts. The Agreements Officer will negotiate directly with the Company on the terms and conditions of the OTA, including payments

To receive an award, one of the following must be present:

- Significant participation by non-traditional defense companies; or
- One-third cost share of the total agreed-upon price unless an exception under section 2371b(d)(1) applies.

To receive an award, Companies must have a Dunn and Bradstreet (DUNS) number and must register in the System for Award Management (SAM). This system verifies identity and ensures that payment is sent to the right party. In general, to invoice and receive payment after award of an OTA, Companies must register in Wide Area Work Flow. The Agreements Officer will provide assistance to those Companies from whom a full proposal is requested. The company must be considered a responsible party by the Agreements Officer, and is not suspended or debarred from such agreement by the Federal Government, and is not prohibited by Presidential Executive Order, or law from receiving such award.

Awards under this CSO will be made to proposers on the basis of the evaluation criteria listed above, and program balance to provide overall value to the Government.

COMPTROLLER GENERAL ACCESS TO INFORMATION

In projects that provide for payments in a total amount in excess of $5,000,000, the agreement may include a clause that provides for the Comptroller General the ability to examine the records of any party to the agreement or any entity that participates in the performance of the agreement.

SECTION 5 - FOLLOW-ON WORK

Upon completion of the prototype project under the OTA, the Government and Company may agree to additional work. If this additional work logically follows from the original prototype project, the Government may request a new proposal from the Company. This proposal may be negotiated with the Agreements Officer without the need to submit a new solution brief.

SECTION 6 – NON-GOVERNMENT ADVISORS

1) Solution briefs - Non-Government advisors may be used in the evaluation of solution briefs and will have signed non-disclosure agreements (NDAs) with the Government. The Government understands that information provided in response to this CSO is presented in confidence and may contain trade secret or commercial or financial information, and it agrees to protect such information from unauthorized disclosure to the maximum extent permitted or required by Law, to include-

    a. 18 USC 1905 (Trade Secrets Act);

    b. 18 USC 1831 et seq. (Economic Espionage Act);

    c. 5 USC 552(b)(4) (Freedom of Information Act);

    d. Executive Order 12600 (Pre-disclosure Notification Procedures for Confidential Commercial Information); and

e. Any other statute, regulation, or requirement applicable to Government employees.

2) Proposals - Non-Government advisors may also be used in the evaluations of proposals. In these cases, Companies will be notified of the name and corporate affiliation of these advisors in the request from the Government to submit a full proposal. Companies will be afforded the opportunity to enter into a specific NDA with the corporate entity prior to submission of the proposal.

DIUx policy is to treat all submissions as source selection information, and to disclose their contents only for the purpose of evaluation. Restrictive notices notwithstanding, during the evaluation process, submissions may be handled by support contractors for administrative purposes and/or to assist with technical evaluation. All DIUx and DoD support contractors performing this role are expressly prohibited from performing DIUx-sponsored technical research and are bound by appropriate nondisclosure agreements.

Submissions will not be returned. The original of each submission received will be retained at DIUx and all other non-required copies destroyed. A certification of destruction may be requested, provided the formal request is received at this office within 5 days after notification that a proposal was not selected.

SECTION 8 – CONTACT INFORMATION

CSOquestions@diux.mil

Be advised, only an Agreements Officer has the authority to enter into a binding agreement on behalf of the Government. He or she will sign the agreement, and only an Agreements Officer has the authority to change the terms of the agreement.