

Do This, Not That

Some thoughts from the OT trenches

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In order to allow the DOD to tap into commercial technology as a means to possess a technical edge over adversaries, Congress—through Section 815 of the Fiscal Year 2016 National Defense Authorization Act—enabled the DOD to bypass the requirements of the Competition in Contracting Act and award a follow-on production contract to a non-traditional defense contractor where the Government determined that a prototype was successful.¹ But with the constraints of the Federal Acquisition Regulation (FAR) gone, how can program managers effectively leverage this new ability?

This article discusses lessons learned from Marine Corps Systems Command programs that have attempted to use other transaction agreements to acquire or build upon existing technology. While other transactions (OTs) may not be *faster* than a traditional FAR-based approach on the front end, an OT’s flexibility, including the ability to test and refine different prototypes without regard to the requirement to treat all companies the same, allows the Marine Corps the opportunity to test different designs, in real-world situations, with minimal up-front costs, to best meet Marines’ needs. Additionally, OTs do satisfy the need to have contract vehicles that are able to mirror the iterative learning and adaptation that are inherent in the Marine Corps’ *Force Design 2030*.

Leverage Demonstrations as Prototypes

Traditional FAR-based acquisitions require the Government to develop detailed statements of work in order to define the characteristics of the goods it wishes to procure, and then the Government has to develop evaluation criteria in advance of the competition

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so that it can judge companies based on the same established set of criteria. However, other transactions afford the Government a certain level of flexibility to use broad evaluation criteria and let companies demonstrate the advantages of their products. The Government can choose whether those advantages are worth pursuing based on that particular technology without needing to do an apples-to-apples comparison with other technologies and pre-defining what weight the Government will assign to a particular approach at each stage—nor does the Government need to worry

about choosing a “brand name” as opposed to the “generic” version. This flexibility encourages the program to engage with companies to understand the capabilities of the existing technology in a manner that the typical market research report would not be able to access.

A prototype under the OT authority for prototypes pursuant to *Title 10 U.S.C. § 4003* includes a demonstration.² Programs that identify existing items that may meet their needs or existing items that may be modified (even significantly modified) to meet their needs can have companies demonstrate their goods in the environment where they will be used and see whether there is a fit. The initial demonstration is not required to determine whether the prototype is successful, but for a relatively nominal sum, companies are often willing to demonstrate their products, including adapting them to



Demonstrations of prototypes are a requirement under other transaction authorities. (Photo by Sgt Micha Pierce.)

specific Government environments, along with providing knowledgeable individuals who can answer questions about those products.³ The demonstrations may formally or informally include a question and answer session (in a formal setting, often resembling oral presentations) for a back and forth with the Government team. In this environment, the questions do not need to be the same for every company, as they should be tailored to the company's individual capabilities, and there is limited protest risk such that the need to script the conversation ahead of time or record the session is unnecessary.

Establish the Scope to Support an Entire Program or Capability

The lore is that OTs enable programs to purchase items faster than the traditional FAR-based acquisition process. This is not only a fallacy but treating the OT process as a simple swap of one process for another overlooks the scope of what a program can accomplish by putting in place an OT with a broader scope that covers the needs of an entire program or capability—instead of for an individual item. Thus, instead of awarding an OT to three companies for a widget, the Government may be wise to award the same three OTs to support everything within the portfolio of a program manager or a capability needed within a group of portfolios.⁴ This approach enables the program to develop relationships with award-ees over time and has the benefit of preserving a competitive environment for a relatively longer time, resulting in long-term cost and schedule benefits. The result is also an existing contract vehicle for the program to leverage to obtain feedback from industry on ideas and develop prototypes. Not all prototypes will go to production, but since there is a direct path to production based on this type of award, the Government call is more likely to garner serious attention than the traditional request for information. Further, any disagreement about a contract award or interpretation of a contract term is seen in a different light by a company maintaining a relationship in pursuit of a potential future award.

As a practical matter, the Government should be careful to preserve its ability to add new companies as other transaction awardees over time as it identifies additional companies with relevant products and experience. The Government also needs to be conscious of its expectations with respect to intellectual property and technical data rights and engage industry before the award of the prototype OT to avoid misunderstandings that can derail a follow-on production award. Smart planning upfront can speed up the overall timeline for the acquisition.

Leverage Contract Terms and Prototyping Appropriate to the Risks

In a traditional FAR-based acquisition, there is often minimal discussion about how the contract terms intersect with testing the quality and functionality of the item being procured because the FAR establishes the contract framework, and the program team is versed in the *DOD 5000* Series. Because the Government can make a production

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award based on the OT authority for prototypes under *Title 10 U.S.C. § 4003* without relying on the FAR, at least for a commercial item, the Government is not constrained by the reliance on the company's quality assurance system pursuant to FAR Part 12. Thus, in some cases depending on the Government's concerns, the Government can and should request detailed information about the quality controls and manufacturing process in an OT above and beyond what would be appropriate for a FAR-based award.

Programs should note that the acquisition framework set forth in the *DOD 5000* Series has not been relaxed with respect to OTs. One question that frequently arises is how much testing (that is, what is necessary for the rel-

evant milestone, authority to proceed, or minimum viable product/capability release) needs to be accomplished during the prototype phase to determine that a prototype is successful and—once a follow-on production award is made—what additional testing is required. When using demonstrations as prototypes, the Government can and should establish subjective and objective means for evaluating whether the prototype can meet the Government's needs, which may or may not need to feed into the decision of whether a prototype is successful. However, there is nothing that requires that every material aspect of a prototype be tested before moving to production, and a program may decide to test only a limited set of capabilities with the expectation that the production award will require certain functionality to be tested, for example, for first items or at fielding. That said, programs should be careful not to continue prototyping after the production award in such a way as to undermine the analysis that led the team to determine the prototype was successful.⁵ In making this decision, the program needs to identify what testing would be required before delivery of an item, ensure that there is a plan to fully test critical functionality before determining to go to production, and then discuss with counsel and the agreements officer what contract terms should be in place to protect the Government from risks associated with going to production.

