



Other Transaction Authority (OTA)

“Intellectual Property Considerations”

Seminar Presenter:
Rick “A to Z” Agopsowicz
Executive Vice President, Program Execution
CorVantage, LLC.

www.publiccontractinginstitute.com

1-202-775-7240

Seminar Objective and Outline

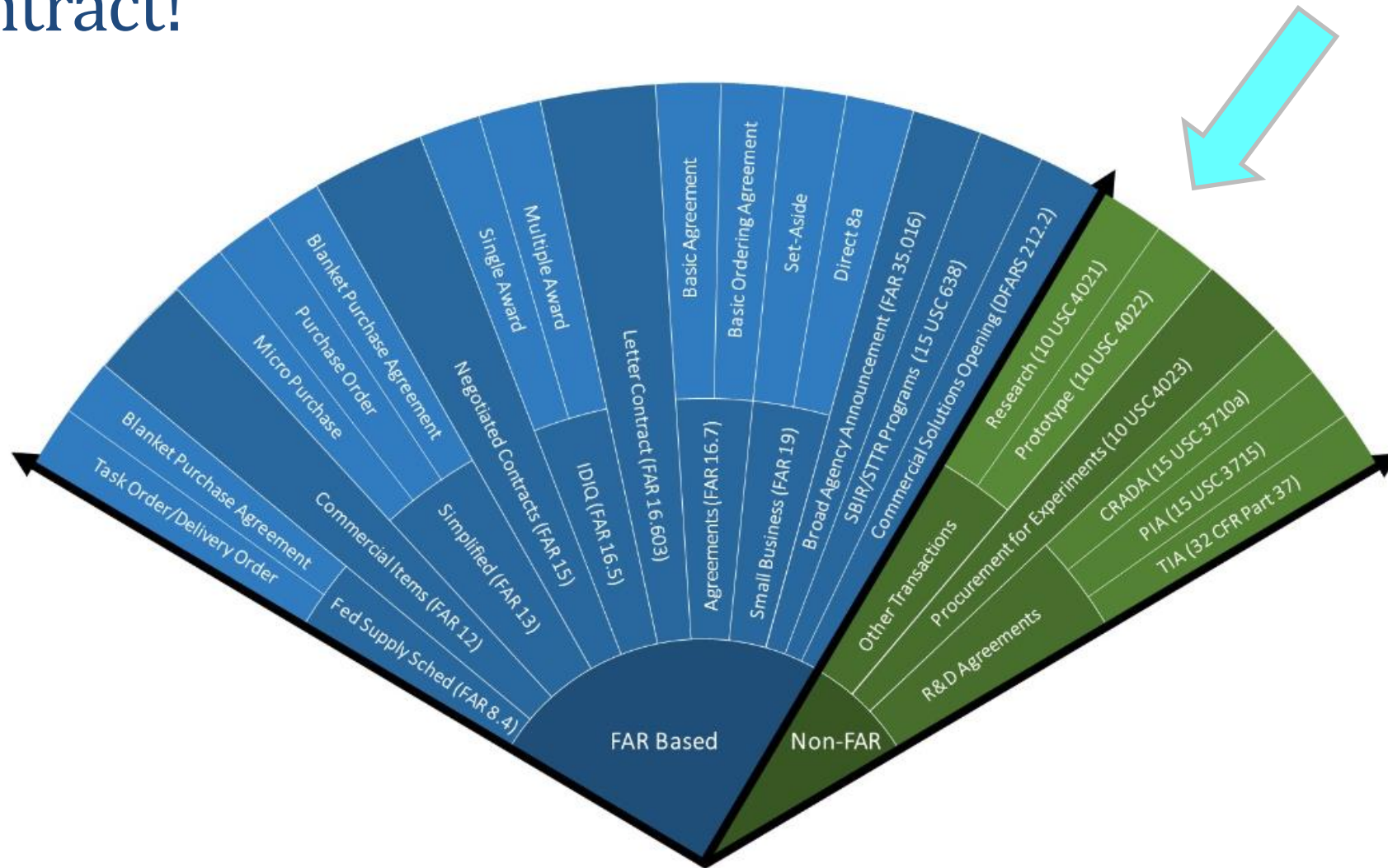
- **Objective: Increase your overall knowledge** of Other Transaction Authority - Intellectual Property Rights
 - How the Government (and therefore industry) works “OTs” (OTA’s) Intellectual Property Rights
 - Scope Limit – 90 minutes, broad topic, broad audience
- **OTA Purpose & Authority – Key tenets**
 - “OTA IS a contract authority...” (It is just not a FAR based contract authority)
 - Note-the differentiation of the term “agreement” is usually used to drive this fact!
 - OTA as a mechanism for the Government to contract (create an “agreement”) where contracting flexibility is the key
 - Why the Government may choose the OTA contracting strategy, and how it may change an acquisition strategy?
- **Intellectual Property Rights – Similarities and differences between a FAR based contract and an OT Agreement**
 - “FAR Normal” Versus an OTA, how different is it really?
 - Best Practices for industry to position themselves for OTA Intellectual Property Rights desired
 - Two sanitized case study examples
- **Summary with Q & A**

Small Print

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OTA – Two of Many Flexible FAR & Non-FAR Means To Contract!



OTA Purpose & Authority – Key tenets

Topics...

Brief History of OTAs

Government Intent & Authority for Use

Federal Agencies Authorized to Use OTA

Restrictions & Applications

Contract -vs- OTA -vs- Grant -vs- Cooperative Agreements

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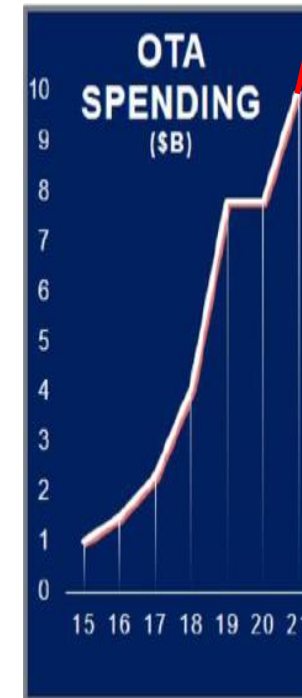
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A Brief History - “Other Transition Authority”

Why so much about OTs?

