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# GovCon 101 Other Transaction Authority Agreements

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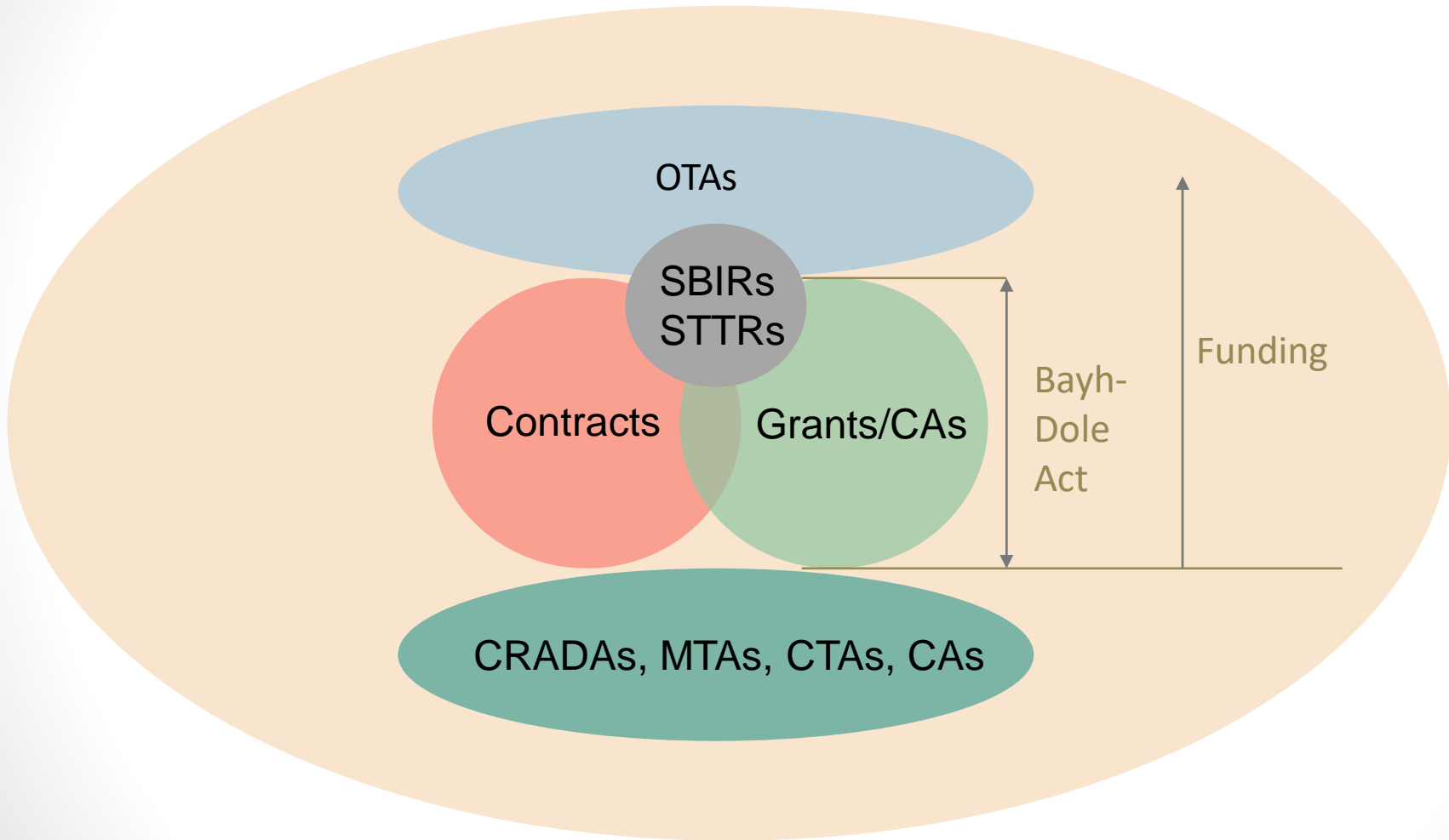
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# Background: What is an OTA?

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- Standard U.S. Government agreements:
  - Procurement Contracts – acquisition of goods or services for the direct benefit of the U.S. Government
  - Grants – provision of financial assistance for a public purpose of support or stimulation authorized by law
  - Cooperative Agreements – collaboration with financial assistance
- OTAs – transactions “other than” procurement contracts, grants, and cooperative agreements

