

Background and Options to Enhance Use of DOE's Other Transactions (OT) Authority

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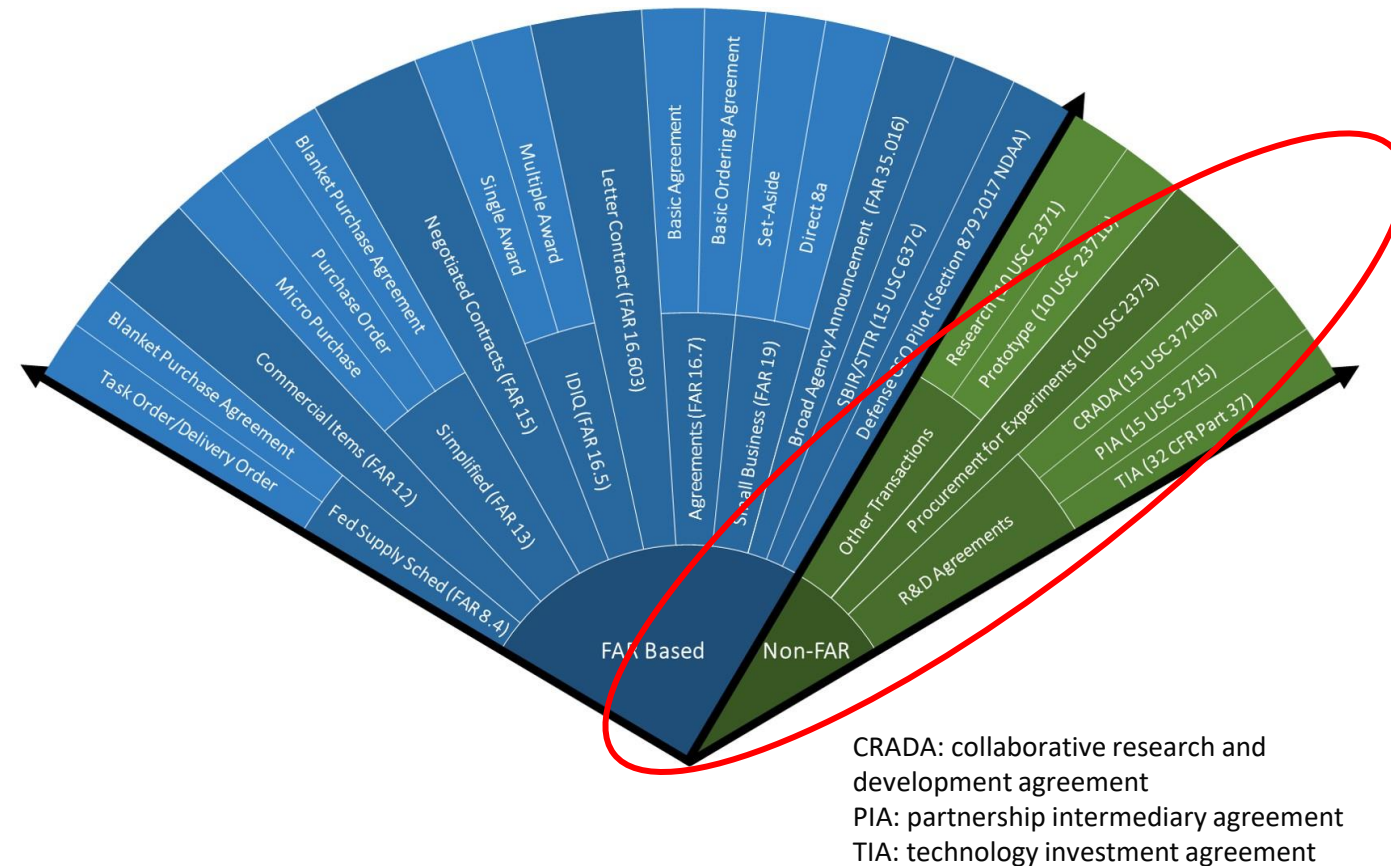
OTA in Statute is a non-FAR based Agreement Authority