- **1958** - OT authority origin - passage of National Aeronautics & Space Act (NASA) – result of “Space Race” (e.g., Sputnik)
- **1989** – OT authority to DARPA (10 USC 2371) for Advanced Projects only
- **1993** – Expands DARPA authority to include prototyping, “working” definition of “prototype project”:
 - A prototype project can generally be described as a **preliminary pilot, test, evaluation, demonstration, or agile development activity used to evaluate** the technical or manufacturing feasibility or military utility of a particular technology, process, concept, end item, effect, or other discrete feature.
 - Prototype projects may include **systems, subsystems, components, materials, methodology, technology, or processes**
- **1996** – OT authority extended to others in DoD (see follow-on topic)
- **2000** – Introduce cost sharing and nontraditional defense contractors (2014 exempted small businesses from cost sharing)
- **2001** – Created follow-on production authority
- **2016** – Section 815 NDAA (Creating 10 U.S.C. § 2371b, and the new and improved Section 845 OT—now the “Section 815 OT”)...enabled aggressive, streamlined acquisition between DOD and industry
 - **Provided that the acquisition professionals seeking to leverage this authority possessed a level of responsibility, business acumen, and judgment that enabled them to operate in this relatively unstructured environment**
- **2017** (Section 863-864 of the FY18 NDAA) **adds education and training requirements**, increases approval thresholds, includes language to clarify approval levels applied to OTs
 - Includes express authority to allow for the award of **Prototype OTs in the SBIR program and non-profit research institutions**, and broadens the follow-on production language to include individual sub-awards under an OT consortium
- **2018** – (Section 211 of the FY19 NDAA) replaces highest level approver of USD(AT&L) with USD(A&S) or USD(R&E) and clarifies the application of follow-on production authority for projects carried out through consortia; added other additional reporting requirements
- **2020** – DoD USD (A&S) authorizes the use of Other Transaction Authority (OTA) for prototype solutions to combat the COVID-19 crisis (with HHS) more than \$7B total – also CARES Act \$3.5B in funding for HHS for this effort
- **2021-2023** – Other minor changes in authorities (not in scope to discuss here)



Vision 2020 PSC Foundation

Note: 2020 grew to \$16B
(was already \$12B in 3QFY21)

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Other Transactions – 10 USC Sections 2371 & 2371b

Other Transactions (OT) **are contractual instruments** other than standard procurement contracts, grants, or cooperative agreements

- An OT Agreement is a contract in that it has all six legal elements for a contract: offer, acceptance, consideration, authority, legal purpose, and meeting of the minds, and will be signed by someone who has the authority to bind the federal government (AO)
 - Terms and conditions can be enforced by and against either party
 - The term “agreements” is routinely used to ensure that there would be no confusion between these arrangements and FAR based procurement contracts
- OTs can include **flexible business arrangements to acquire research and development activities** to advance new technologies, and prototypes or models to evaluate technical or manufacturing feasibility or Government utility of new or existing technology
- This **may apply to processes, concepts, end items, and systems from non-traditional defense contractors*** (as well as from traditional defense contractors when statutory requirements for small business participation or cost sharing arrangements are satisfied) allowing the government access to cutting edge solutions
 - *(10 U.S.C. Section 2302(9)) a non-traditional defense contractor is not currently performing, nor performed, for 1-year preceding the solicitation for the OT, any contract / subcontract for the DoD subject to full coverage under the cost accounting standards (CAS) (\$50M)
- OTs provide **opportunities to structure agreements that may leverage commercial business practices and remove barriers to entry** such as **cost accounting system (CAS) compliance** and **intellectual property rights requirements**, to encourage non-traditional defense contractors to do business with the government

Other Transactions – Cont'd

OTs typically use RDT&E funding, but the statute does not prohibit use of other appropriations

- The nature of the activity and overall effort it will support should be considered when determining appropriate funding sources
- OT agreements may be fixed-price, expenditure based, or hybrid

Agencies must be explicitly authorized by Congress to use OTs (“who” is in the next sub-section)

Most laws and regulations governing federal contracts do not apply to OTs (i.e., Federal Acquisition Regulation (FAR) and the Competition in Contracting Act (CICA)), **however**, the Procurement Integrity Act applies (source selection information protection), and **competitive practices are applicable**

- OT statutes and guidance allow the agency to determine what the competition will look like and how it will be structured (e.g., can be other than F&O, limited, or sole source)
- Competition design is meant to keep prices low, quality high, and give the Government leverage in negotiations

OT authorities are authorized by law with clear statutory guidelines

- Since OTs are defined in the negative (acquisition and assistance statutes and regulations do not apply) —they are **NOT procurement contracts, grants, or cooperative agreements** (more on this in a subsequent section)
 - **Any statute, regulation, or policy that applies solely procurement, grants, or cooperative agreement contractual arrangements will not apply to OTs**
 - Note: Statutes and regulations applicable to acquisition and assistance are only a subset of all federal statutes or regulations
- **Laws and regulations that are unrelated to the acquisition or assistance process will still apply to OTs.** These can include, but are not limited to, **appropriations, security, export control, socio-economic, and criminal laws**

Research Other Transactions – 10 USC Section 2371

Intent & Authorities for Use

- Research OTs (inclusive of HHS OTAR, OT for Advanced Research) are **appropriate for basic, applied, and advanced research projects** related to systems or other needs (broader classes of funding can change as rules/laws are constantly being updated)
 - Research OTs may be used to pursue research and development of projects with dual-use application (commercial and government)
 - Unlike Prototype OTs, Research OTs do not include authority for transition to follow-on production contracts or transactions
- Research OTs should include a **cost sharing arrangement** that, **to the maximum extent practicable**, do not require funds provided by the government to exceed funds provided by other parties
 - “Practicable” means: If joint funding helps the project, it is practicable; if it impedes the success of the project, it is not practicable
 - If the awardee is a small business or a non-traditional government contractor (or total is a combination thereof) – no cost sharing is required
 - If the awardee is a traditional government contractor – cost sharing is required (generally)
 - If the team’s membership includes at least one of the following – cost share may not be required
 - A “significant” role for non-traditional contractor, non-profit, or academic institution
- Reminder: **competition should be pursued to the maximum extent practicable** to incentivize high quality and competitive pricing