# U.S. Government Agreements



# Current Authorities

1. NASA – 51 U.S.C. § 20113(e)
2. DoD Research –  
10 U.S.C. § 4021 (previously 2371)  
32 C.F.R. Part 37 (TIAs)
3. DoD Prototype –  
10 U.S.C. § 4022 (previously 2371b)  
32 C.F.R. Part 3 (outdated)
4. DoD Rapid Deployment –  
10 U.S.C. § 4424
5. DoC – 15 U.S.C. § 4659
6. BARDA – 42 U.S.C. § 237d-7e
7. DHS – 6 U.S.C. § 391
8. DoE –  
42 U.S.C. § 7256(g)  
42 U.S.C. § 16538  
10 C.F.R. Part 603 (TIAs)
9. DoT – 49 U.S.C. § 5312 (among others)
10. NIH –  
42 U.S.C. § 282(n)  
42 U.S.C. § 285b-3  
42 U.S.C. § 287a
11. USAID – 22 U.S.C. § 2395(b)
12. USDA – 7 U.S.C. § 3319k
13. Coast Guard – 14 U.S.C. § 719
14. CDC – 42 U.S.C. § 242c(e)
15. ARPA-H – 42 U.S.C. § 290c
16. DoD Health – 10 U.S.C. § 1092(b)
17. IC – 50 U.S.C. § 3024(n)(5)
18. (proposed) FinCEN –  
FinCEN Modernization Act of 2023

Authority	Nontraditional Contractor	Recipient Cost Share	Competition	Purpose
NASA	Small business preference	–	Maximum extent practicable preference	Various
DOD Research	–	50% <i>(Preferred)</i>	–	Basic, applied, and advanced research
DOD Prototype	Required <u>OR</u> 33% <i>(Waiver available)</i>		Maximum extent practicable	Prototypes for military items or personnel
BARDA	–	–	Maximum extent practicable	Countermeasures and advanced research and development
DHS	<i>[DOD Research/Prototype]</i>	<i>[DOD Research/Prototype]</i>	<i>[DOD Research/Prototype]</i>	Basic, applied, and advanced research / prototype projects
DOE	–	50% <i>(Preferred)</i>	Required with exceptions	Research, development, and demonstration
DOT	–	20%	–	Public transportation

# NASA Space Act Agreements

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- Agreement types:
  - Funded – Transfer of funds from NASA
  - Reimbursable – Transfer of Funds to NASA
  - Non-Reimbursable – Each party bears its own costs
- Funded agreements are generally subject to full and open competition and limited to U.S.-based activities and entities
- Title-seizing statute generally applies to funded agreements
- Government data may be protected under framework applicable to CRADAs
- Agreements are publicly disclosed

# DOE Technology Investment Agreements

- For-profit companies must be involved in performance or commercialization
- No profit or fee is permitted at any tier involving substantive performance
- Cost sharing is required by default
- Title-seizing statute does not apply
- Government data may be protected under framework applicable to CRADAs

# Procurements for Experimental Purposes

- Framework under 10 U.S.C. § 4023 that is sometimes used by components of DoD to make purchases by “contract or otherwise”
  - Exempt from procurement rules under Chapter 137 of Title 10 (now reorganized) if quantities are limited to certain research and evaluation tasks
  - Limited to “ordnance, signal, chemical activity, transportation, energy, medical, space-flight, telecommunications, and aeronautical supplies, including parts and accessories and designs thereof”
  - Consolidated authority from prior branch-specific statutes
- If exercised, clarification should be sought on whether an agreement constitutes a procurement contract to determine whether other authorities still apply (e.g., the Bayh Dole Act)



