



# Other Transaction (OT) Authority

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## Summary

An *other transaction* (OT) is a special vehicle used by federal agencies for obtaining or advancing research and development (R&D) or prototypes. An OT is not a contract, grant, or cooperative agreement, and there is no statutory or regulatory definition of “other transaction.” Only those agencies that have been provided OT authority may engage in other transactions.

OT authority originated with the National Aeronautics and Space Administration (NASA) when the National Aeronautics and Space Act of 1958 was enacted. Subsequently, seven other specific agencies have been given OT authority: the Department of Defense (DOD), Federal Aviation Administration (FAA), Department of Transportation (DOT), Department of Homeland Security (DHS), Transportation Security Administration, Department of Health and Human Services, and Department of Energy. Other federal agencies may use OT authority under certain circumstances and if authorized by the Director of the Office of Management and Budget (OMB).

Generally, the reason for creating OT authority is that the government needs to obtain leading-edge R&D (and prototypes) from commercial sources, but some companies (and other entities) 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, and, accordingly, other transaction authority gives agencies the flexibility necessary to develop agreements tailored to a particular transaction. The Competition in Contracting Act (CICA), Contract Disputes Act, and Procurement Integrity Act are examples of three statutes that do not apply to OTs.

Evaluating OTs and the use of OT authority is a challenging undertaking. Because the *Federal Acquisition Regulation* (FAR) and certain procurement statutes do not apply to OTs, the methods or mechanisms used to track contractor performance and results also do not apply. Additionally, the types of activities, functions, and outcomes associated with other transactions cannot be easily measured for the purpose of evaluation. It does not appear that anyone has yet devised a reliable method for conducting an evaluation that would yield quantifiable, objective data.

Evidence of congressional interest in the use of other transaction authority includes the expansion of OT authority over the years (as noted above), and a 2008 congressional hearing on the Department of Homeland Security’s use of OT authority.

This report will be updated as events warrant.

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## Introduction

An *other transaction* (OT) is a special type of vehicle or instrument used by federal agencies for research and development purposes, and only those agencies that have statutory authority to engage in OTs may do so. There is no statutory or regulatory definition of “other transaction,” though, in practice, it is defined in the negative: an OT is not a contract, grant, or cooperative agreement. While the government may benefit from the work carried out pursuant to an other transaction, an OT does not necessarily involve the purchase of goods or services.<sup>1</sup> Using an OT, the government may gain access to research or technology developed by, or in concert with, one or more non-governmental entities, such as commercial firms.<sup>2</sup> Depending on the language of a particular statute, an agency may use OTs for basic, applied, or advanced research projects; prototypes; or some other purpose.<sup>3</sup> Alternatively, an agency also may use a contract for research and development (R&D), which is covered by Part 35 of the *Federal Acquisition Regulation* (FAR), but OTs provide certain advantages over contracts.<sup>4</sup> Generally, the advantages derive from the fact that OTs are not subject to the FAR and certain procurement statutes.<sup>5</sup> Companies (and

<sup>1</sup> An executive agency uses a contract “when ... (1) the principal purpose of the instrument is to *acquire* (by purchase, lease, or barter) *property or services* for the direct benefit or use of the United States Government; or (2) the agency decides in a specific instance that the use of a procurement contract is appropriate.” (31 U.S.C. §6303.) (Italics added to aid in identifying significant terms.) In addition to describing when a federal agency shall use a contract, the Federal Grant and Cooperative Agreement Act (P.L. 95-224; 31 U.S.C. §§6301-6308), which is popularly known as the Chiles Act, also describes when an agency shall use a grant (31 U.S.C. §6304) or a cooperative agreement (31 U.S.C. §6305).