Prototype Other Transactions – 10 USC Section 2371b

Intent & Authorities for Use

- Prototype OTs are appropriate for research and development **and prototyping activities** to enhance mission effectiveness of personnel and systems
- Prototype OTs **may be used to acquire a reasonable number of prototypes to test in the field** before making a decision to purchase in quantity
 - Prototype OTs provide a **streamlined path to award a non-competitive follow-on Production OT or FAR contract**
- For OTs, a “prototype project” is defined as a prototype project addressing a **proof of concept, model, reverse engineering to address obsolescence, pilot, novel application of commercial technologies for government purposes, agile development activity, creation, design, development, demonstration of technical or operational utility, or combinations of the foregoing.**
 - **A process, including a business process, may be the subject of a prototype project**
- Although the Competition in Contracting Act (CICA) is not applicable to OTs, competition should be pursued to the maximum extent practicable to incentivize high quality and competitive pricing
 - Additionally, competitive procedures are required in order to leverage the authority for transition to follow-on production contracts or transactions without subsequent competition
- Sometimes there is a reference to a 3rd type of OT – Production
 - Resulting from a follow-on to a Prototype project completion, whereas the first award (Prototype not Research) was competed, and competitors notified as part of that competition of intent for a follow-on direct award of a FAR or non-FAR based production contract
 - In cases where the first phase is a direct award, the Production Award is competed

OTA Purpose & Authority – Key tenets

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Federal Agencies Who Can Use OT Authority

NASA – Permanent 1958

NIH – Permanent 1972

- Of 27 Centers and Institutes some have authority, some authorities are by program not by center or institute ref. [Other Transactions | grants.nih.gov](#)

DoD – Permanent 1972

FAA – Permanent 1996

DoT – Permanent 1998

TSA – Permanent 2002

DHS – Temporary 2002

- Originally was for 5 years, was to expire end of FY 2022, requesting permanent, also extension through 2024

DoE – Temporary 2005

- Energy Policy Act of 2005 (Section 1007), extended to 2011 for TIAs, further extended to 2015 for TIAs
- See ARPA-E below DHHS / DNDO – Permanent 2006

DHHS – Permanent 2006

DNDO – Permanent 2006

ARPA-E – Permanent 2011

Federal Agencies with Congressional OT Authorization

Agency	OT Authority	Agency Specific OT Requirements, Limitations, and Restrictions
NASA	51 U.S.C. § 20113(e)	No limitations or restrictions.
DOD*	10 U.S.C. § 4021 10 U.S.C. § 4022	Authorizes Research OTs and Prototype OTs. See DoD Other Transactions for detailed requirements, limitations, and restrictions.
DOE	42 U.S.C. § 7256	Limited to RD&D projects. Cost sharing agreement required. Authorized for RD&D and prototype projects.
HHS	42 U.S.C. § 247-7e	Limited to RD&D projects. Cost sharing agreement required. Authorized for RD&D and prototype projects.
DHS	6 U.S.C. § 391	Prototype projects require a non-traditional contractor and cost sharing agreement.
DOT	49 U.S.C. § 5312	Limited to RD&D focused on public transportation.
FAA	49 U.S.C. § 106(l)	No limitations or restrictions.
TSA	49 U.S.C. § 114(m)	No limitations or restrictions.
DNDO	6 U.S.C. § 596	No limitations or restrictions.
ARPA-E	42 U.S.C. § 16538	No limitations or restrictions.
NIH	42 U.S.C. § 285b-3	Limitations and restrictions differ based on specific research programs.
	42 U.S.C. § 284n	
	42 U.S.C. § 287a	

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Restrictions & Applications – Research OTs

Restrictions, applications

Restrictions

- FAR (and supplements) is not applicable
- 50/50 cost share arrangement to maximum extent practicable
- Agencies must be explicitly authorized by Congress to use OTs
- Contracting Officer must have Agreement Officer authority to execute

Applications

- R&D (or RD&D, R&D and demonstration) activities to advance new technologies and processes to evaluate feasibility or utility of a technology
- To address perceived obstacles to doing business with the government by non-traditional defense contractors, **to include intellectual property rights**, and compliance with cost accounting standards
- For flexibility to tailor agreements to reach non-traditional defense contractors with innovative research development solutions
- For negotiable funding arrangements, payment milestones, and length of agreement to achieve research projects

Restrictions & Applications – Research OTs

Restrictions, applications – Pros & Cons, a Government view

Pros	Cons
Attributes of an OT can enable faster development and potential fielding of capability	Pursuit and execution of an OT requires highly experienced and empowered staff; lack of guidance, structure, and processes can challenge and intimidate inexperienced staff
Reduces barriers to entry for non-traditional vendors; allows greater government access to commercial innovators that do not typically do business with the government	Government assumes increased risks without the process, precedent, and protection of the FAR
Standard cost accounting requirements are not required under an OT, enabling greater access to commercial innovators that previously did not want to share cost data with the government	Flexible arrangements in intellectual property and cost accounting data can have long-term negative implications for the government
OTs offer flexible approach to managing intellectual property , enabling greater access to commercial innovators that do not comply with traditional government data rights	
Agencies that have been designed with OT authority have options for OT implementation to include Commercial Solution Opening program, use of existing consortia OTs, or the development of a unique internal OT	
OTs are not subject to traditional GAO protests, unless the application of an OT is challenged to be inappropriate (they can be challenged in the court of federal claims)	

Restrictions & Applications – Prototype OTs

Restrictions, applications

Restrictions

- FAR/DFARS are not applicable
- Agencies must be explicitly authorized by Congress to use OTs
- Contracting Officer must have Agreement Officer authority to execute OTs
- Cost sharing requirements apply if no significant participation by non-traditional contractors, non-profits, SBs, etc.
- Limited to requirements that have a prototyping element
- OTs can only deliver limited quantities of prototypes
- Prototype project must address anticipated follow-on activities, competitive procedures must be used to award prototype project, and successful completion of prototype project required to transition to follow-production vehicle
- May not exceed \$500M without Agency Senior Executive approval

