



**FEDERAL DEMONSTRATION PARTNERSHIP**  
Redefining the Government & University Research Partnership

# Contracts Subcommittee

Co-Chairs:

Melissa Korf, Harvard Medical School

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# Agenda

- Other Transaction Authority (OTA) Working Group update and preliminary survey results
- FDP and COGR DoD survey update
- Troublesome Clauses 2.0 update and next steps
- Discussion



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# Other Transaction Authority (OTA) Working Group Update

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The University of Tennessee Health Science Center



# What's an Other Transaction?

- Other Transaction Authority permits a Federal agency to enter into “Other Transactions,” transactions other than grants, cooperative agreements, or contracts.
- Other Transactions can be for Research, Prototypes, or Production.
- Among federal agencies, OTs are viewed as a flexible mechanism that allows for rapid awards in critical areas.
- While OTs are generally not subject to Federal laws and regulations such as the Federal Acquisition Regulation (FAR) and 2 CFR 200 (Uniform Guidance), an OT agreement may borrow from these sources.



# Where did OTs come from?

- NASA pioneered Other Transaction Authority with the enactment of the National Aeronautics and Space Act of 1958.
- In 1989, Congress codified title 10, United States Code (U.S.C.), §2371, providing the Defense Advanced Research Projects Agency (DARPA), and later others within DoD the authority to enter into Research OTs.
- Section 2371 was later amended by section 845 of the National Defense Authorization Act (NDAA) for FY 1994 to expand the original OT authority and to allow DARPA, and later others within DoD, to carry out “OTs for prototype projects.”
- In 2015, this OT for Prototype authority was made permanent and codified at 10 U.S.C. §2371b.
- NIH received OTA in 2016.



# OTs take different paths, challenging traditional academic research

In the Department of Defense realm, OTs are often awarded through consortia.

- A consortium is an association of two or more individuals, companies, or organizations participating in a common action or pooling resources to achieve a common goal and can range from a handful to as many as 1,000 members.
- A consortium does not have to be a legal entity but must be legally bound through some form of agreement.
- Consortia often require membership (including payment of a membership fee) to apply for funding opportunities.



# National Institutes of Health OTA

- NIH Office of Acquisition Management and Policy Standard Operating Procedures for Other Transactions requires that tests be passed before a determination that OT can be used:
  1. Can a traditional government contract, grant, or other cooperative agreement be used?
  2. What are the expected benefits of participation by prospective firms or consortia? Is a specific technology or research methodology available that would be better, more readily available, or less expensive?
  3. Why would the prospective vendor(s) not participate if an instrument other than an OT was used?



# NIH's Increasing use of OTA

- Since 2016, NIH has issued 515 OTs
- The Office of Director has issued 71.85% of OTs.

| Administering Institute/Center | Projects   | Total Funding          |
|--------------------------------|------------|------------------------|
| NINDS                          | <u>1</u>   | \$3,316,481            |
| NCI                            | <u>1</u>   | \$913,614              |
| NICHD                          | <u>8</u>   | \$21,258,817           |
| NCATS                          | <u>61</u>  | \$45,711,030           |
| NHLBI                          | <u>74</u>  | \$619,823,185          |
| OD                             | <u>370</u> | \$1,201,328,322        |
| <b>Total</b>                   | <b>515</b> | <b>\$1,892,351,449</b> |





# Flexibility for whom?

- “Allows flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and the best practices into award instruments.”
- Great concept but there seems to be no consensus on the when’s and why’s this flexibility is needed.
- Flexibility also means that no two awards will look the same. There is no standard OT, creating a less predictable negotiation framework.



# Thought Question

- In order to award OT the federal agencies who have this authority need to ensure compliance with 10 USC § 2317.
- Would it be helpful to have the federal agencies codify and publish their use requirements so that recipient organizations would have a better sense of when a traditional grant, cooperative agreement, or contract would not be appropriate?



# OTA Survey Results

A survey was sent to the then 181 FDP member institutions with instructions to provide one response per institution; 132 completed responses were received.

- 68 respondents had received OTs; 64 had not.
- 65 respondents identified the specific federal agencies from which they had receive OTs.



# Does your institution receive OTA?

- If so, from what agencies? NIH was identified as the most common federal agency making OT awards received by FDP members:
  - NIH (34)
  - DARPA (31)
  - DoD (25)
  - Army (11)
  - NASA (11)
  - Energy (7)
  - TSA (7)
  - ONR (6)
  - Homeland Security (6)
  - FAA (5)
  - Transportation (3)
  - Other agencies identified: Justice, USDA, USDI, EPA, HRSA-Bureau of Health Professions, AFRL



# On average does it take more or less time to negotiate an OTA?

- The most common response was that “Individual OTA funded agreements vary widely enough that some take more time and others take less time to negotiate.”



For the OTA mechanism(s) your institution has negotiated, which terms, if any, have been concerning?

- Publication and IP were most frequently identified as being problematic.
- Comments:
  - “Complicated subaward flow-down; confusing and inconsistent terminology; payroll evidence issues; unilateral modifications; processes in the contract can be changed by the government without our approval; title to property.”
  - “Can't remember all this - there've been a bunch of them. But the negotiations take forever, and we're forced to argue over every little thing.”



