



**DEBUNKING  
THE HYPE  
INVOLVING  
"OTHER  
TRANSACTION  
AUTHORITY"**

**BY JEROME GABIG AND RICHARD RALEIGH**

**“OTHER TRANSACTION AUTHORITY” (OTA) AND ITS ASSOCIATED “OTHER TRANSACTIONS” (OTS)<sup>1</sup> ARE EXPERIENCING A SURGE OF ACTIVITY,<sup>2</sup> THANKS IN PART TO RECENT LEGISLATION.**

Certainly, OTA can be a valuable procurement tool if used correctly. In fact, recent efforts with the use of OTs have been overwhelmingly positive.

Unfortunately, there has also been an abundance of “hype” concerning OTA and OTs that could lead one to believe them to be a panacea for government contract ills—a “pill” that will result in fast and flawless procurements.<sup>3</sup> Perhaps the most detrimental aspect of this “hype” is that it could lull members of Congress and senior executive

branch leaders into thinking that serious procurement reform is no longer needed.

This article is not an explanation of what OTA and OTs are; rather, it is an explanation of what they are not. It seeks to clarify what OTs work well for, and to dispel the myths that have recently been cropping up due to the increased “hype” over OTA.

Exemplary of this “hype” is a recent Defense Acquisition University (DAU) video<sup>4</sup> featuring an interview with Lauren Schmidt, the Defense Innovation Unit Experimental (DIUx)<sup>5</sup> Pathway Director. OTs are the contracting vehicle of choice for DIUx, and within the video, OTs are compared to conventional *Federal Acquisition Regulation* (FAR)-based contracts and are heralded as:

- Faster,
- More flexible, and
- More collaborative.

While not wanting to detract from DIUx’s remarkable accomplishments in promptly and

effectively awarding contractual vehicles for the development of prototypes to nontraditional defense contractors, this article suggests the same results could likely have been accomplished while working *within* the FAR system, and that each of these three categories—faster, more flexible, and more collaborate—are indicative of the misplaced “hype” surrounding OTA and OTs.

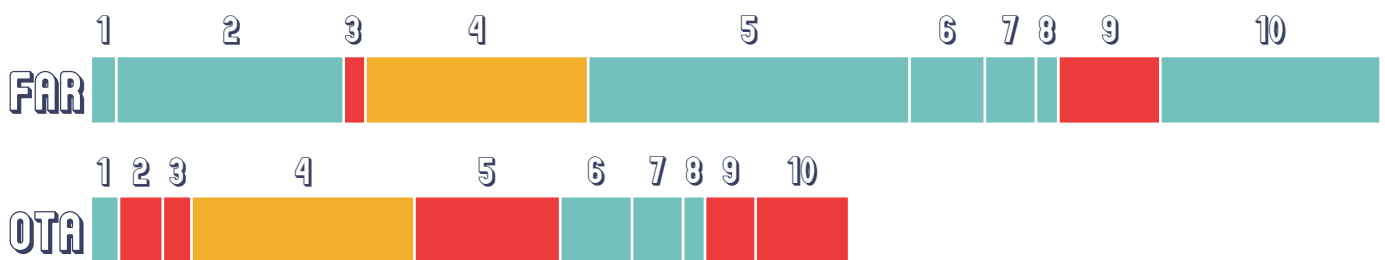
Let’s examine each of these categories in turn.

**1. “FASTER”**

Perhaps the best documented explanation of why OTs are supposedly “faster” than conventional FAR-based contracts has been compiled by Advanced Technology International (ATI), a nonprofit specializing in collaborative research initiatives between industry and the U.S. federal government. **FIGURE 1** below shows information compiled by ATI, which contrasts their estimates for the time a conventional FAR-based project contract takes versus an OTA-based project for the chronological components of the acquisition cycle.<sup>6</sup>

It is useful to examine those components of the acquisition cycle that ATI asserts can

**FIGURE 1.** ATI’s Estimated Average Completion Time for Projects: FAR vs OTA\*



<span style="color: teal;">■</span> <b>GOVERNMENT ONLY</b> <span style="color: red;">■</span> <b>INDUSTRY ONLY</b> <span style="color: yellow;">■</span> <b>SHARED</b>	
1   Define Requirements	6   Final Source Selection
2   Develop/Approve/Issue Solicitation	7   Government Acquisition/Legal Review
3   Industry Day/Proposers' Conference	8   Execute Award Decision
4   Proposal Preparation	9   Negotiate Terms and Conditions
5   Proposal Evaluation	10   First Task on Contract

\*Source: ATI, “Other Transaction Agreements: Fast, Flexible Access to Innovation,” available at <https://www.atl.org/other-transaction-agreements>.

be more quickly accomplished using an OT to see if ATI's assertions can withstand scrutiny. Specifically, the authors of this article contend that the following components are "suspect":

- "(2) Develop/Approve/Issue Solicitation";
- "(5) Proposal Evaluation";
- "(9) Negotiate Terms and Conditions"; and
- "(10) First Task on Contract."