In this regard, for a follow-on production award that is not subject to Chapter 137 of *U.S.C. Title 10*, the program needs to carefully define how it will handle disputes over quality issues. For example, is the company required to strictly perform with the requirements, or is substantial performance acceptable? Under what circumstances can the Government withhold payment, and in the case that the Government withholds payment, is that a remedy that fully protects the Government (both in terms of the timing of the withholding vis-à-vis the company and the ability of the Government to use any withheld funds elsewhere in accordance with applicable fiscal law constraints)? If the Govern-

ment terminates, is any payment due and, if so, how is the amount calculated? The less tolerance a program has for working through quality issues with a company, the more important the remedies and dispute provisions become.

Be Smart About Purchasing Services to Support the Prototype

While many successful prototypes will require the purchase of services to maintain the item, the OT authority generally does not authorize the purchase of services.⁶ However, where the primary purpose of the follow-on production award is to produce the successful prototype, it has become common practice to procure related services. In this regard, the program team will want to be able to defend its decision to include services as part of the follow-on production award.⁷

One approach is for the program to document the services requirement as those required for operation or maintenance of the item that is successfully prototyped. For a piece of equipment, the original equipment manufacturer may be required to maintain the equipment. Where software is incorporated into the item, the OT awardee may be the only authorized software maintenance provider. During the demonstration phase, the Government should question companies about any support they typically provide and obtain an understanding of the training and skillsets the company brings to the table. Where possible, even if it is not included in the definition of success, the Government should establish the demonstration plan, so it has an opportunity to observe the provision of those services. Further, early in the planning process, the Government team needs to think about how they intend to ensure quality standards for the services. Programs may request a copy of a company’s commercial terms and conditions as a deliverable during the demonstration, compare the level of effort and ask individuals about their skill sets during the demonstration.

Conclusion

The Marine Corps has been given a powerful acquisition tool to be able to test prototypes and move into pro-

duction without further competition. In order to use this tool effectively, program managers need to change the lens that they have used to succeed in the FAR-based contract world. Instead of one contract award followed by the delivery of a good or service, OTs can and should be used to support a group of dynamic needs using creative ap-

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proaches to testing existing technology to see if existing technology can meet those ever-changing needs. While there is flexibility in the process, the need for planning in order to procure a successful prototype remains, and that requires the program and the agreements officer to think about the terms and related services prior to negotiating the production terms and conditions.

Notes

1. Initially codified in 10 U.S.C. § 2371b, effective 1 January 2022, this section is being transferred as part of the transfer and reorganization of part V of subtitle A of Title 10, Defense Acquisition Statutes and the new statutory citation is 10 U.S.C. § 4003. For purposes of this article, the statutory authority will be referenced as the “OT Authority.”

10.U.S.C. § 4003 (d) describes the appropriate use of the authority as the inclusion of one non-traditional defense contractor participating to a significant extent in the prototype project, all of the significant participants as small businesses, or requires that one-third of the total cost of the prototype project be paid out of funds provided by sources other than the Federal Government.

“Successful completion” of the prototype is defined as having “(1) met the key technical goals of a project; (2) satisfied success metrics incorporated into the Prototype OT; or (3) accomplished a particularly favorable or unexpected result that justifies the transition to production.” Definitions and Requirements for Other Transactions Under *Title 10, United States Code*, Section 2371b, Office of the Secretary of Defense Memorandum, 20 November 2018.

2. “[A] prototype project addresses a proof of concept, model, reverse engineering to address obsolescence, pilot, novel application of commercial technologies for defense purposes, agile development activity, creation, design, development, demonstration of technical or operational utility, or combinations of the foregoing” (emphasis added).

3. The authors note there are other statutory authorities that can be used solely to demonstrate products. However, the OT for prototyping authority under 10 U.S.C. § 4003 enables the Government to use that as a means to award a follow-on production contract.

4. This approach is distinguished from a consortium agreement, which is another option for structuring an OT in that the Government retains control over the relationship with the companies instead of working through a third party.

5. See, for example, GAO’s decision in Oracle America, Inc., where the Government modified the prototyping contract to add what they characterized as an in-scope modification after they claimed the prototype had been completed. Staff, *B-416061*, (Washington, DC: Government Accountability Office, May 2018).

6. The authors note that there is an argument that because a prototype includes a business process, and the production of a business process may require labor, it is possible that the prototype is a service. However, there is no question that the typical understanding of a “service” can not be prototyped within the statutory construct and applicable DOD guidance.

7. DOD has determined that the Service Contract Labor Standards (formerly the Service Contract Act) do not apply to other transaction agreements. (“Generally, the statutes and regulations applicable to acquisition and assistance do not apply to OTs.”) See Department of Defense, *Myth #4, DoD Other Transactions Guide*, (Washington, DC: November 2018). This is in line with the standard interpretation that requires application where, among other requirements, the primary purpose of the contract is to procure a service, and for an OT, the primary purpose is to procure a good (*i.e.*, the prototype). Programs should be cautious not to document anything that may undermine that determination.