# Survey comments IP

- “Private sector colleagues have shared that they prefer OTAs, as they permit far more favorable IP terms than standard FAR federal contracts. Universities seem to approach OTAs like any other agreement and request typical Bayh-Dole terms. This seems like a missed opportunity, especially as OTAs tend to fund research that is more advanced and potentially commercializable. Should we be more aggressive and attempt to retain greater IP ownership rights under OTAs?”
- “If the University can rely in any manner on traditional rules of Federal Contracting when in the position of subrecipient of OTA funding, especially with respect to IP and Publication rights.”
- “It's one thing for an agency to issue a single contract to a turn-key prime who in turn manages all aspects of a program for the agency, but why has USAMRAA allowed MTEC to have a "chokehold" on all potential collaborators - gotta pay to play (membership fee), and a portion of any IP royalties gets siphoned off to the MTEC organization, who had nothing directly to do with the creation of the IP.”



# Other negotiation pain points

- Leveraging of standard FAR clauses in inappropriate circumstances
- Flexibility and lack of standardization lead to complicated negotiations
- Security
- Export control
- Compliance Areas
- Matches regulatory requirements
- Audit
- Consequences to basic science





# OTs and Audit

- **If 2 CFR 200 and Single Audit requirements are not explicitly referenced in the OTA funded agreement, does your institution treat these awards as if these standards are applicable?**

57% (39/68) of respondents applied 2 CFR 200 to their OTAs



# Other survey topics

- Is your institution a member of an consortia?
  - 57% respondents answered yes
- Has your institution been requested to cost share on OTA?
  - Most answered “No” or “Not sure”



# OT Cost Sharing-Thought Question

- OT are designed to address Government need and commercial profit therefore cost-sharing is mandated as the use of OT is reserved for dual-use (Government and private industry use)
- As non-commercial entities should universities and other non-profit research entities be exempted from the need to cost-share on OT awards?
- OT authority allows for exemptions to be granted under exceptional circumstances
- OT must be competitive to the extent practicable



# Non-traditional defense contractor

- Why do government agencies add FAR clauses to OTAs when OTAs are not contracts?
- Are universities considered "Non Traditional Defense Contractors?"
  - An entity that is not currently performing and has not performed, for at least a one-year period preceding the solicitation of sources by DoD for the procurement or transaction, any contract or subcontract for the DoD 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 (see 10 U.S.C.2302(9))
- Are there any risks to accepting OTAs?
- What's the advantage to the agency in using OTA?



# What do you think?

- Are OTAs the future of research funding?
- Would you use a standard FDP subaward template to issue a subaward on an OT prime?
- Should OTAs be tracked in some special way for reporting purposes since there is no CFDA number associated with them?



# Thought question

- Agency processes should be fair and transparent and should be conducted in accordance with industry norms for the technology being solicited
- Does your institution find the OTA solicitation process to be fair and transparent?



# Final comment

- There is no real clear definition of what an "other transaction" is, since it is defined by what it is not. Could more of a definition help us better navigate this space?



# OTA Working Group Co-Chairs

Please feel free to contact us with any comments or questions!

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# Troublesome Clauses: Do they still exist?



# Troublesome Clauses 1.0 (TC 1.0!)

- Web site developed as a resource to the FDP membership (both research institutions and federal agencies) for improving grant and contract negotiations
- Goal was to provide information related to difficult negotiations and document the collaborative approaches used to expedite the process
- Supported three main reporting options:
  - Time to Resolution by Issue Type
  - Outcome by Issue Type
  - Issue Type by Prime Sponsor
- Site is technically still live but requires updating to account for current issues



# 2021: Do Issues still exist?

- Are there still clauses that delay/ cause issues in federal contracting?
- What kind of agreements are impacted?
- Is there a role of institutional policies?

Many institutions have revised policies related to the acceptance of publication restrictions since the original data collection. How have issues evolved over time?



# DoD request to COGR

- Similar to TC 1.0, the planning phase for TC 2.0 included a pilot information collection in response to a DoD request to COGR for information on contract negotiation issues/delays.
- Current Working Group members completed a Qualtrics survey to provide information on their GFY 2020 DoD contract negotiations.
- DoD focus is on fundamental research, but other contracting issues were identified.





# Parallel Pilot Survey Activities

- COGR Survey

- Generalized focus on overall experiences
- One response per institution
- Focus on issues related to fundamental research

- Pilot FDP survey

- Transactional focus
- One response per contract
- No pre-defined focus for issues



# Preliminary Results FDP

- Issues reported with DoD contracts for Prime awards, OTAs, and subcontracts
- Issues identified were related to:
  - Data security/management
  - Understanding of academic environment and appropriate flow-downs (small businesses)
  - Reluctance of primes to negotiate on behalf of academic subrecipients
  - Differences in what institutions can accept based on institutional policies
- Most reported issues NOT related to fundamental research
  - Are institutions consistently asking for a determination when they believe one is applicable?



# What does this mean?

- Contracting issues exist
- They are not fixed over time
- It is useful to monitor the evolution of issues as regulatory environments and contractual mechanisms change
- Real data as opposed to anecdotal information can inform future pilots



# Next steps: Troublesome Clause Database 2.0

- Pilot Data Collection – **Complete!**
- Table of current priority issues and why they are troublesome – **Final Draft Coming Soon!**
- Development of detailed system requirements and documentation – **Just Beginning!**

(Do you have an innate love of detailed system requirements? Email [Melissa\\_Korf@hms.harvard.edu](mailto:Melissa_Korf@hms.harvard.edu) to get involved!)





# Discussion

- Questions? Comments? Ideas for new pilots?





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