Each is separately analyzed as follows.

### DEVELOP/APPROVE/ISSUE SOLICITATION

ATI is probably correct in asserting that it takes longer for a conventional FAR procurement to complete the develop-

ment, approval, and issuance of a solicitation than it takes with an OT. However, it does not have to be that way. There are examples to the contrary.<sup>7</sup> Sadly, heads of contracting activities (HCAs) have grown accustomed to bureaucratic ways that stifle promptly developing, approving, and issuing a solicitation. However, this bureaucratic lethargy could be overcome with dynamic leadership at the HCA level.<sup>8</sup>

### PROPOSAL EVALUATION

Academically, there is no cogent reason why a proposal for a conventional FAR procurement should take longer to evaluate than a proposal for an OT. The amount of time to perform an evaluation largely depends on the competency and availability of evaluators. Anecdotally, because of their higher visibility and more dynamic

government team, OTs are able to attract more competent evaluators who are available to work on an expedited basis.

Another likely advantage for OTs is that they generally have more focused evaluation factors that are likely to be the actual discriminators for source selection. Although FAR 15.304 has long admonished tailoring the evaluation criteria to expeditiously discern the best proposal, all too often for conventional FAR acquisitions the evaluation criteria follow a rote format. If agencies used more focused evaluation factors for conventional FAR acquisitions, the balance in favor of OTs with respect to evaluation timelines would likely tip back the other way.

FIGURE 2. Complexity of IP Clause Negotiation: OTs vs. Conventional FAR Contracts

OTs	The parties must negotiate: 1   Government licenses to legacy patents owned by the vendor, and 2   Rights to inventions conceived or reduced to practice in the performance of the OT (to include where the vendor employees and government employees are coinventors).	← PATENTS →	The matters to be negotiated in column 2 for OTs has essentially been "pre-agreed" in FAR 52.227-11, "Patent Rights—Ownership by the Contractor."* Accordingly, FAR 52.227-11 typically saves considerable time by not having to negotiate patent rights.	CONVENTIONAL FAR CONTRACTS
	For commercial computer software, OTs and conventional FAR contracts take essentially the same approach as set forth in DFARS 227.7202-1.	← SOFTWARE →	DFARS 227.7202-1(a) states: "Commercial computer software or commercial computer software documentation shall be acquired under the licenses customarily provided to the public unless such licenses are inconsistent with federal procurement law or do not otherwise satisfy user needs."	
	For commercial technical data, the negotiation is likely to begin "at ground zero," which means multiple back-and-forth dialogues are not uncommon.	← TECHNICAL DATA →	For commercial technical data, the allocation of rights has already been prescribed in DFARS 252.227-7015, "Technical Data—Commercial Items." The allocation is inherently "fair," with rights being allocated primarily based on which party paid for the development. Hence, for negotiations involving commercial technical data, the conventional FAR contract is likely to take less time.**	

\* The allocation of rights in FAR 52.227-11 follows the Bayh-Dole Act, which generally permits the contractor to own the IP conceived or reduced to practice by the contractor while performing the contract. In return, the government obtains a royalty-free license. Some contracting officers have experienced push-back from nontraditional defense vendors wanting greater rights. OTA agreement officers are often unaware that the other alternative for the nontraditional government contractor is to accept funding from venture capitalists. Compared to the oppressive terms typically demanded by venture capitalists, the allocation of rights under the Bayh-Dole Act are notably generous. Consequently, agreement officers often have more leverage than they suspect in negotiating IP clauses with nontraditional defense contractors.

\*\* Individual deviations can be pursued under DFARS 201.403, but deviations undoubtedly will result in delay.

## NEGOTIATE TERMS AND CONDITIONS

The ATI graphic would have the reader believe an OT takes approximately a third of the amount of time to negotiate compared to a conventional FAR contract. This assertion is not based in logic. Negotiation takes two parties. As a norm, the more there is to negotiate, the longer the negotiations are likely to take. As will be discussed, there is considerably more to negotiate for OTs than there is to negotiate for conventional FAR procurements.