Applications

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- For flexibility to tailor agreements to reach non-traditional vendors with innovation research development and demonstration (RD&D) solutions
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Reduces barriers to entry for non-traditional vendors; allows greater government access to commercial innovators that do not typically do business with the government	Government assumes increased risks without the process, precedent, and protection of the FAR (e.g., EMD to LRIP/FRP challenge)
Provides a potential avenue to access to third party funding (e.g., venture capital)	Flexible arrangements in intellectual property and cost accounting data can have long-term negative implications for the government
OTs offer flexible approach to managing intellectual property , enabling greater access to commercial innovators that do not comply with traditional government data rights	
A path has been established to allow for a streamlined, non-competitive follow-on production contract or agreement (production OT, FAR contract, etc.)	
Agencies that have been designed with OT authority have options for OT implementation to include Commercial Solution Opening pilot program, existing consortia OTs, or development of a unique internal OT	
May leverage COTS for prototyping solutions	
OTs are not subject to traditional GAO protests, unless the application of an OT is challenged to be inappropriate (they can be challenged in the court of federal claims)	
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	Contract (FAR based)	OTA Based Agreement	Federal Grant	Federal Cooperative Agreements
Purpose	Procurement document used to purchase property or services for Government direct benefit or use (FAR Parts 1-53, of Title 48 (CFR) defines the way the acquisition workforce plans, forms, and administer contracts	Used when Government needs access to R&D (or prototypes) from commercial sources requiring more flexibility than the traditional Government acquisition allows - OT Agreement is a contract, it contains 6 legal elements of a contract: offer, acceptance, consideration, authority, legal purpose, meeting of the minds - - signed by someone who has the authority to bind the federal government	A flexible instrument designed to provide money to support a public purpose.	A flexible instrument designed to provide money to support a public purpose
Terms & Conditions	Governed by FAR	Flexible, as negotiated – not inclusive of those governed by FAR or CICA, but other US statutes apply (note: “get around it” does not refer to FAR, but can use similar words)	Governed by the terms of the grant agreement	Governed by the terms of the cooperative agreement
Scope	Determined by Government , with input from proposer in many cases. Somewhat, inflexible in scope of work, budget, and other changes (changes must be agreed to when changed)	Determined by Government , with input from proposer in many cases. Somewhat, inflexible in scope of work, budget, and other changes (changes must be agreed to when changed)	Developed by proposer , as <u>agreed to by Government</u> . Flexible as to scope of work, budget, and other changes (as agreed to when changed)	Determined by parties. Typically, flexible in scope of work, budget, and other changes (as agreed to when changed)
Solicitation	RFP/RFQ	RFP, RFPP, BAA, CSO	Grants.gov (“kit”)	Request for Agreement
Sponsor Involved Post Award	Significant	Significant, <u>as negotiated</u>	Limited	Substantial
Payment	Typically, deliverables / milestones based	<u>As negotiated</u>	Typical annual	Typically annual or as negotiated
Re-budget	Restrictive	Restrictive	Can be flexible	Usually flexible
Reporting	Frequent (typically monthly)	Can be frequent (typically monthly), <u>as negotiated</u>	Annual (and end of PoP)	Determined by agreement
Flexibility	Significant responsibility to the Government for the conduct of the project and production of results	Significant responsibility to the Government for the conduct of the project and production of results	More freedom to adapt the project and less responsibility to produce specific results	Significant involvement between the Federal agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement

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 - Best Practices for industry to position themselves for OTA Intellectual Property Rights desired
 - Two sanitized case study examples
- Summary with Q & A

Intellectual Property Rights – Similarities and differences between a FAR based contract and an OT Agreement

Topics...

“FAR Normal” Versus an OTA, how different is it really?

Best Practices for industry to position themselves for OTA
Intellectual Property Rights desired

Two sanitized case study examples

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Two sanitized case study examples

“FAR Normal” IP Rights Versus an OTA, how different is it really?

Separating myth from reality...

First – where are we heading? – From our “restrictions & applications” area...the Yin and Yang of OTAs and IP

- **Pro** (Gov’t perspective) - OTs offer flexible approach to managing intellectual property, enabling greater access to commercial innovators that do not comply with traditional government data rights
- **Con** (Gov’t perspective) – OTs offer flexible arrangements in intellectual property and cost accounting data can have long-term negative implications for the government

The key questions to discuss: What is a flexible approach? What are flexible arrangements?

Let’s define a “FAR Normal” set of rules around “Rights in Technical Data or Computer Software,” using a specific example set

- We are using a DFARS example here, (POV: it offers more “learnable” specifics based on material available...) – but in general, it represents Federal...
 - Yes, we know DFARS is not applicable to OTA’s but it still an IP baseline we can move from for OTAs

Some key basic terms and concepts...

“FAR Normal” IP Rights Versus an OTA, how different is it really?

Separating myth from reality...

Some key basic terms and concepts...

- We are equating Intellectual Property in this case as “Rights in Technical Data or Computer Software”: (licensing data as opposed to “ownership”) - In broad terms this concerns the Government’s right to use, modify, reproduce, release, perform, display, or disclose data and SW developed by a contractor
- **Technical Data:** All recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including SW documentation)
- **Form, fit, function data:** Means technical data that describes the overall physical, functional, and performance characteristics of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items (can include qualification requirements)
- **Ground rules:** To determine the scope of what the Government uses to determine the license to be gained
 - **Source of Funding:** (Source of funding used by the contractor to develop the product in consideration) Funding may either be Public (Government) or Private. – DFARS clause 252.227-7013, general classes
 - Developed exclusively with Government funds
 - Developed exclusively at private expense (contractor must be able to defend assertion)
 - Developed with mixed funding (contractor must be able to defend assertion)
 - **Developed:** - DFARS clause 252.227-7014
 - Developed means that an item, component, or process exists and is workable (for a technology here, DFARS has analogous for SW as well)
 - E.g., it as been analyzed, tested sufficiently to demonstrate to reasonable people skilled in the applicable art/technology to demonstrate there is a high probability it will operate as intended
 - It does not need to be advanced to the point where it offered or sold in the commercial market

“FAR Normal” IP Rights Versus an OTA, how different is it really?