<sup>2</sup> Although the word “commercial,” when used in discussing OT authority, does not appear to have a generally agreed upon definition, several authors who have written about OTs offer their own explanations or definitions. In one of its reports on DOD’s use of OT authority, the Government Accountability Office (GAO) uses the term “commercial firm” to identify a company that typically does not do business with DOD. (U.S. General Accounting Office, *DOD’s Guidance on Using Section 845 Agreements Could be Improved*, GAO-NSIAD-00-33, Apr. 2000, p. 4. GAO was renamed the U.S. Government Accountability Office in 2004.) The DOD inspector general (IG), as reported by GAO, “defined a commercial firm as one that had not performed research on cost-based contracts or that had been subject to an audit by the Defense Contract Audit Agency within the past 3 years.” (Ibid., p. 14.) A broader definition may be found in a *Public Contract Law Journal* article: “For purposes of this article, when the term ‘commercial’ is used, it encompasses all entities that are not part of the Federal Government, including universities, laboratories, and nonprofit entities.” (Diane M. Sidebottom, “Updating the Bayh-Dole Act: Keeping the Federal Government on the Cutting Edge,” *Public Contract Law Journal*, vol. 30, no. 2 (winter 2001), p. 226.) The definitions of “commercial item” and “commercial activity” found in the in *Federal Acquisition Regulation* (FAR) and Office of Management and Budget (OMB) Circular A-76, respectively, have specific applications. The FAR’s definition of “commercial item” has to do with procedures that apply to the purchase of commercial items. (FAR 2.101.) The definitions of “commercial activity” (and “inherently governmental activity”) found in Circular A-76 are used to distinguish between activities that can be subjected to competitive sourcing and those that cannot (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, available at [http://www.whitehouse.gov/omb/circulars/a076/a76\\_rev2003.pdf](http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf), pp. A-2-A-3 and D-2.)

<sup>3</sup> While testifying at a congressional hearing in 2008, the chief procurement officer (CPO) of the Department of Homeland Security described, for example, how the Transportation Security Administration (TSA) used OTs as a way to reimburse costs associated with certain airport projects. (U.S. Congress, House Committee on Homeland Security, Subcommittee on Emerging Threats, Cybersecurity and Science and Technology, “Other Transaction Authority: Flexibility at the Expense of Accountability?” 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., unpublished hearing, Feb. 7, 2008, p. 4.)

<sup>4</sup> The FAR is Title 48 of the *Code of Federal Regulations* (CFR). It is “the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds.” (FAR, “Foreword.”) The FAR is available at <http://www.acquisition.gov/far/current/pdf/FAR.book.pdf>.

<sup>5</sup> The FAR “applies to all acquisitions as defined in Part 2 of the FAR...” (FAR 1.104.) Part 2 does not include a definition of “other transaction.” Additionally, the definition of “contract action” in the FAR specifically excludes other transactions: “‘*Contract action*’ means any oral or written action that results in the purchase, rent, or lease of supplies or equipment, services, or construction using appropriated dollars over the micro-purchase threshold, or modifications (continued...)”

other entities) unwilling or unable to comply with government procurement regulations and statutes might be less likely to engage in a contract than an OT. By using an OT instead of a contract, an agency and its partners are able to develop a flexible arrangement tailored to the project and the needs of the participants: “Other Transactions are meant to present the Government and contractor with a ‘blank page’ from which to begin when negotiating such instruments.”<sup>6</sup> Additionally, OTs promote “a more collaborative working relationship,” which can be more conducive to R&D than the type of relationship established by a contract.<sup>7</sup>

After reviewing the origin and expansion of other transaction authority, this report examines the advantages of other transactions, reviews the applicability of the FAR and procurement statutes to OTs, discusses methods and challenges involved in evaluating other transactions, presents suggestions for the use of OTs, and concludes with a list of possible policy options.

## Origin and Expansion of Other Transaction Authority

### Background

The reasons for the introduction and passage of specific legislative provisions that provide one or more agencies with OT authority may vary, or, in some cases, may not have been articulated or disclosed. This section, although it incorporates material published after several agencies already had received OT authority, describes several factors that, taken collectively, might have played a significant role in creating an environment favorable to the establishment of OT authority.

Over the years, the federal government’s position as a primary source of funding for R&D has changed, and this change has had implications for how the federal government obtains R&D. Testifying in 2002, a managing director from the Government Accountability Office (GAO) noted that the federal government’s financial contribution to R&D research had decreased over the years:

[T]he R&D landscape has changed considerably over the past several decades. While the federal government had once been the main provider of the nation’s R&D funds, accounting

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(...continued)

to these actions regardless of dollar value. Contract action does not include grants, cooperative agreements, *other transactions*, real property leases, requisitions from Federal stock, training authorizations, or other non-FAR based transactions.” (FAR 4.601.) (First use of italics in original. Second use of italics added to aid in identifying relevant language.)