A conventional FAR procurement contains numerous clauses—many of which are mandatory. Viewed pragmatically, these clauses are tantamount to being pre-agreed-to terms and conditions by the parties. To state the obvious, pre-agreed clauses generally take less time to negotiate. Consider, for example, the time that can be saved by not having to negotiate clauses such as a “disputes” clause, a “changes” clause, or a “termination for convenience” clause.

Intellectual property (IP) clauses are an excellent example of provisions that are susceptible to prolonged negotiations for OTs. DIUx has made clear that IP clauses are a major concern to the nontraditional defense contractors with whom DIUx seeks to do business. Accordingly, IP clauses are generally the focus of considerable attention when negotiating an OT for a prototype from a nontraditional defense contractor. **FIGURE 2** on page 45 explains why it is likely to take significantly more time to negotiate IP clauses for an OT compared to negotiating IP clauses for a conventional FAR contract.

In addition to the IP clauses that are commonly negotiated for OTs, there are numerous other clauses that should be negotiated. Several such clauses were identified in the *DOD Other Transactions Guide for Prototype Projects* (January 2017).<sup>9</sup> Listed in **FIGURE 3** below are some of those clauses.

In summary, for the acquisition of a prototype, it logically would take significantly longer to negotiate the appropriate clauses for an OT than the appropriate clauses for a conventional FAR procurement. While ATI asserts that terms and conditions would be more quickly negotiated for OTs, this seems only possible if:

- Those negotiating OTs simply use the FAR clauses regarding IP, or
- The OTA agreements officers simply accept what industry wants without negotiation.

Either of these approaches would likely have unfortunate consequences.

## FIRST TASK ON CONTRACT

ATI would have us believe that it takes more than twice as long to place the first task on a conventional FAR contract than to place the order using an OT. Logic does not support such an assertion.

**FIGURE 3.** Typical Clauses to be Negotiated for OTs

CLAUSE IDENTIFIED IN DOD GUIDE	DOD GUIDE CITE	REFERENCE TO FAR COUNTERPART
FLOW DOWN CLAUSES	¶ C2.10	See FAR Subpart 12.5, “Applicability of Certain Laws to the Acquisition of Commercial Items,” and FAR 52.212-5, “Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.”
PRICE REASONABLENESS	¶ C2.11	See FAR Subpart 15.4, “Contract Pricing”
ALLOWABLE COSTS	¶ C2.12	See FAR Part 31, “Contract Cost Principles and Procedures.”
ACCOUNTING SYSTEMS	¶ C2.13	See DFARS 252.242-7006, definition of acceptable accounting system.
AUDITS	¶ C2.14	See FAR Subpart 42.1, “Contract Audit Services.”
COST SHARING	¶ C2.16	See FAR 16.303, “Cost-sharing contracts.”
PAYABLE MILESTONES	¶ C2.17.2	See FAR Subpart 32.10, “Performance-Based Payments.”
PROVISIONAL INDIRECT RATES	¶ C2.17.4	See FAR 52.216-7, “Allowable Cost and Payment.”
PROPERTY ACQUIRED UNDER OT	¶ C2.18	See FAR Part 45, “Government Property.”
CHANGES	¶ C2.19	See FAR Subpart 43.2, “Change Orders.”
DISPUTES	¶ C2.20	See FAR Subpart 33.2, “Disputes and Appeals.”
TERMINATION	¶ C2.21	See FAR Part 49, “Termination of Contracts.”
REMEDIES	¶ C2.21.2	The common law of federal contracts as derived from decisions of Boards of Contract Appeals and the Court of Federal Claims.
CLOSE-OUT	¶ C2.23.2	FAR 4.804, “Closeout of contract files.”

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FIGURE 4.

