Extending Other Transaction Authority

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DOE has created a number of tools the National Laboratories (labs) can use to collaborate with industry, including Strategic Partnership Projects (SPPs), Cooperative Research and Development Agreements (CRADAs), User Facility Agreements, Agreements for Commercializing Technology (ACTs), and direct technology licensing through its technology transfer offices. However, a heretofore underutilized tool is the Other Transaction Authority (OTA).

An Other Transaction (OT) is a special mechanism used by federal agencies for obtaining or advancing R&D or prototypes; it is not a contract, grant, or cooperative agreement, and there is no statutory or regulatory definition of "Other Transaction." OTA is valuable in cases where the government needs to obtain R&D and prototypes from commercial sources, but the companies equipped to provide them are unwilling or unable to comply with the government's procurement regulations. The government's procurement regulations and certain procurement statutes do not apply to OTs; thus, OTA gives agencies the requisite flexibility to develop agreements tailored to a particular engagement.

While the Energy Policy Act of 2005 granted OTA to DOE at the agency level, it failed to authorize the labs to use it. OTA could be offered as a unique authority provided by DOE to the labs that can enable HEP to showcase a more effective model for technology transition— but drive it at the local laboratory level, where the interaction with industry is vital for success.

OTA is an ideal mechanism to help labs better identify market needs and become more valuable to the private sector because it can establish a formalized relationship where both parties have "skin in the game" early on in the research process, so markets can be better understood for deployment of technology. For example, under current law, laboratory partners cannot be funded by the partnering lab by means of a CRADA. Thus, CRADA partners, if they are to be funded, must enter into procurement subcontracts with the laboratories, which not only introduces another complex agreement to the partnership, but potentially disparate terms and conditions. Because OTA is merely defined in the negative, an OT can be crafted to function much like a CRADA, but without the prohibition of funds-out.

Current mechanisms (e.g., CRADAs and SPPs) don't engage the deployment/commercialization community early enough in the development process. Therefore, industry does not have enough incentive to be part of the process in defining the deployment model. Having agency funding tied to OTA and a funds-out collaborative agreement keeps the critical researchers involved, as well as a partner— but can call out specific performance deliverables related to transition that the agency funding the OTA could request. Furthermore, the OTA allows for negotiation of onerous federal contract provisions that often keep companies from doing business with the federal government. Therefore, HEP could be "open for business" with non-traditional federal contractors who otherwise would not be willing to do business with DOE.

Additionally, a collaborative mechanism with bilateral flow of funds better ensures the risk of failing to commercialize the technology is not carried exclusively by the industry partner, but also by the laboratory. HEP could fund projects that authorize use of funds-out collaborative agreements with industry partners that then leverage federal funds as well as industry in-kind contributions. The OTA includes provisions and milestones for performance that can include: prototype development, delivery, market scope definition, deployment models, etc., which are elements not included in R&D subcontracts. With commercialization requirements as part of the funding mechanism (along with provisions with respect to intellectual property), both parties are focused early in the research process on moving a national lab technology to deployment.

Because OTA affords flexibility not available in other agreements, HEP can set expectations about technology transition but drive the activity at the research/partnership level rather than the agency level. This will enable tailoring of an arrangement most suitable for the technology and the market in which the technology will be deployed, with terms and conditions that reflect the risks and potential reward chain available to the industry partner.