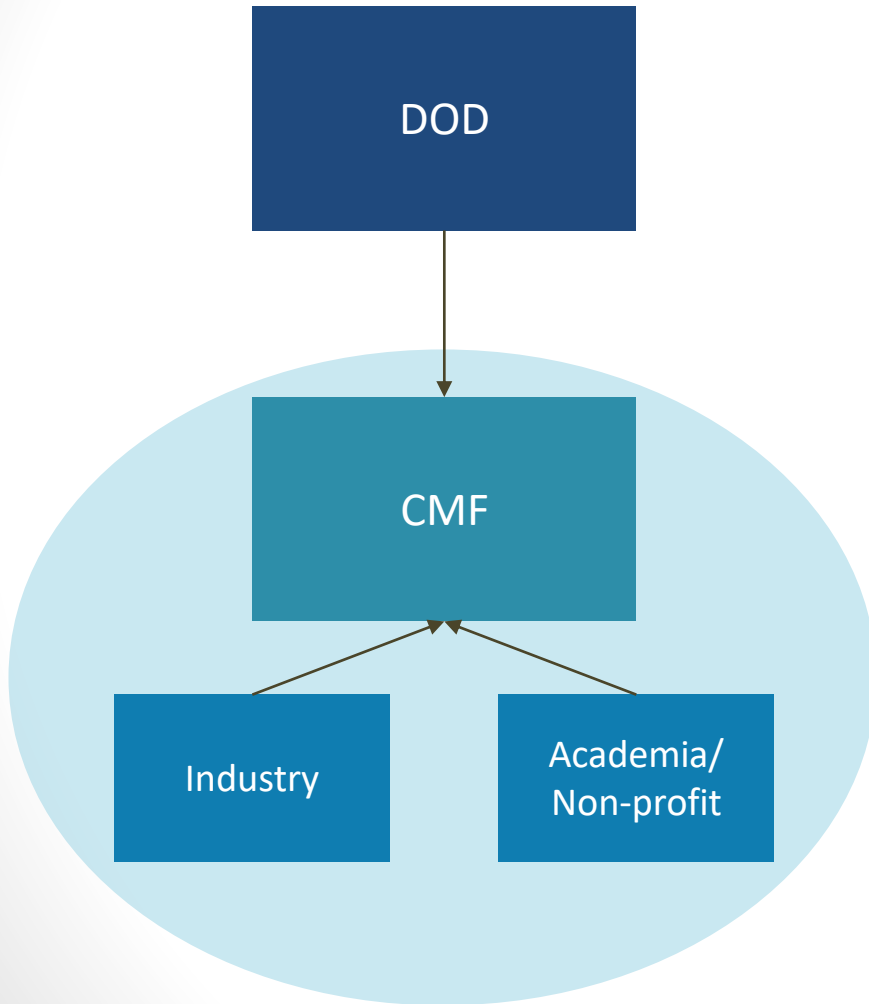
# OTA Consortia

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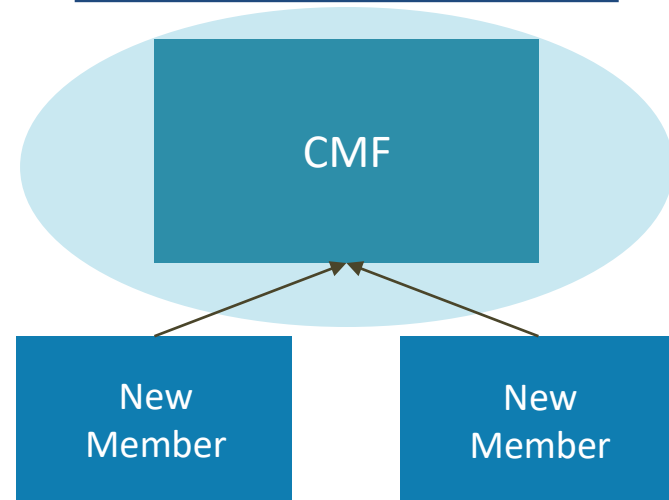
- Agencies have increasingly relied on OTAs with consortia
- Eliminate the need for large number of agency staff to provide contracting services
- Allow for rapid transitions that are further insulated from protest
- Operate similar to hunting licenses and provide opportunity to collaborate with antitrust protections
- Can be used by traditional contractors to obtain non-traditional partners

# Consortium Process

## Competitive Selection for OTA



## CMF Solicits New Members



# Protests

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- Standard of review:
  - GAO generally will **not** review protests of OTA awards or solicitations
  - GAO **will** review protests of an alleged improper use of an OTA in lieu of a standard contract to procure goods or services with limited consideration of compliance with applicable authority
  - Similar result can be expected at the Court of Federal Claims and potentially the FAA, although dated implied-in-fact claims have not been tested
- Claims under the Administrative Procedure Act may be possible, but an Arizona district court decision suggests the APA may not be available in some cases.
- Recent Developments
  - February 2020 Arizona district court decision found no jurisdiction over OTA protest because “in connection with” procurement based on follow-on work
  - August 2022 Court of Federal Claims finds jurisdiction because “in connection with” procurement based on follow-on work

# Disputes

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- Contract disputes should be reviewable in the Court of Federal Claims under the Tucker Act
- Dispute procedures, if any, typically governed by agreement
- Likely no board jurisdiction under the Contract Disputes Act
- Other dispute issues:
  - False Claims Act
  - Consortia
  - Research versus Prototype OTAs
  - Prejudgment interest

# Intellectual Property: Inventions

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- Bayh-Dole Act and related regulations do not apply
- In theory, any framework is permissible for recipient inventions
- In practice, agencies often insist on frameworks similar to the Bayh-Dole Act:
  - Non-exclusive license for U.S. Government purposes
  - Reporting and patent filing obligations (somewhat flexible)
  - March-in rights (somewhat flexible)
  - Domestic manufacturing tied to exclusive licensing (flexible)

# Intellectual Property: Data and Copyright

- Standard data rights frameworks do not apply
- Agencies may reference standard rights during negotiations
  - Unlimited rights
  - Government purpose rights
  - Limited or restricted rights
- Marking is generally required
- Ability to assert copyright
- Government works of authorship