STATUTES LIKELY TO APPLY TO OTS		
✓	FALSE CLAIMS ACT	
✓	COUNTERFEIT PARTS	
✓	BUY AMERICAN STATUTE	41 USC Chapter 83
✓	CYBERSECURITY ACTS	
✓	FEDERAL LABOR LAWS AND EXECUTIVE ORDERS	E.g., the Defense Base Act
✓	ANTI-DEFICIENCY ACT	
✓	THE RESTRICTIONS ON OBTAINING AND DISCLOSING CERTAIN INFORMATION STATUTE	41 USC Chapter 21 (formerly the Procurement Integrity Act)
✓	PROHIBITION ON REQUIRING CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS OR STATEMENTS	Pub. L. 113-235, § 743 (implemented in FAR 52.203-19)
✓	INVERTED DOMESTIC CORPORATIONS	Pub. L. 113-76, § 733 (implemented in FAR 52.209-2, "Prohibition on Contracting with Inverted Domestic Corporations")

Although the term "on contract" is vague, for a conventional FAR contract, ATI is probably referring to the first task order for an indefinite-quantity contract under FAR 16.504. Orders under such contracts do not require any synopsis publications.<sup>10</sup> Additionally, there are significant limitations on protesting such task orders.<sup>11</sup> In short, the administrative step of issuing the first task is essentially the same for both the FAR-based indefinite-quantity contract and the OT.

Although ATI may have had anecdotal experience to support their assertion that it takes twice as long for the first task to be issued on a conventional FAR contract compared to an OT, the only logical explanation is bureaucratic ineptness. In all probability, when the mystic of OTs wears off, OTs will similarly be plagued with similar delays.

## 2. "MORE FLEXIBLE"

Ms. Schmidt is on firm ground in asserting that OTs are "more flexible" than conventional FAR contracts.<sup>12</sup> However, hype creeps in when she states: "Because all of the terms and conditions of OTs are nego-

tiable, we can negotiate directly with those companies and design an OT that works best for all parties."<sup>13</sup> The truth is that there are numerous terms and conditions obligated by law or Executive Order which still *must be included* in OTs:

OTs generally are not required to comply with laws that are limited in applicability solely to procurement contracts, such as the Truthful Cost or Pricing Data [statute].... However, if a particular requirement is not tied to the type of instrument used, it generally would apply to an OT—for example, fiscal and property laws generally would apply to OTs for prototype projects.<sup>14</sup>

FIGURE 4 above contains a partial list of statutes that are highly probable to be binding on OTs.

The Government Accountability Office (GAO) has accurately identified the underlying problem:

According to company representatives that we spoke to, DOD's

acquisition environment presents unique challenges to non-traditional companies that they otherwise do not experience in the private industry. The acquisition environment is driven by laws that provide transparency and fairness, regulations that promote specific socio-economic goals, and DOD's approach for implementing those laws and regulations. For the most part, the selected 12 companies we spoke with expressed frustration with the complexity of DOD's acquisition process; the time, cost, and risk associated with competing for and executing a contract; and interacting with DOD's contracting workforce.<sup>15</sup>

Simply put, as exemplified by FIGURE 4's partial list of binding statutes that are highly intrusive to nontraditional defense contractors, OTs offer little toward solving the statutory-caused complexity, cost, and risk associated with doing business with the federal government.

Returning to the assertion that OTs are more flexible, the goal of the Federal Acquisition System is to "[s]atisfy the cus-



**OFPP MYTH-BUSTING****MISPERCEPTION:**

**We can't meet one-on-one with a potential offeror.**

**FACT:**

**Government officials can generally meet one-on-one with potential offerors as long as no vendor receives preferential treatment.**

\*Source: OFPP Myth-Busting Memo 1, Misperception #1 (February 2, 2011).

tomers in terms of cost, quality, and timeliness of the delivered product or service."<sup>16</sup> Presumably, OTs have the same goal. Put in perspective, "more flexibility" is of little value unless it is capable of providing benefits in terms of cost, quality, or timeliness.

In the hands of a highly competent OTA agreements officer, the flexibility is likely to be beneficial. However, the search for a highly competent OTA agreements officer must begin with a highly competent contracting officer. As explained in a recent GAO audit of federal acquisitions:

We continue to highlight DOD acquisition workforce issues in our High-Risk List, through the DOD Contract Management area, because agencies continue to face challenges in maintaining sufficient staff levels and monitoring the competencies of their acquisition workforce.<sup>17</sup>

In summary, "more flexibility" is only an advantage for OTs if the OTs are being overseen by a highly competent agreements officer who can astutely exploit the flexibility. While highly competent contracting officers exist, ATI's assumption depends on every OT being assigned to a highly competent contracting officer. If this is not the case, then the "more flexibility" factor will not necessarily result in improvements in cost, quality, or timeliness.