- OTAs are part of a suite of non-Federal Acquisition Regulation (FAR) based agreements, including CRADAs, PIAs, TIAs, among others
- Advantages compared with other mechanisms:
 - FAR does not apply**, but contract can include FAR clauses, as needed
 - Traditional competition and accounting regulations do not apply**—e.g., Competition in Contracting Act (CICA) and Cost Accounting Standards (CAS)
 - Intellectual property (IP) rights can be negotiated** based on the preferred IP strategies of the parties to the OTA
 - Other terms** can be established and negotiated as needed

Source: Defense Acquisition University (DAU). “Contracting Cone”.

Note: OTA is an Other Transaction Authority, and can also be referred to as “other transaction” (OT), or the contracting mechanism for using the OTA itself

Example: Contracting Cone with Relevant Federal Statutes and Regulations (including DoD OTA)



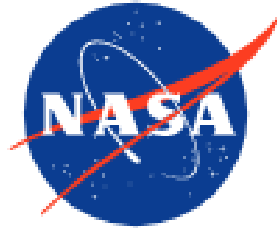
Federal Agencies and Offices with OT Authority

Agency	R&D Authority	Prototype Authority	Permanent Authority	OT Statutes
Department of Defense (DoD)	✓	✓	✓	10 U.S.C. § 2371 and § 2371 (b)
Advanced Research Project Agency – Energy (ARPA-E)	✓		✓	42 U.S.C. §16538
Department of Energy (DOE)	✓	✓*		42 U.S.C. §7256 (references 10 U.S.C. § 2371)
Department of Health and Human Services (HHS)	✓		✓	42 U.S.C. §247d-7e
Department of Homeland Security (DHS)	✓	✓		6 U.S.C. §391 and §538, Division F, P.L. 115-141 (references 10 U.S.C. § 2371)
Department of Transportation (DOT)	✓		✓	49 U.S.C. §5312
Domestic Nuclear Detection Office (DNDO)	✓	✓	✓	6 U.S.C. §596
Federal Aviation Administration (FAA)	✓		✓	49 U.S.C. §106(l)
National Aeronautics and Space Administration (NASA)	✓	✓	✓	51 U.S.C. §20113(e)
Transportation Security Administration (TSA)	✓		✓	49 U.S.C. §114(m) (references 49 U.S.C. §106(l))

* DOE may have prototype authority depending on interpretation of legislation.

Source: Modified from Moshe Schwartz and Heidi M. Peters. 2019. Note: The authorities listed may be restricted to specific programs.

Examples of NASA and DoD Uses of Their OT Authorities



- NASA used their OT authority for the Commercial Orbital Transportation System (COTS) public-private partnership to develop the Falcon 9 space launch vehicle
- Aimed to demonstrate commercial capability prior to purchasing commercial services
- OT contracts to SpaceX (2006-2012)