<sup>6</sup> Nancy O. Dix, Fernand A. Lavalley, and Kimberly C. Welch, “Fear and Loathing of Federal Contracting: Are Commercial Companies Really Afraid To Do Business With the Federal Government? Should They Be?” *Public Contract Law Journal*, vol. 33, no. 1 (fall 2003), p. 26. The benefit of OT authority is that it “... allows government and industry to define their relationship through negotiations without the normal constraints. Under OT authority, the program management approach, program objectives and criteria for measuring progress, oversight and reporting requirements, price to the government, fee for industry, and the statement of work are embodied in an Agreement reflecting the results of this negotiation. Agreements are inherently more flexible than traditional contracting vehicles, and could be changed simply by the mutual agreement of government and industry participants.” (U.S. General Accounting Office, *Acquiring Research by Nontraditional Means*, GAO/NSIAD-96-11, Mar. 1996, p. 3.)

<sup>7</sup> U.S. General Accounting Office, *Acquiring Research by Nontraditional Means*, p. 3.

for 54 percent in 1953 and as much as 67 percent in 1964, as of 2000, its share amounted to 26 percent, or about \$70 billion, according to the National Science Foundation.<sup>8</sup>

With most R&D being carried out in the private sector, “the federal government must now increasingly compete with others to obtain the research and technology it needs.”<sup>9</sup> Elaborating on how the government’s circumstances have changed, Diane M. Sidebottom wrote the following:

[In the past,] ... the Government was a large customer of ... complex technologies and was often the only customer for production quantities of some of the more expensive inventions. While Government still has deep pockets, these pockets are nowhere near as deep as they were in the past. Massive budget cutbacks across the board have put the Government in the interesting position of being just another customer of technology and often not the largest customer at that. More and more, the Government is relying on commercial off-the-shelf technologies and leveraging the investment in technology that is being made privately by commercial industry. The situation has changed so much that many corporations are refusing to do business with the Government because its regulatory rules are too onerous. The Government is finding that not only can it not acquire many of the technologies it needs, but also many corporations will not even accept government dollars to help develop new technologies.<sup>10</sup>

Despite the government’s ongoing need to take advantage of the commercial sector’s leading-edge technology and research, statutory and regulatory procurement requirements have served as a deterrent to working with the federal government. While “[t]he name of the game now in corporate high-tech research is speed and stealth,” the federal government “responds poorly to both ... largely because of the myriad of regulatory and statutory requirements the agency must satisfy before the actual award and during its administration.”<sup>11</sup> Although the government’s regulatory and statutory requirements provide for, among other things, consistency, some would argue, as the author of the following passage does, that standardization is not necessarily conducive to R&D.

While, in theory, consistency ensures fairness and equal treatment, it does not necessarily allow for different needs and situations. In the R&D arena, every technology area has its own special peculiarities and problems that may require multiple solutions. The commercial world largely recognizes this and negotiates unique contracts and agreements to specifically address each situation. The Government is usually unable to do that because of the regulatory framework under which it works. The statutes and regulations are largely unchangeable, leaving the Contracting Officer only a minimal amount of discretion. The discretion that does exist is rarely used because innovation in contracting is highly suspect in many government organizations. This inability to be flexible and negotiate alternative solutions has turned off many companies, particularly the high-tech ones. These corporations tend to employ innovative thinkers who are unimpressed by the cookie-cutter approach of the Government’s system. When confronted by such a system, they often will refuse the

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<sup>8</sup> U.S. General Accounting Office, *Industry and Agency Concerns Over Intellectual Property Rights*, GAO-02-723T, May 10, 2002, p. 3.

<sup>9</sup> U.S. General Accounting Office, *Information on the Federal Framework and DOD’s Other Transaction Authority*, GAO-01-980T, July 17, 2001, p. 1.

<sup>10</sup> Diane M. Sidebottom, “Intellectual Property in Federal Government Contracts: the Past, the Present, and One Possible Future,” *Public Contract Law Journal*, vol. 33, no. 1 (fall 2003), pp. 86-87.

<sup>11</sup> *Ibid.*, p. 86.