Separating myth from reality...

Some key basic terms and concepts...continued

- **Non-Commercial Categories in Technical Data or Software Rights:** (we will get to Commercial in a bit)
 - DoD Policy: When an agency is purchasing Non-Commercial Items, it is to acquire only the data to satisfy the agency needs, and no more than that
 - Typical needs:
 - Form, fit, and function data; data required for repair or maintain, install, operate (adequate to “use the system”)
 - Adequate to “build” (fit) a system around this purchase. (e.g., form, fit, and function)
 - Adequate to “integrate” into another system (inputs and outputs)
 - Sustainment needs around either of the above (cases: Government does the work; a Government contractor does the work; the “developer” does the work)
 - Government must provide
 - The specific the technical data to be delivered under the contract, the specific schedule, the specific procedure for the Government to determine acceptability
 - Separate CLINs (practicable) for each deliverable data item
- **Rights:**
 - **Unlimited rights:** Applies to both Technical data and SW (most liberal)
 - The Government may use, modify, reproduce, perform, display, release, or disclose in whole or in part , in any manner, and for any purpose, and to have others or authorize others to do so... (includes right to distribute to competitors for re-procurement purposes)
 - 252.227-7013(b)(1) (6 of 9 criteria) – i.e., Developed exclusively with Government funding; developed exclusively for the Government under contract; form, fit, and function data; data necessary for the installation, operation, maintenance, or training; publicly available data; data the Government obtained unlimited rights to under another contract (can be a pitfall)
 - A LOT to digest here....also 252.227-7014(b)(1)

“FAR Normal” IP Rights Versus an OTA, how different is it really?

Separating myth from reality...

- **Rights continued:**

- **Limited rights:** Only applies to Technical data, does not apply to SW

- This is the most restrictive protection the contractor can obtain for technical data delivered to the Government under a contract – applies to data developed exclusively at private expense - 252.227-7013(b)(3)
- Includes the Government may use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part within the Government
 - The Government may NOT (without contractor permission) release or disclose the data outside the Government, use for manufacture, or authorize use by another party
- Prevents the Government from authorizing a 3rd party to become a competitor of the developer in either the commercial or Government marketplace
- An exception: emergency repair or overhaul (and direct the recipient at close of work to destroy all data in possession)

- **Restricted rights:** Only applies to SW (e.g., not technical data) – **analogous SW (and SW documentation) version of “Restricted rights”** - 252.227-7014(b)(3)

- Applies where SW or documentation is developed at private expense (proof)
- The Government may not give restricted rights to other contractors for re-procurement purposes (OR re-engineering)
- As with Limited Data Rights, provides for contractor exclusivity in the Government marketplace

- **Government Purpose Rights (GPR):** Applicable to all mixed funding situations (including competition) – applies to both Technical Data and SW (and documentation)

- Authorizes the Government to release, reproduce, or disclose within the Government without restriction AND to release outside the Government for Government Purposes Only (e.g., in Government competition, but contractor retains rights in commercial marketplace)
- GPR is effective for 5-years following award, unless otherwise negotiated (then reverts to unlimited rights)

“FAR Normal” IP Rights Versus an OTA, how different is it really?

Separating myth from reality...

Some key basic terms and concepts...continued

- **Rights continued:**
 - **Specifically Negotiated License Rights:** any license granted other than Unlimited, Limited, Restricted, or GPR
 - Somewhere between unlimited and limited/restricted (may not be less than limited/restricted), 252.227-7014(b)(4)
 - “Yes, Virginia, there is a Santa Clause...”
 - **Commercial Technical Data Rights:** There is a presumption these items were developed at private expense, and the Government may not challenge the contractor on this unless the Government can demonstrate otherwise
 - It includes standard data which comes with the purchase except it also includes form, fit, and function data; data required for repair or maintain, install, operate, or handle in cases where that data is not normally provided to commercial uses, and is required for military purposes
 - **Commercial SW Rights:** There is a presumption these were developed at private expense, and the Government may not challenge the contractor on this unless the Government can demonstrate otherwise – and analogous to Commercial Technical Data Rights above
- **Pre-notification:** Government must include the required provision in the RFP and direct offerors to identify any SW or Technical Data expected to be delivered with restrictions on use, release, or disclosure
 - Note: This enables the Government to see if they need to seek greater rights, or **is Form, Fit, and Function is adequate**
 - Caution: If these procedures are not followed by the contractor (e.g., the contractor does not mention restrictive rights) the Government has protections post-award for rights modifications based on 2 cases
 - The new “rights” based on new information; or
 - The failure to notify the Government of an IP restriction was inadvertent (and it did not materially affect the source selection decision)

“FAR Normal” IP Rights Versus an OTA, how different is it really?

Separating myth from reality...

So, we have used the above to define “FAR Normal” set of rules around “Rights in Technical Data or Computer Software,”

Then the “yin and yang” of OTAs

- **Pro** (Gov’t perspective) - OTs offer flexible approach to managing intellectual property, enabling greater access to commercial innovators that do not comply with traditional government data rights
- **Con** (Gov’t perspective) – OTs offer flexible arrangements in intellectual property and cost accounting data can have long-term negative implications for the government

So back to the question: What is a flexible approach? What are flexible arrangements?

- We can take a first step, and say” “Well, it is not the above FAR approach” – **BUT what is reasonable?**
- First, a reminder of the Government’s typical needs:
 - Form, fit, and function data; data required for repair or maintain, install, operate (adequate to “use the system”)
 - Adequate to “build” (fit) a system around this purchase. (e.g., form, fit, and function)
 - Adequate to “integrate” into another system (inputs and outputs)
 - Sustainment needs around either of the above (special cases: Government does the work; a Government contractor does the work; the “developer” does the work)
- Well, flexible approach / arrangements **MAY** not be the same as the DFARS example – they **CAN** be different, but what is practicable? ...lets discuss briefly

“FAR Normal” IP Rights Versus an OTA, how different is it really?

Separating myth from reality...

So, we have used the above to define “FAR Normal” set of rules around “Rights in Technical Data or Computer Software,”

So back to the question: What is a flexible approach? What are flexible arrangements?