# Intellectual Property: Confidentiality and Non-Use

- Freedom of Information Act (FOIA) continues to apply
  - Proprietary information developed outside the scope of an agreement would generally be protected from disclosure
  - Contractual limitations on disclosure may limit agency obligations under FOIA
  - Information generated by U.S. Government employees or incorporated into an OTA could be subject to disclosure
  - Disclosure through public database could be possible for some agencies
  - Disclosure of consortia agreements may be less likely
- Federal employee Trade Secrets Act and Defend Trade Secrets Act do not independently offer protection

# Costs and Accounting

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- Standard cost principles and accounting requirements do not automatically apply
- Relationship between OTAs and independent research and development
  - OTA costs under 10 U.S.C. § 2371 (now 10 U.S.C. § 4021) or “equivalent” authority can qualify as independent research and development
  - Credits
- Price reasonableness and cost justifications can still be required in evaluation
- Agencies are sometimes willing to permit compliance with Generally Accepted Accounting Principles or non-U.S. equivalents
- Comptroller General access to records is generally required if U.S. Government cost share exceeds \$5 million
- Agency access rights are often negotiable, but agencies may insist on receiving the same level of access as the Comptroller General



# Milestone Payments and Cost Sharing

## Milestone Payments

1. Fixed price with bilateral adjustments
2. Interim cost reimbursement with milestone-based ceiling
3. Interim cost reimbursement with agreement-based ceiling
4. Cost reimbursement with carry forward adjustment

## Cost Sharing

1. Cost share based on budget estimates
2. Recipient responsible for excess over ceiling
3. Recipient responsible for discrete activities or cost elements
4. Cost share based on invoice percentages
5. Recipient parallel activities considered without being part of agreement

# Tangible Property

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- Agencies typically do not want responsibility for tangible property
  - FAR Part 45 does not apply to OTAs
  - December 2018 DoD OTA Guide focuses on deliverables
  - Agencies may rely on provisions similar to the Uniform Guidance for Grants and Cooperative Agreements (2 C.F.R. Part 200)
- Potential “contractor-acquired property” issues:
  - Disposal
  - Maintenance and use
  - Risk of loss
  - Insurance

# Third-Party Agreements

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- Subcontracting approvals, notices, and competition
- Cost-reimbursement agreements:
  - Affiliate transactions
  - Paid-cost rule
  - Cost principles and accounting (e.g., GAAP or IAS?)
- Flow-down obligations and consolidation of intellectual property
- Transfers of technology to foreign persons or firms

# Termination

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- Scope of terminations for convenience
- Standards for breach
  - Risk of inflexible performance language or result-based deliverables
  - Reperformance obligations and cost
- Payment
  - Undelivered work; delivered work
  - Settlement costs
- Post-termination rights and responsibilities
  - Audits and records
  - Transfer of property or data deliverables

# Dispute Provisions

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- Agreement terms should address necessary contractual elements, including the authority of the employee entering into an agreement on behalf of the U.S. Government
- Dispute procedures help, but terms should clarify scope of any applicable administrative exhaustion requirements
- Self-help rights
- Clarify available remedies; agree on remedies in advance
- Intellectual property
  - If possible, agreement terms should reference express “authorization and consent”
  - Consider special references to intellectual property and confidentiality
- Consider impact of “first-party” and “third-party” limitations on liability

# Inapplicable Requirements

1. Full and open competition
2. Requirement-setting and solicitation criteria
3. Permissible “kinds of contracts”
4. Certified cost or pricing data requirements
5. Agency audit rights
6. Rights in technical data
7. Allowable costs, including restrictions on reimbursing “restructuring costs”
8. Cost Accounting Standards
9. Contract Disputes Act
10. Byrd Amendment (Lobbying)
11. Basic whistleblower protections

# Likely Inapplicable Requirements

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1. Service Contract Act  
*(potential for DoL Disagreement)*
2. Walsh-Healey Act
3. Anti-Kickback Act  
*(may apply to acquisition)*
4. Buy American Act
5. Equal employment opportunity requirements
6. E-Verify requirements
7. National Labor Relations Act notice requirements
8. Privacy Act
9. Small business subcontracting
10. Drug Free Workplace Act  
*(may apply by policy)*
11. Human trafficking requirements
12. Confidentiality agreement restrictions
13. Investigator conflict of interest requirements
14. Limitations on pass-through charges and restrictions on subcontractor sales
15. Procurement Integrity Act  
*(depending on authority)*

# Potentially Applicable Requirements

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1. Anti-Assignment Act
2. Cargo Preference Act of 1954
3. Fly America Act (*potentially only based on contractual term*)
4. Subcontract reporting requirements
5. System for Award Management and unique identifier requirements
6. Prohibition on doing business with suspended or debarred entities (*with a potential exception for DOD prototype OTAs*)
7. Section 508 requirements
8. Title VI of the Civil Rights Act of 1964 (*potentially only if deemed financial assistance*)



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# Questions?