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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



**EDITOR'S NOTE - TRUE OR FALSE
(CLAIMS)?**

Steven A. Meyerowitz

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SHORT-CUT TO FALSE CLAIMS ACT
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and Nikesh Jindal

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National Spectrum Consortium Provides Opportunity for Government-Funded Electromagnetic Spectrum R&D

*By Holly A. Roth, Chip Yorkgitis, and Elizabeth C. Johnson**

This article discusses a recent U.S. Army Contracting Command special notice announcing that the Office of the Deputy Assistant Secretary of Defense, Emerging Capabilities and Prototyping Office, intends to enter into a Section 845 Prototype Other Transaction Agreement with the National Spectrum Consortium.

On April 3, 2015, the recently formed National Spectrum Consortium (“NSC”) entered into a five-year, \$1.25 billion, Section 845 Prototype Other Transaction (“OT”) Agreement with the U.S. Army Contracting Command-New Jersey acting on behalf of the Office of the Deputy Assistant Secretary of Defense (“ODASD”), Emerging Capabilities and Prototyping (“EC&P”). This is a gateway development in an initiative of the Department of Defense (“DOD”), first announced in March 2014, to provide government funding to support the research, development and maturation of technologies to enable advanced approaches to electromagnetic spectrum use. This program emerges as the call for significantly more commercial mobile wireless spectrum continues unabated and the pressure increases on DOD and other federal government agencies to make more efficient use of their spectrum.

The recent results of the AWS-3 spectrum auction—more than \$45 billion raised—leaves no doubt as to the value of additional spectrum access for wireless broadband providers. Yet, increased spectrum requirements is not a problem faced by the commercial mobile industry alone. All aspects of government and industry are feeling the crunch which many agree suppresses U.S. innovation and economic growth and has the potential to adversely impact U.S. military operations both domestically and overseas. The resulting need for more efficient spectrum use and the necessity for more spectrum sharing by government users among themselves and with non-federal government users has created a sense of urgency within DOD to explore, develop, and implement solutions.

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THE OPPORTUNITY

The 845 Prototype OT Agreement is the first step in a significant funding opportunity. Through the DOD's award to the NSC, the DOD has made sub-agreement opportunities available to both traditional and non-traditional government contractors for projects to broaden the military and commercial access to, and use of, the electromagnetic spectrum (in addition to Spectrum Relocation Fund monies). DOD has said that specific industry segments of interest will include wireless technologies, radars and signal processing, electronic warfare, spectrum monitoring and sensing, and optical free space communications. The process enabled by the OT Agreement is expected to afford increased visibility into DOD spectrum needs and priorities and offer greater ability to leverage independent research and development ("R&D") investments to meet those needs. DOD officials have stated repeatedly, beginning with a December 2014 Dynamic Spectrum Access Industry Day, that "everything is on the table."

Only NSC members will be eligible to receive sub-agreements under the OT Agreement awarded to the NSC by the DOD. Due to the nature of the OT authority granted to the DOD, the focus of the NSC will be, to the maximum extent possible, to encourage the involvement of non-traditional government contractors. However, there will be significant opportunities for traditional government contractors as well. The NSC continues to accept membership applications from all U.S. companies and universities which are capable of making a technical contribution to the advancement of spectrum-related technologies. As of June 9, 2015, 83 members were listed on the NSC Web site. Membership is open to any company, university, or research organization and is subject to low entry barriers.

The OT Agreement with the NSC recently announced will be for a period of five years.

DOD announcements explain that the collaboration envisioned between the government and industry under the OT Agreement, and ancillary agreements between and among the NSC and its members, will focus on four major activities:

- (1) Maturing technologies that assist in improved electromagnetic spectrum awareness, sharing, and use;
- (2) Experimentation to better inform the optimal allocation of those technologies for both public and private objectives;
- (3) Demonstration of new technologies to increase trust among spectrum stakeholders; and
- (4) Policy development to ensure technologies do not outpace the

appropriate guidance for their best use.