- **Example: Limited (data) rights or Restricted (SW) rights**

- “This is the most restrictive protection the contractor can obtain for technical data delivered to the Government under a contract – applies to data developed exclusively at private expense - 252.227-7013(b)(3)”
 - Includes the Government may use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part within the Government
 - The Government may NOT (without contractor permission) release or disclose the data outside the Government, use for manufacture, or authorize use by another party

So, is there something below Limited or Restricted that is “more flexible” from industry’s perspective? – But also, we must look from the practicable nature of the Government rational / need for rights – if it doesn’t meet the Government need, what do we do?

- **Example: “No rights” is not a practicable approach – Is it possible to have some Commercial type Rights with some terms for a “mixed funding” situation? (Versus GPR)**
 - So, you can see where this can be tricky – and really needs the situation to discuss how to deal with it...but really that becomes SNLR
- **Example: What example does not fit into Specifically Negotiated License Rights? – Beyond the example above**
 - Any license granted other than Unlimited, Limited, Restricted, or GPR?

• **Also see the Annex at the end of this presentation (page 41) on additional OTA and Intellectual Property topics**

- **Price, Profit, Contracts, IP, Ts & Cs**

Intellectual Property Rights – Similarities and differences between a FAR based contract and an OT Agreement

Topics...

“FAR Normal” Versus an OTA, how different is it really?

**Best Practices for industry to position themselves for OTA
Intellectual Property Rights desired**

Two sanitized case study examples

Best Practices for industry to position themselves for OTA Intellectual Property Rights desired

- **Start early BD & Capture before you are looking at an RFP or RFPP coming at you**
 - Where are you at in the procurement cycle?
 - Pre-requirement, known requirement, Research RFP or Prototype (RFPP), Production
 - What objectives do they (Government) have
 - What is the intended use and sustainment approach the Government has for the end product (if there is one) – that will likely drive the Governments need for IP
 - Remember:
 - Form, fit, and function data; data required for repair or maintain, install, operate (adequate to “use the system”)
 - Adequate to “build” (fit) a system around this purchase. (e.g., form, fit, and function) practicable
 - Adequate to “integrate” into another system (inputs and outputs)
 - Sustainment needs around either of the above (special cases: Government does the work; a Government contractor does the work; the “developer” does the work)
 - Get in early – pre-RFP and provide the correct context for the Government during BD & Capture
 - Understand their needs & requirements
 - Help them understand Industry capability (NOT just yours)
 - Provide options to the Government from their perspective to help them decide (e.g., What IP rights are the right kind of IP to meet their objectives?)
 - Be aware of the Government drive to compete - DO NOT try to achieve “lock-in” offering
 - Even OTAs (not CICA, but Competition design is meant to keep prices low, quality high, and give the Government leverage in negotiation)
 - KNOW HOW TO PRICE YOUR IP (consider case study example of not being ready)
- **Remember always - “You get what you negotiate”**

Intellectual Property Rights – Similarities and differences between a FAR based contract and an OT Agreement

Topics...

“FAR Normal” Versus an OTA, how different is it really?

Best Practices for industry to position themselves for OTA
Intellectual Property Rights desired

Two sanitized case study examples

Two sanitized case study examples

- **Multi-year OTA for “cockpit level communication system interface system”** – POV, in this case, DoD was “Digging Out of a hole”
 - Original multi-year OTA: prototype and initial production quantity (LRIP)
 - Government came back after a couple of successful years, and asked Agreement/Contract modification
 - “Only a single supplier can fulfill requirement” production contract (moving from LRIP quantity to production)
 - Drivers & Issues
 - Original “Prototype OT with Follow On Production”
 - Sustainment of original LRIP devices included sustainment by the OTA Prototype contractor
 - Original number of LRIP quantities required scaling of sustainment efforts of original OTA holder
 - Success in one airborne platform required moving solution to other aviation platforms (so a lot more systems)
 - IP lessons learned
 - Prototype with follow on Production scale “underthought”
 - Government sustainment organization could not accept sustainment mission, without full DT&E and OT&E Technical (and SW) Data – which would be produced in a normal Major Capability Acquisition EMD Phase (not in original OTA)
 - A “Lesson Observed” (versus “Learned”) issue with OTAs “cutting corners”
 - If you took a previous OTA class with me, EMD was one of two “ugly issues” with the other being cost sharing affect on competition
 - Recovery effort to scale OTA contractor to
 - 1) Produce higher numbers of LRIP quantities
 - 2) Temporarily sustain the system while working “backward” to accomplish EMD with enough data to support the Government Sustainment organization (then transfer responsibility)
 - 3) To support both of the above, required the contractor to develop a full IP Strategy to support 1 & 2 above, with no real solid idea of how to price the value of what the Government wanted to buy – since there was an “assumption” of continued contractor sustainment support...

New Training / Simulation System - “Importance to Win”

- Major 3-month long proposal effort (+ BD and Capture before that)
- For the proposals it required:
 - All Computer SW items specified (>100)
 - All libraries, compilers, development environments specified
 - A complete SW system architecture with all components and all interfaces
 - For each SW & SW Library Item component
 - Native Code Development Environment
 - Code language
 - Provider/Developer
 - Consolidated data rights/SW rights listing for every single item including assertion basis as well, for each item, note if the source code was included
 - E.g., We did not allow source code for basic computer models of aviation platform physics
 - Full pricing for the above
 - Needed to specify which items had which rights
 - KEY Evaluation criteria
 - 1) enabled the Government to maintain (yielded a strength), and OR
 - 2) a 3rd Party to maintain (yielded a significant strength)
- Significant Scope of Effort to Propose
 - Above was ~1/3+ of Technical Eval Criteria
 - 1/4th of Proposal real-estate
 - About 25% of the overall effort of the team)