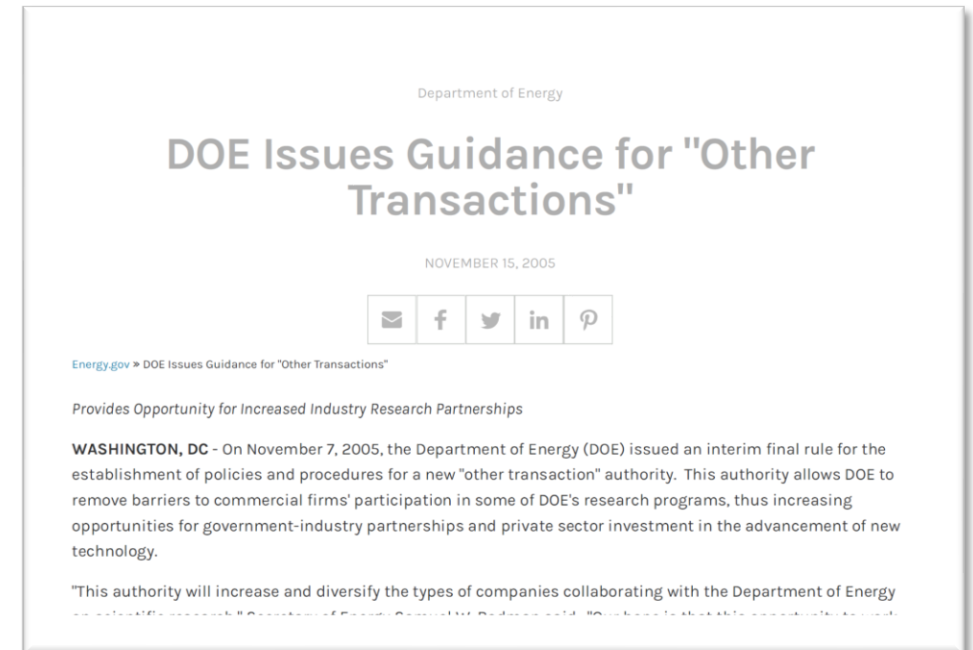
- DoD has obligated \$11 billion through their OT authority to address COVID-19 pandemic response including:
 - Pfizer for vaccine manufacturing (July 2020)
 - AstraZeneca for vaccine manufacturing and development (October 2020) (GAO 2021)
- OT contracts also used for prototyping PPE and decontamination equipment



DOE's use of OT Authority has been Limited to TIAs

“DOE will implement this new regulation **similarly to the Department of Defense (DOD)** by awarding and administering **Technology Investment Agreements (TIAs)** for the support of research projects” [emphasis added] —DOE Press Release, November 7, 2005

- Aimed “to provide contracting officers greater flexibility to negotiate award provisions in areas that can present barriers to those commercial firms (e.g., intellectual property, audits, and cost principles)”
- DOE issued new regulation in 10 CFR 603 modeled after DoD's TIA regulations
- Interim Final Rule published in Federal Register on November 15, 2005
- At the time, TIAs were a new mechanism at DOE