**3. "MORE COLLABORATIVE"**

Industry would probably confirm that the government is more collaborative in pursuing OTs than in pursuing conventional FAR procurements—but, it does not have to be that way. The FAR also provides the flexibility to contracting officers to be more collaborative if they simply choose to do so. For example, the FAR states:

The government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the government determine the capabilities available in the commercial marketplace.<sup>18</sup>

Sadly, conventional FAR acquisitions are typically undertaken in a culture where collaboration is not encouraged. This harmful culture has been addressed by the Office of Federal Procurement Policy.

In the private sector, when one party expresses an interest in using the technology of another party, the parties typically sign a non-disclosure agreement (NDA) before the party with the technology shares trade secrets. Although nontraditional defense contractors would prefer to follow that practice when dealing with the government, rarely does the government cooperate in this regard. Nevertheless, there is no reason why government personnel cannot sign NDAs.<sup>19</sup>

In summary, the reason why conventional FAR contracts are less collaborative is not because the FAR prohibits such collaboration. Instead, the reason is because contracting officers generally are unwilling to conduct the procurement in a more collaborative way. Thus, hyping OTs as "more

collaborative" is simply that—hype.

**EXPLAINING DIUX'S SUCCESS WITH OTS**

DIUx's successes are real, and DIUx should be commended for its achievements. However, based on the previous discussion that conventional FAR procurements offer essentially the same opportunities as OTs for fast, flexible, and collaborative procurements, DIUx's success probably does not lie exclusively with its use of OTs.

Instead, perhaps the foremost reason is that DIUx has attracted *highly* competent acquisition professionals. A possible secondary reason is a phenomenon called the "Hawthorne effect" or the "observer effect." In the field of psychology, the Hawthorne effect occurs when a group of people under observation changes its behavior to please the observers rather than reacting to the variables the researchers have injected into the experiment. Stated differently, the highly competent staff at DIUx were probably even more conscientious and hard-working in performing their duties because they knew their experimental unit was under close scrutiny and evaluation.

**CONCLUSION**

In summary, OTA and OTs are experiencing a revitalization. OTs are a valuable acquisition tool if used correctly; however, they are not a panacea for all ills. There is reason for concern that the "hype" which OTs have recently attracted could influence Congress and high-level executive branch officials into halting further improvement upon the conventional federal acquisition process.

Frank Kendall, former Under Secretary of Defense (Acquisition, Technology, and Logistics), aptly described the current situation involving OTA and OTs:

After decades of searching for some *new form of acquisition magic*, it may be time to accept that the basics of fostering professionalism in both government and industry, developing sound requirements through close operator and acquirer cooperation,

strong well-crafted incentives, and disciplined attention to detail...represents the best route to improving defense acquisition.<sup>20</sup>

Put in the proper perspective, OTs have their uses, and they are effective, but "faster," "more flexible," and "more collaborative" procurements are best achieved when the acquisition is overseen by highly qualified acquisition professionals. If members of Congress and senior executive branch leaders believe an inexperienced procurement workforce can achieve a successful prototype acquisition simply through the use of an OT, then they have bought into "some new form of acquisition magic." **CM**

