

# THE GOVERNMENT CONTRACTOR®



THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 62, No. 45

December 9, 2020

## FOCUS

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### FEATURE COMMENT: New Administration: New Acquisition System?

New acquisition policy initiatives from current Department of Defense leadership are unlikely in their remaining few weeks. The new administration, however, has a chance to hit the ground running by implementing congressional mandates and recommendations that have been ignored or slighted for years. DOD has the opportunity to create an alternative or parallel acquisition system to the one that the Packard Commission said, and experience shows, “takes too long and costs too much.”

Key congressional mandates that have been ignored or incompletely implemented include §§ 867 and 863 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018. Section 867 provides that the defense secretary shall “[i]n the execution of science and technology and prototyping programs ... establish a preference...for using transactions ... pursuant to sections 2371 and 2371b of title 10, United States Code, and ... procurement for experimental purposes.”

Section 863, addressing education and training for transactions other than contracts and grants, amended 10 USCA § 2371 to add a new paragraph (g), providing: “Education and Training.—The Secretary of Defense shall—(1) ensure that management, technical, and contracting personnel of the Department of Defense involved in the award or administration of transactions under this section or other innovative forms of contracting are afforded opportunities for adequate education and training.”

DOD has been slow to take advantage of the Middle-tier of Acquisition, 2016 NDAA § 804, which provides for rapid prototyping and rapid fielding

of new capabilities. Use of this authority has been uneven among the military services. The Navy has been particularly recalcitrant. Other transactions (OTs), which should be the core of this approach, have not always been used. Venerable policies, like requiring a modular open systems approach, have been honored more in the breach than in the observance. Recommendations to make dual-use DOD’s preferred method of conducting contracted science and technology projects have never been implemented. Recommendations of the Defense Science Board to convert certain segments of the defense industrial base to commercial practices have been ignored for years.

The Dual Use Research Project panel chaired by former Marine Commandant A.M. Gray recommended dual-use as DOD’s primary approach to science and technology projects, with OTs as the default contracting method. This supports the statutory civil-military integration policy. 10 USCA § 2501(b). In the 1990s, the acquisition reform task force of the Defense Science Board found that certain segments of the defense industry can and should be allowed to provide capabilities and support them on a fully commercial basis. In 2009, another Defense Science Board task force recommended creation of an alternative system and special organization to fulfill urgent operational needs. Part of their recommendation was implemented with the enactment of middle-tier of acquisition. Elements related to human capital and an organization to effectuate their recommendations through culture change have gone unheeded.

First, the question is do we need an alternative to the traditional acquisition system? Some might agree with the DOD inspector general who, when discussing OTs, has asserted that the traditional system “has served us well.” Contrary to this view is the widely held understanding that defense contractors are burdened by the unique and arcane business practices mandated by the traditional system. These practices discourage commercial companies from participating in the Government

marketplace, particularly DOD’s research and development efforts. Eric Schmidt, former CEO of Google and former chair of the Defense Innovation Board has said, “The DoD breaks almost every rule in modern product development.” This means innovation in DOD’s business practices should be a top concern of the new administration.

There can be an alternative to the traditional DOD acquisition system, which has grown willy-nilly over the decades. Congress has provided the legal authorities—the piece parts—for such a system. DOD needs to implement existing congressional mandates and promulgate supporting policies. DOD has the authorities, the mandates and a serious need. For the advancement of science and technology, engaging a wider industrial base and, most importantly, delivering new capabilities at the speed of relevance, the innovation with greatest potential impact is how DOD conducts business.

There is no need to abolish Federal Acquisition Regulation contracting for executing defense projects. What DOD can do to comply with congressional mandates and implement legal authorities is create an alternative system based on Other Transactions, Procurement for Experimental Purposes, 10 USCA §§ 2371, 2371b and 2373, and other flexible business practices. Operate the two systems in parallel and accumulate data to support a decision to continue two systems or to select one or the other as optimal for DOD needs.

**A Different Approach**—OTs are not just a unique and potentially revolutionary contracting method. They can be the core of an alternative system. The spirit inherent in flexible contracting demands flexible thinking—critical thinking about an entire project. This involves an analysis of needs; exploring and strategizing possible technical, business and financial approaches; developmental contracting; and a business approach for potential production and sustainment. In the current traditional system, virtually every element just mentioned is executed in isolation—in a stove pipe, disconnected from other parts of the system.

According to the FAR, acquisition begins “when agency needs are established” and requirements described (FAR 2.101). For major system acquisitions in DOD, the Joint Capabilities Integration and Development System (JCIDS) defines requirements. Many would agree with Jarrett Lane and Michelle Johnson, who wrote in their 2018 article “Failures of

Imagination: The Military’s Biggest Acquisition Challenge,” that “under the JCIDS process, the Defense Department typically predetermines the solution it seeks, spending far too little time analyzing and truly understanding the problem and the full range of ways to solve it.” In contrast, the OT process starts with “defining the problem, need, or capability gap.” (DOD OT Guide, Nov. 2018). This allows “for innovative trade space for a wide-range of solutions.” This is the function of an empowered multi-disciplinary action team.