Potential barriers to using OT Authority

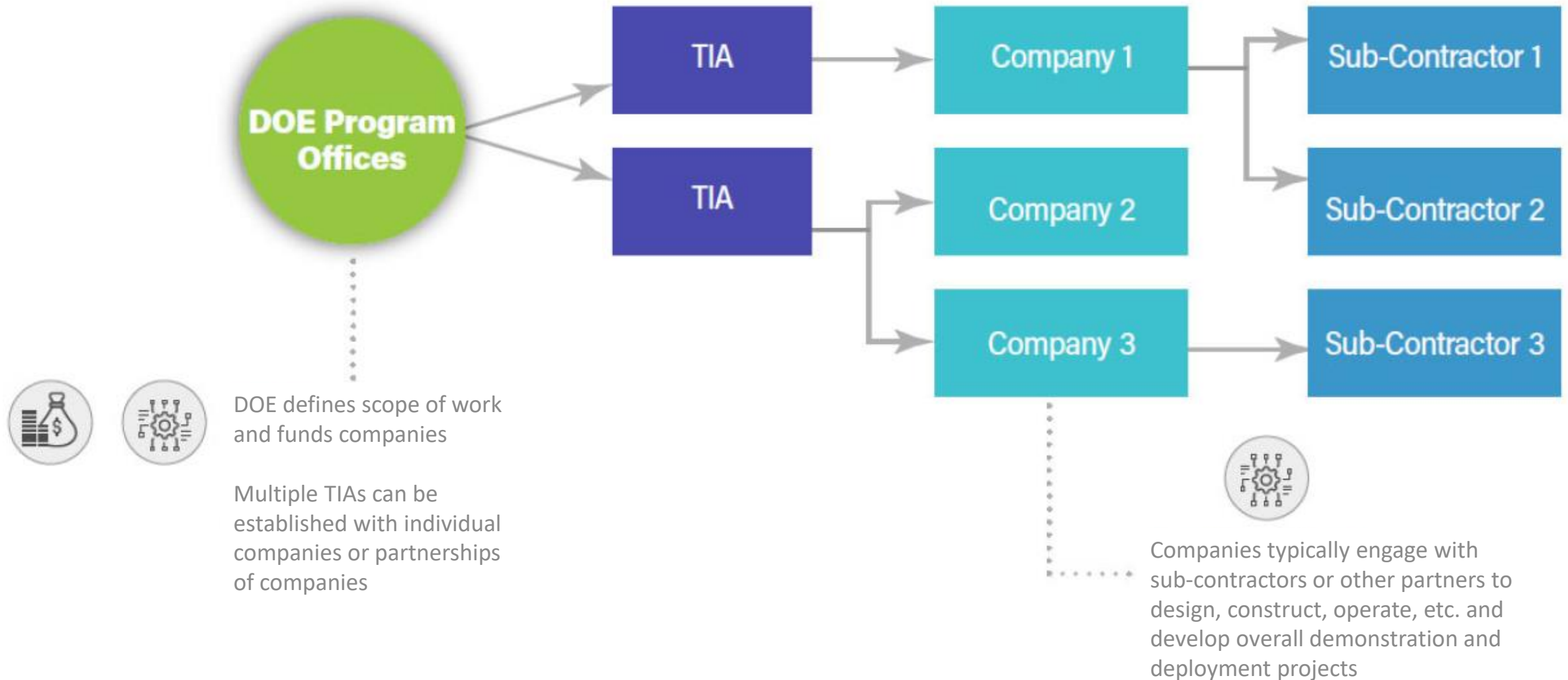
Challenges Associated with Policy

1. Need for Approval from a Senate-Confirmed Presidential Appointee
2. Uncertainties from the Temporary Nature of the Authority
3. Inadequacy in Adopting DoD's OT Regulations
4. Need for Greater Flexibility to Negotiate Real Property Interests