Seminar Objective and Outline

- **Objective: Increase your overall knowledge** of Other Transaction Authority - Intellectual Property Rights
 - How the Government (and therefore industry) works “OTs” (OTA’s) Intellectual Property Rights
 - Scope Limit – 90 minutes, broad topic, broad audience
- **OTA Purpose & Authority – Key tenets**
 - “OTA IS a contract authority...” (It is just not a FAR based contract authority)
 - Note-the differentiation of the term “agreement” is usually used to drive this fact!
 - OTA as a mechanism for the Government to contract (create an “agreement”) where contracting flexibility is the key
 - Why the Government may choose the OTA contracting strategy, and how it may change an acquisition strategy?
- **Intellectual Property Rights – Similarities and differences between a FAR based contract and an OT Agreement**
 - “FAR Normal” Versus an OTA, how different is it really?
 - Best Practices for industry to position themselves for OTA Intellectual Property Rights desired
 - Two sanitized case study examples
- **Summary with Q & A**

Seminar Summary

- **OTA Purpose & Authority – Key tenets**
 - “OTA IS a contract authority...” (It is just not a FAR based contract authority)
 - Note-the differentiation of the term “agreement” is usually used to drive this fact!
 - OTA as a mechanism for the Government to contract (create an “agreement”) where contracting flexibility is the key
 - Why the Government may choose the OTA contracting strategy, and how it may change an acquisition strategy?
- **Intellectual Property Rights – Similarities and differences between a FAR based contract and an OT Agreement**
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 - Best Practices for industry to position themselves for OTA Intellectual Property Rights desired
 - Two sanitized case study examples

QUESTIONS & ANSWERS - DISCUSSION

Contacts

Rick "A to Z" Agopsowicz | Executive Vice President, Program Execution

(C) 210-316-8579 | (O) 657-207-0040

6 Centerpointe Drive, Suite 700, La Palma, CA 90623

Rick.Agopsowicz@CorVantageLLC.com

CORVANTAGE

BRAD WEALAND | Vice President

(M) 267-218-4722 | (O) 657-207-0040

Brad.Wealand@CorVantageLLC.com

6 Centerpointe Drive, Suite 700, La Palma, CA 90623

CORVANTAGE

Other Transaction Authority (OTA) – Intellectual Property Considerations

October 17, 2023 – Noon – 1:30 PM Eastern (90-minute class)

Summary

This class is a “deeper dive” into a particular aspect of Other Transaction Authority (OTA, a non-FAR based contract agreement), specifically addressing Intellectual Property considerations.

Today, the OTA is often used by the Government as “the right contract/agreement strategy” enabling focus on the intended acquisition environment, constraints, and desired outcomes. OTA enables the Government a unique contract authority within the spectrum of Federal contracts (for those agencies authorized by Congress to use that authority).

OTs can include flexible business arrangements to acquire research and development activities to advance new technologies, and prototypes or models to evaluate technical or manufacturing feasibility, or Government utility of new or existing technology. One of the flexibilities OTs have, is in Intellectual Property (IP) rights where there is a flexible approach (compared to the FAR) to managing intellectual property rights. This may enable greater Government access to commercial innovators that do not comply with traditional (FAR) government data rights considerations. However, those flexible arrangements in IP can have long-term negative implications for the government, and though the FAR is not the IP rights driver for OTs, the Government acquisition team must work to mitigate long term Government program risks.

This class will focus on:

- OTA Background and Purpose (Establishing Context)
- Understanding the Government need for IP rights (a must to be able to position yourself to negotiate IP rights)
- IP rights similarities and differences between FAR based contracts and an OT agreement
- A case studies (sanitized to protect contracted company proprietary details and identity)
- Q&A and Discussion

Additional Topics

Other Transaction Authority (OTA) – Intellectual Property Considerations

Pricing & Profit

Pricing & Profit Government intentions are not significantly different than what you would expect with the FAR EXCEPT pricing details

- OT statutes and guidance allow the agency to determine what the competition will look like and how it will be structured (e.g., can be other than F&O, limited, or sole source)
- Competition design is meant to keep prices low, quality high, and give the Government leverage in negotiations
- Though FAR requirements can not be used as regulatory, they can be leveraged as a best practice
 - We must also note the trend of Government to include FAR related clauses as direction, but not per statute or regulation – but its because of failed projects...
- “You get what you negotiate” – but you can “become too hard to work with” also...
 - To avoid this condition, work this during BD qualification, Capture, and Proposal as much as possible

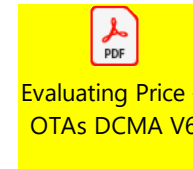
Consider a Government POV – “Evaluating Price – OTAs” by DCMA (DoD, but do not expect it to be significantly across other agencies, except maybe NIH – see our op-ed discussions in this presentation regarding NIH)

- Price Reasonableness standards as a starting point “...not too high”
- Data may be needed (if adequate competition exists, multiple bids may meet the need)
 - E.g., commercial pricing data, market data, parametric data, or cost information (last resort)

Pricing & Profit

Price Considerations, Continued

- **Total Cost of Acquisition:** AO must think through total costs (including potential follow-on production and sustainment costs if applicable) – how do these costs correlate to value?
 - *Even beyond the OT follow-on production contract
 - One source selected for production? (...creating a future sole-source environment?)
 - Limited (Tech Data) or restricted (SW) data rights (creating a future sole-source environment)
- **Time/Value Consideration:** Cost to Program Office to evaluate
 - *Not likely a material consideration if the value of the acquisition is large



More details here (6 pages on the topic of these 2 pages)...[Evaluating Price - OTAs](#)

Profit

- **No guidelines for OTs specifically, you will see even with the FAR** “there is no statutory or regulatory limits on (a) the amount of profit that may be negotiated between the government and its contractors or (b) the amount of profit that a contractor may realize through performance” – **BUT remember Best Practices are Best Practices regardless of origin (at risk of digging a hole trying to answer this...)**
- [Profit Guidance 48 CFR](#) – CO’s are going to be familiar with the FAR and when using the FAR (yes this is an OTA discussion, but remember, – and in general, CO’s are not required to analyze profit on awards where price negotiation is not based on cost analysis (e.g., adequate competition and offers) When price negotiation is based on cost analysis (other than adequate competition) COs’ use the agencies structured approach for to analyze profit, e.g.,
 - Defense CO’s have good profit data as a result of DoD application of weighted guidelines
 - Applies above Truthful Cost & Pricing Data (used to be TINA pre-2014) = Thresholds, \$2m award post July 1, 2018)
 - Profit estimation - DFARSPGI 253.215-70 12-30-2022 (DD Form 1547, [Weighted Guidelines Tool](#))
- A guide? (Note typically profit deals with FFP, T&M, Labor-hour; Fee deals with Cost+)
 - Experimental or R&D Contracts –15% of estimated costs
 - Architect - engineering services for public works or utilities – 6% of Project Value
 - CPFF contracts – 10% of estimated costs
 - FFP and other types of cost contracts – no limitation on fee (...but...)
- Must remember price reasonableness is a LOT more than may realize to get to “not too high” (separate PCI class on Cost & Price Proposal Evaluation)