DOD anticipates that the OT Agreement with the NSC will facilitate more focused research agendas coupled with rapid contracting for spectrum-related R&D, generate unprecedented ability to tailor research, support policy consideration simultaneously with technological advances, and eliminate excessive bureaucratic requirements.

OT AGREEMENTS AND THE NSC

An OT agreement is a special type of contract vehicle used by Congressionally authorized government agencies, such as DOD, to identify, develop, and demonstrate emerging technologies. The OT Authority was statutorily created to assist certain government agencies (DOD, NASA, DHS) in quickly obtaining leading-edge R&D and prototypes from commercial sources that are unwilling or unable to comply with the government's comparably onerous and complex procurement regulations. An OT agreement provides authorized agencies the flexibility necessary to negotiate agreements tailored to a specific transaction. As noted above, DOD made a sole source award of the OT Agreement to NSC, pursuant to which there will be consultations between the DOD and NSC members to help DOD identify technology projects meriting R&D funds under the OT Agreement. The NSC, in coordination with DOD, will issue request for proposals ("RFPs") to which only NSC members may respond. NSC will then award sub-agreements (contracts or grants) under the OT Agreement to NSC members for the specific, approved, electromagnetic spectrum R&D projects. The exact vehicles by which consultations with the governments will occur, the frequency of RFPs, and other details of how the NSC-NSC Member-DOD relationship will play out is still under discussion, but now that the DOD and the NSC have announced execution of the OT Agreement, consultation has commenced, and initial award activity will occur in the near future. Indeed, on June 5, 2105, the DOD, specifically the Naval Research Laboratory, held an Industry Day for NSC members to focus on Automated Tactical Optical Line-of-Sight Links ("ATOLL") in advance of a planned Request for Initiative Proposal announcement.

THE NSC

The NSC continues to actively seek membership to take advantage of this opportunity. Members include traditional and non-traditional government contractors, commercial contractors, small businesses, academic institutions, research organizations, and non-profit organizations that have expertise and experience in electromagnetic spectrum and wireless communications technologies. The NSC is managed by SCRA Applied R&D ("SCRA"), aka Advanced Technology International (the "Consortium Management Firm"). SCRA will be authorized to negotiate, execute and administer the NSC's efforts under the

OT Agreement awarded by the DOD. SCRA will issue RFPs in coordination with DOD, collect proposals, enter into sub-agreements after award is made by the DOD entity evaluating proposals, and perform cost analysis on proposals submitted by NSC's members. SCRA will also serve as a third party to help mitigate the risk of potential antitrust violations among the members. Compared to the level of funding available, the cost of membership is low: \$1,500 annually for large business, and \$500 annually for small business, universities, and non-profits.

**TRADITIONAL AND NON-TRADITIONAL GOVERNMENT
CONTRACTOR QUALIFICATIONS FOR CONTRACTS UNDER
THE OTA**

Certain requirements will apply to NSC members interested in competing for a research and development contract under the OT Agreement. Notably, the OT Agreement requires the “participation to a significant extent” of a “non-traditional government (or “defense”) contractor” at any level of the project or, alternatively, a 33 percent cost share on all projects awarded. The significant participation of a “non-traditional defense contract” could include the “non-traditional defense contractor,” among other things, supplying key technologies or products, accomplishing a significant part of the effort, causing a material reduction in the cost or schedule, or causing a material increase in performance. A contractor ceases being a “non-traditional” government contractor when, within the year prior to the issue date of a project under the OT Agreement, the contractor (as a prime or subcontractor, team member, or lower tier vendor), has entered into, or performed an existing government contract worth more than \$500,000 or that is subject to full Cost Accounting Standards coverage. A non-traditional defense contractor awarded a contract in excess of \$500,000 by the NSC under the OT Agreement would not lose its classification of “non-traditional.”