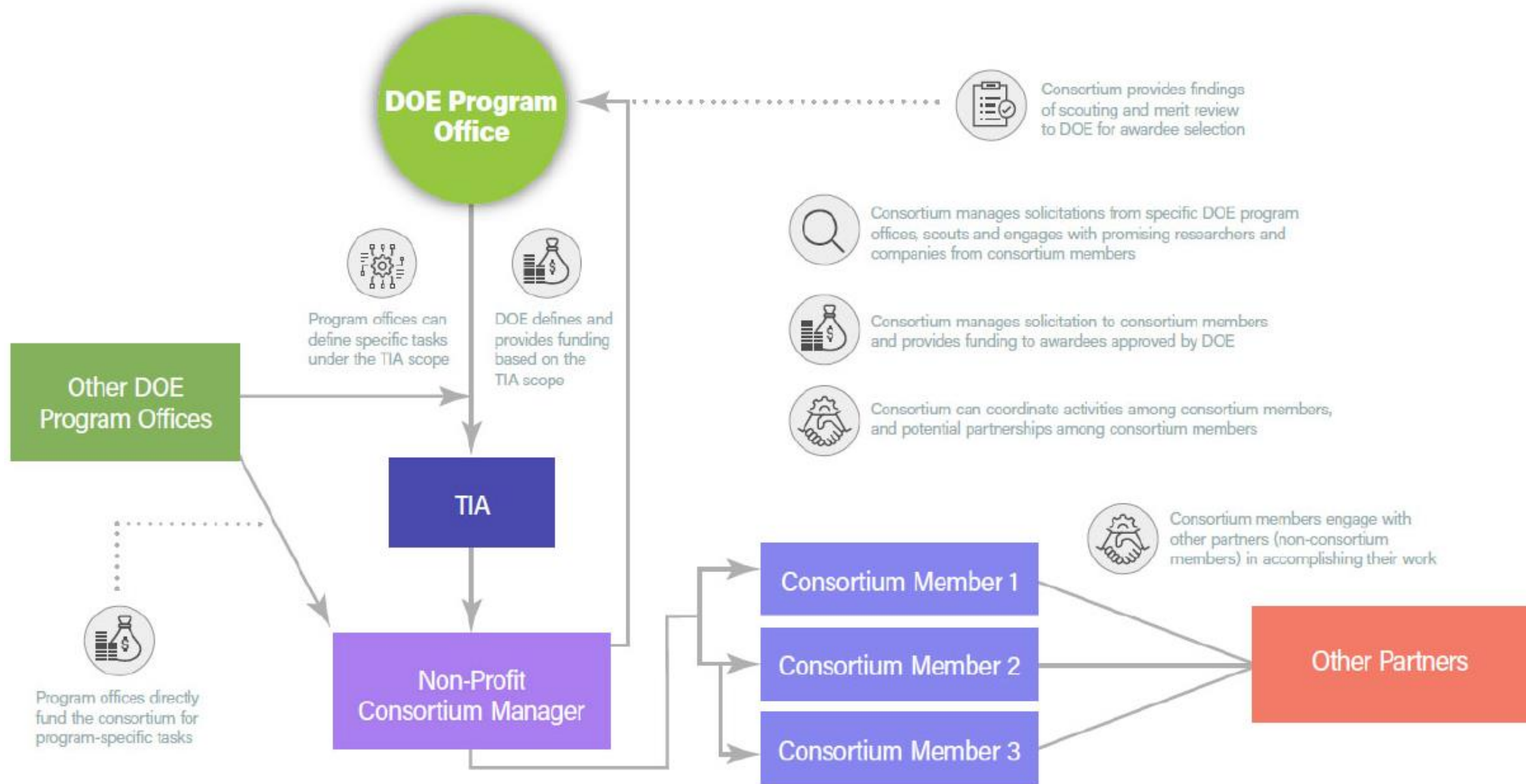
Challenges Associated with Flexibility

5. Perceived Risks Associated with Accountability and Oversight
6. Lack of Understanding Differences in Flexibilities between TIAs and Other Mechanisms
7. Perceived Constraints of Contracting Office Capacity

Example: OT Agreement Model for Demonstrations



Example: OT Agreement Model for Consortia



Two strategic pathways to enhance use

1. Implement the options under the existing TIA governance framework

TIA regulations provide additional flexibilities beyond traditional mechanisms that could address some, but not all of the challenges experienced in using other mechanisms to achieve RD&D and commercialization outcomes.

2. Explore achieving a broadened scope of the OT authority beyond the TIA governance framework

Implementation options under a “broadened OT authority scope” strategic pathway will require policy interventions, such as regulatory and legislative proposals, with potentially longer timeframes than those pursued under the current TIA regulation.

Potential Options to Expand Use of the OT Authority Across DOE and Updates

Options



Policy

1. Seek a legal determination for whether the OT authority covers prototyping
2. Develop a DOE "OT Guide"
3. Revise the TIA regulation (10 CFR 603) to reflect the full scope of the OT statute
4. Analyze and explore revising legislation for scale-up and deployment



People

5. Champion the use of the OT authority by DOE leadership (S-2 or above)
6. Establish an Innovation Contracting Corps to access existing pockets of capacity to implement the OT authority
7. Strengthen capabilities to implement the OT authority



Practice and Culture

8. Establish and promulgate OT authority-specific training
9. Develop a technology transfer toolkit outlining differences among authorities
10. Establish an internal, cross-programmatic, and cross-functional working group to share successes and lessons learned

Updates since April 2020

- Office of Management is developing new content for and promulgating OT authority-specific training for contractors to increase capacity
- Existing pockets of contracting capacity (Golden Field Office) are mentoring contractors at other field offices
- Internal Working Team being established with Leadership support focused on revising the TIA regulation

For Further Information

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Relevant Resources

What is DOE's OTA (as codified)?