Contracts

Agreement Types

- OT agreements **may be fixed-price, expenditure based, or hybrid**

Sample Agreement

- However, this is the “wild-wild West”
 - [ASPR BARDA Sample Agreement](#)



Required Forms

- “Sometimes we are required to complete forms that look like “grant forms” -- implying we must submit a ton of cost detail and not providing any space for profit...”
 - “We do not want to submit cost detail if not a Cost Reimbursement-type agreement, but the OTA client is often silent on contract type, let alone how to bill – so what do we do? - For something that arguably is not constrained by the FAR, or even 2 CFR 200, how do we navigate the cost/no profit aspects?”
- Remember – “Price Reasonableness?” (Not to high?) – methods?
 - Comparison of offerors’ prices to each other, compare to an IGCE, standard deviation analysis, prior buys (similar Ts & Cs), Market Research, Cost & Pricing data (vendor is the last resort)
- “You get what you negotiate” – but you can “become too hard to work with also...”
 - To avoid this condition, work this during BD qualification, Capture, and Proposal as much as possible

Intellectual Property: Terms and Conditions

NOTE: I am not a licensed contract attorney (I am an Engineer/Program Execution SME) for specific Q&A please see your General Counsel/Contacts Shop (Material is included for completeness)

- **Inventions**

- 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)
- Agencies may be willing to redefine “subject inventions”
- Agencies may not be able to transfer all rights in U.S. Government employee inventions, but could issue an exclusive license

- **Data**

- Standard data rights frameworks do not apply
- Agencies may reference standard rights during negotiations
 - Unlimited rights
 - Government purpose rights
 - Limited rights
- Marking is generally required
- Copyright is not always addressed

- **Confidentially and Non-Use, Cont’d**

- Available protections
 - Damages
 - Third-party obligations or restrictions
 - Reverse engineering
 - Records
 - Withholding delivery
- Relationship between confidentiality and data rights
- Interagency communications

Intellectual Property: Terms and Conditions

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- **Confidentially and Non-Use, Cont'd**

- 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

- **Joint Research**

- Default joint patent and copyright ownership rules can be varied by agreement
 - Patents: Must file application and no accounting
 - Copyright: Rights arise upon creation and accounting
- Considerations for joint research:
 - Copyright by U.S. Government employees
 - Assignment of U.S. Government inventions
 - When a CRADA is entered into under an OTA, avoid conflicting terms if possible and ensure that OTA provisions protect rights to the same extent as CRADA provisions

Richard “Rick A to Z” Agopsowicz

CorVantage, LLC, Executive Vice President, Program Execution



“Rick A to Z” leads CorVantage Program Execution of client strategies and programs to achieve their Business Objectives through Market Analysis, Pipeline and Business Development, Capture, Negotiations, and Public Sector Program Execution.

Professional Experience:

“A to Z” has over 45 years of Government and Industry experience in operations and government acquisition across R&D and operational programs, complex program management, systems development engineering, Information Assurance, Information Operations/Cyber Development & Special Technical Operations, and business capture.

During his preceding 30-year career with the U.S. Air Force, he held positions from B-52 operational squadron level up to that of Director at the Air Force Information Warfare Center. He has now spent 20+ years as an industry senior executive working with over 50 clients winning and executing programs. This includes leading over 170 campaigns across 42 Federal Agencies and 17 State & Local Governments as well as commercial business-to-business. He has worked in defense, homeland security, intelligence, Special Operations, energy, health and human services, biotechnology & life sciences, IT/telecommunications, and transportation.

“A to Z” is actively involved in the Professional Services Council, Washington Homeland Security Roundtable, Coast Guard Industry Academy Alumni Association, University advisory boards, and Technology Incubators & Accelerators. He is a guest lecturer at Defense Acquisition University DAWIA Senior Program Management and Contracting Officer courses. He also is a professional educator in Accessing Government non-dilutive R&D Funding, Source Selection Evaluation, Innovative Contracting, DoD Adaptive Acquisition Framework, and Best Practices in Business & Capture Leadership with George Mason University, Public Contracting Institute, and Federal Publications Seminars as well as directly with CorVantage Clients.

About CorVantage, LLC. For more than 14 years, our team has worked together providing proven leadership to help our clients succeed in Business Expansion & Capture, and Public Sector Program execution. We bring a team of seasoned professionals which have demonstrated success and a commitment to foster a collaborative team environment. Our team leaders have an average of more than 25 years of experience capturing and managing multi-billion-dollar projects.

Richard “A to Z” Agopsowicz

Selected Previous Experience

- EVP, Business Capture & Program Execution, CORTAC Group, Inc.
- Managing Director, Business Development, Robbins-Gioia, LLC.
- Senior Vice President, Capture Practice, Steven Myers & Associates
- Director, US Air Force Information Warfare Center (AFIWC/RM), and Technical Director, Advanced Programs “Skunk Works”
- Planner and operational lead conducting special operations in support of SOCOM, EUCOM, CENTCOM, LANTCOM, Intelligence Community, and UK MOD

Conceptualized, organized, and led the development & employment of National level capabilities during Desert Storm Joint Force Component/Task Force Activities

Program Manager, Air Force Information Systems Security Research & Development

B-52 Squadron and Wing Combat Crew Flight Instructor (Defensive Air tactics, techniques, and procedures) and Combat Crew Training School Flight Instructor

Strategic Air Command, 1st Combat Evaluation Group, COMBAT SKYSPOT instructor, as well as assigned to multiple 1CEVG Sites

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