## NCMA X COLLABORATE

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### ENDNOTES

- Note: In current usage, the acronym "OTA" is often used to refer to both "other transaction authority" and "other transaction agreement" interchangeably. For clarity and consistency within this article, "OTA" shall refer to "other transaction authority" and "OT" shall refer to "other transaction"/"other transaction agreement."
- See, e.g., Angela Styles, "Other Transaction Authority—Big Rewards, Risks," National Defense magazine (September 27, 2018), available at <http://www.nationaldefensemagazine.org/articles/2018/9/27/ethics-corner-other-transaction-authority--big-rewards-risks> (stating "the Defense Department's use of other transaction authority has increased 100-fold, attracting both traditional and nontraditional contractors to the table"); and Scott Maucione, "OTA Contracts are the Cool New Thing in DOD Acquisition," Federal News Network (October 19, 2017), available at <https://federalnewsnetwork.com/acquisition/2017/10/ota-contracts-are-the-new-cool-thing-in-dod-acquisition> (stating "[o]ther transaction authority contracts seem to be the hip new thing in defense acquisition circles").
- See Frank Kendall, "The New Other Transactions Authority Guide: Helpful, But Not Enough," *Forbes* (January 3, 2019), available at <https://www.forbes.com/sites/frankkendall/2019/01/03/the-new-other-transactions-authority-guide-helpful-but-not-enough/#526c236c41cf> (stating "[t]here is a perception in some quarters that OTAs are a magic wand that can eliminate the difficulties of doing business with the government").
- "DIUx: Pathways to Commercial Innovation and OTAs," available at [https://media.dau.mil/media/DIUx+Pathways+to+Commercial+Innovation+and+Other+Transaction+Authority+%28+OTAs%29+1\\_7jckbnq](https://media.dau.mil/media/DIUx+Pathways+to+Commercial+Innovation+and+Other+Transaction+Authority+%28+OTAs%29+1_7jckbnq).
- DIUx was founded by then Secretary of Defense Ash Carter to help the Department of Defense more quickly tap into emerging commercial technologies.
- ATI, "Other Transaction Agreements: Fast, Flexible Access to Innovation," available at <https://www.ati.org/other-transaction-agreements>.
- One example is the GBU-28 Bunker Buster that was that went from concept to deployment in the Gulf War in record time. (See Federation of American Scientists, Military Analysis Network, "Guided Bomb Unit-28 (GBU-28) BLU-113 Penetrator," available at <https://fas.org/man/dod-101/sys/smart/gbu-28.htm>.)
- A potential obstacle for prototypes acquired under conventional FAR procedures is the FAR 5.203(e) requirement of at least a 45-day response time for vendors to submit proposals commencing with the release of the solicitation.
- The January 2017 version has since been rescinded and replaced by a terser *DOD Guide*. (See <https://aaf.dau.mil/ot-guide/>.) However, nothing in the more current *DOD Guide* contradicts those clauses/topics identified in the July 2017 *Guide* as appropriate for addressing in OTs.
- FAR 16.505(a)(1).
- According to FAR 16.505(a)(10)(i): "No protest under subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except....[a] protest on the grounds that the order increases the scope, period, or maximum value of the contract; or.... [f]or agencies other than DOD, NASA, and the Coast Guard, a protest of an order valued in excess of \$10 million....or [f]or DOD, NASA, or the Coast Guard, a protest of an order valued in excess of \$25 million...."
- A frequently cited example of greater flexibility is the statutory relief granted to OTs concerning the Freedom of Information Act (FOIA; 10 USC 2371(i)). Specifically, OTA excludes from FOIA disclosure: "information [that] was submitted to [DOD] in a competitive or noncompetitive process having the potential for resulting in an award, to the party submitting the information." However, this statutory relief is unnecessary. There is essentially identical protection against FOIA requests already within the FAR. As FAR 52.203(b)(2)(ii) states: "The government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the contractor's disclosure as confidential where the information has been marked 'confidential' or 'proprietary' by the company. To the extent permitted by law and regulation, such information will not be released by the government to the public pursuant to a [FOIA] request."
- Lauren Schmidt, as quoted within "DIUx: Pathways to Commercial Innovation and OTAs," see note 4.
- DOD Other Transactions Guide for Prototype Projects* (January 2017), see note 9, at ¶ C.2.7.2. (Elsewhere, the *DOD Guide* states: "However, in negotiating these clauses, the agreements officer must consider other laws that affect the government's use and handling of intellectual property, such as the Trade Secrets Act; the Economic Espionage Act; the Freedom of Information Act (FOIA); the Privacy Act; and the Lanham Act." (*Ibid.*, at ¶ C.2.3.1.1.)
- GAO, "Military Acquisitions: DOD Is Taking Steps to Address Challenges Faced by Certain Companies," GAO-17-644 (July 2017): 8 (emphasis added).
- FAR 1.101(b)(1).
- GAO Report, "Federal Acquisitions: Congress and the Executive Branch Have Taken Steps to Address Key Issues, but Challenges Endure" (September 2018): 37.
- FAR 1.102-2(a)(4).
- A sample NDA can be found in DFARS 227.7103-7, "Use of Non-Disclosure Agreements." (See also OFPP's "Myth-Busting Memo 2," Misperception #5 (May 7, 2012), which states: "In cases where a vendor is concerned that existing protections are insufficient and engaging in pre-solicitation communication will be beneficial, agencies should consider the use of appropriate non-disclosure agreements (NDAs) to ensure that proprietary information will be kept from potential competitors.")
- Frank Kendall, "Analysis: Five Myths About Pentagon Weapons Programs," *Government Executive* (March 21, 2018), available at <http://www.govexec.com/contracting/2018/03/analysis-five-myths-about-pentagon-weapons-programs/146816/> (emphasis added).

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