Highlights of DOE's OTA Governing Statutes

42 U.S.C. § 7256 (a)

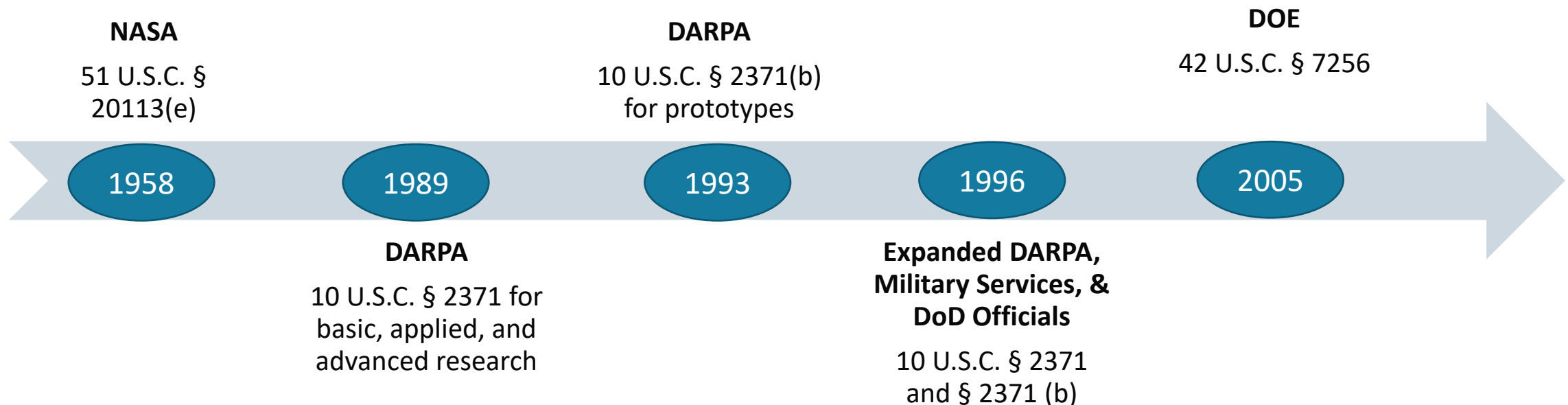
The Secretary is authorized to enter into and perform such contracts, leases, cooperative agreements, or **other similar transactions with public agencies and private organizations and persons**, and to make such payments (in lump sum or installments, and by way of advance or reimbursement) as he may deem to be necessary or appropriate to carry out functions now or hereafter vested in the Secretary. [emphasis added]

42 U.S.C. § 7256 (g)

...the Secretary may exercise the **same authority to enter into transactions** (other than contracts, cooperative agreements, and grants), subject to the same terms and conditions as the **Secretary of Defense under Section 2371 of title 10** (other than subsections (b) and (f) of that section). [emphasis added]

History of the OTA

- The first OTA was provided by Congress to the National Aeronautics and Space Administration (NASA) through the National Aeronautics and Space Act of 1958 (P.L. 85-568) (termed the Space Act Agreements).
- In 1989, Congress provided the Department of Defense (DoD) Defense Advanced Research Projects Agency (DARPA) with OTA for research projects through the National Defense Authorization Act (NDAA) for FY90 (P.L. 101-189). Various amendments followed, including
 - In 1993, NDAA for FY94 expanded DARPA’s authority to include “prototype” development (P.L. 103-160).
 - In 1996, NDAA for FY97 expanded the OTA to military services and designated officials (P.L. 104–201).
- In 2005, Congress provided DOE with OTA, referencing 10 U.S.C. § 2371 with some language modifications.



Relevant Resources

- Defense Acquisition University (DAU). “Contracting Cone,” <https://aaf.dau.edu/aaf/contracting-cone/>.
- Government Accountability Office (GAO). 2021. COVID-19 Contracting - Actions Needed to Enhance Transparency and Oversight of Selected Awards. Washington, D.C.: GAO.
- Moshe Schwartz and Heidi M. Peters. 2019. “Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress.” Washington, D.C.: Congressional Research Service (CRS). (For OTA legislative history)
- NASA. “COTS: Commercial Partners,” <https://www.nasa.gov/content/cots-commercial-partners>.