Getting the multi-disciplinary team, at whatever level it operates, staffed with the right mix of talent and operating cooperatively is essential for success. Team members are not limited to speaking as representatives of their organization or discipline but as valued contributors seeking a common goal. The DOD Guide says:

A small, dedicated team of experienced individuals works best when planning an OT agreement. In addition to the Project Manager, end user, and warranted [agreement officer], the agency needs to secure the early participation of subject matter experts on their cross-functional team, such as legal counsel, comptrollers, contract administrative support offices, and small business representatives.

A new approach involves more than education and organizing teams. Currently the system is contracting office-centric rather than program manager-centric. Education is critical but may not be enough. Professionals schooled and comfortable in a rule-based/compliance-dominated system are unlikely to have the critical thinking skills and inclination to embrace and thrive in a changed culture. DOD needs to rethink how it addresses the human capital applied to acquisition.

Rather than stove pipes and barriers, the Government needs to operate collaboratively with science and technology informing the art of the possible and the solution sets available. Prototyping informs the technical potential and financial implications of an approach or project. Once the Government team has made progress in parsing the problem to be solved and potential solution sets, collaboration needs to be expanded to include industry inputs.

**How to Do It—Best Practices and Policies**—Science and technology needs to incorporate good ideas from all sources. Today, many of the most advanced ideas are in the private sector. Combining

DOD needs with commercial advances has many benefits both initially in R&D and later in economies of scale and product improvements. A dual-use approach to science and technology should be DOD's default position with defense-only solutions being a last resort. R&D contracting needs to be freed from the FAR. FAR pt. 35 on R&D states that the purpose of contracted R&D is the acquisition of "knowledge" *not* what the FAR regulates, procurement of "supplies and services" (FAR 35.002). A dual-use strategy is best accomplished by commercial-like contracting with OTs.

OTs can be used for upgrades and sustainment. The successful Commercial Operations and Support Savings Initiative program of the late 1990s and early 2000s provides a model. One characteristic of that program was to encourage collaboration between DOD R&D organizations and buying commands. Collaboration on projects at any stage of the process can be facilitated through the flexibility of OTs. Government laboratories, acquisition organizations, operational commands, and other Government agencies can be combined in a single project OT agreement with private-sector organizations. Vertically or horizontally integrated or hybrid collaborations can be formed.

The nascent alternative acquisition system makes use of OTs in conjunction with other authorities. A variety of pathways and potential business arrangements are possible. Enhanced outreach might be provided through use of a partnership intermediary, 15 USCA § 3715, or a prize challenge, 10 USCA § 2374a, either of which could lead to a prototype project with or without follow-on production. There are past and present examples to instruct the team and help achieve project goals. The front end of the process needs an alternative to the a priori dictate a la JCIDS to increase collaboration and better understanding of the problem, solution sets, and goals.

Nothing much is likely to occur without real leadership beginning at the top and permeating throughout DOD or other agencies with OT authority. Leaders must understand that OTs are not a niche authority, a slimmed-down version of the FAR. They allow a whole new approach to thinking through problems and crafting solutions that lead to new capabilities more rapidly and affordably than the current system. Contractual structures unlike anything permitted under the FAR can be created as needed. Leadership is critical.

The following action items for the creation of an alternative system should be taken at the DOD level. Many of these policies can be implemented at the military service, command, program office or even installation level without waiting for top level policy.

1. Empower personnel with education and training for the execution of OTs/other forms of innovative contracting, and implement congressional mandates by creating a preference for the use of OTs and other forms of innovative contracting and business practices.
2. Establish a policy making a dual-use approach preferred for science and technology projects, with OTs as the default instrument for execution (including for the Small Business Innovation Research program). Defense-only approaches or FAR contracting should be a last resort for contracted science and technology.
3. Stimulate the use of middle-tier acquisition with prototype OTs as the default instrument for execution.
4. Identify defense industry segments that can be moved to commercial practices with OTs or FAR pt. 12, commercial item acquisition, as the default contracting instrument.
5. Lastly—but critically important—make sure OT action teams at whatever organizational level are (1) empowered (including with delegations of authority and broad charters), and (2) insulated and protected from layers of "just say no" bureaucracy.

Implementation of these recommendations will inevitably fail in a business-as-usual environment. Decades of ostensible acquisition reform has shown that. Albert Einstein pointed out: "You cannot solve a problem with the same thinking that created it." Those who see OTs as merely "another tool" will be unable to see how the potential of OTs can be unleashed if they are allowed to become the core of an alternative system, a new paradigm. Empowered and protected teams centered on program management, people with a mission to accomplish and money to accomplish the mission, are needed. This may call for a new organization. It certainly requires critical thinking and abandoning business as usual.



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