Government's arrangement and find other methods of financing under more compatible terms.<sup>12</sup>

Aside from the issues raised above, complying with government statutes and regulations constitutes, for some companies, an unacceptable administrative burden. The following passage focuses exclusively on Department of Defense (DOD) contracting, but, nevertheless, it captures the scope of the task facing companies that compete for government contracts:

Depending on such factors as the contract type and dollar value, a DOD contract could incorporate more than 100 contract clauses. These clauses implement statutory or regulatory requirements covering such issues as financial management and intellectual property, among others. While these requirements are intended to protect the government's or suppliers' interests, concerns have been raised about the costs or impact of complying with the requirements.<sup>13</sup>

Evidence of the extent to which some companies go to ensure proper compliance with government regulations was uncovered by GAO in its study of government contractors and government acquisition requirements. GAO's review of eight companies' operations revealed that

[f]our companies ... have a separate administrative structure for government sales, and two other companies ... have added employees to their administration to handle their government contracts, in order to ensure compliance with the acquisition requirements. The remaining two companies ... have subsidiaries that they reportedly keep separated to avoid being burdened with requirements, especially cost accounting standards and cost and pricing data requirements.<sup>14</sup>

Government requirements concerning intellectual property rights and cost accounting standards, in particular, are often cited as barriers to companies that otherwise might compete for government contracts. Although an extensive discussion of intellectual property rights is beyond the scope of this report, the following passage summarizes the government's intellectual property rights: "In general, the government obtains unlimited rights when technical data were developed or created exclusively with government funds, government purpose rights when the data were created with mixed funding, and limited rights when the data were created exclusively at private expense."<sup>15</sup> After noting that intellectual property concerns have affected the willingness of at least some companies to enter into government contracts, GAO identified several specific concerns: "perceived poor definitions of what technical data is needed by the government, issues with the government's ability to protect proprietary data adequately, and unwillingness on the part of government officials to exercise the flexibilities available to them concerning intellectual

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<sup>12</sup> Ibid., p. 87.

<sup>13</sup> U.S. General Accounting Office, *DOD's Guidance on Using Section 845 Agreements Could Be Improved*, GAO/NSIAD-00-33, Apr. 2000, pp. 5-6.

<sup>14</sup> U.S. General Accounting Office, *Impact on Company Structures and Operations*, GAO/NSIAD-94-20, Apr. 1994, p. 5.

<sup>15</sup> U.S. General Accounting Office, *DOD's Guidance on Using Section 845 Agreements Could Be Improved*, p. 47. "Government purpose rights enable the government to allow others to use the data for government purposes, while limited rights generally require the government to obtain the contractor's written permission before doing so. (Ibid.) Part 27 of the FAR "prescribes the policies, procedures, solicitation provisions, and contract clauses pertaining to patents, data, and copyrights." (FAR 27.000.) Several CRS reports address various aspects of intellectual property rights. For example, see CRS Report RL32051, *Innovation and Intellectual Property Issues in Homeland Security*, by John R. Thomas.

property rights.”<sup>16</sup> An additional problem is that giving the government “rights to certain information and data ... could decrease ... businesses’ competitive advantage.”<sup>17</sup>

On the one hand, the government’s cost accounting standards, coupled with the Truth in Negotiations Act (TINA)<sup>18</sup> and the FAR’s cost contract principles and procedures (Part 31 of the FAR), “are among the government’s primary means of attempting to assure itself that it acquires goods and services at a fair and reasonable price on a cost-based contract.”<sup>19</sup> Compliance with these statutory and regulatory requirements and procedures may mean, for example, that a company has to disclose certain information to the government and permit the government to audit its books. While the thrust of these requirements is to protect the government, they can pose an administrative burden to companies: “... many commercial companies cannot or will not establish the separate accounting systems needed to perform government cost-reimbursement contracts, grants, or cooperative agreements.”<sup>20</sup> Furthermore, a company might be concerned that “a false move [on its part] could result in liability under the False Claims Act,” or it might be wary of “the risk attendant to the right of the Federal Government to audit books and records for years after the contract is complete and after the federal customer has accepted and paid for the goods or services.”<sup>21</sup>

## Agencies That Have OT Authority

Although other transaction authority “as it currently exists began in 1989 with Congress’s enactment of legislation authorizing the Defense Advanced Research Projects Agency (DARPA) to use other transactions,”<sup>22</sup> the first agency that received OT authority was the National Aeronautics and Space Administration (NASA). In chronological order, the agencies that have OT authority, and the Congress in which the applicable statute or statutes were enacted, are as follows:

- 85<sup>th</sup> Congress: NASA
- 101<sup>st</sup> Congress: DOD (OT authority for science and technology)
- 103<sup>rd</sup> Congress: DOD (OT authority for prototypes)

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<sup>16</sup> U.S. General Accounting Office, *Industry and Agency Concerns Over Intellectual Property Rights*, p. 2.

<sup>17</sup> U.S. Government Accountability Office, *Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority*, GAO-05-136, Dec. 2004, pp. 24-25. “One reason companies have reportedly declined to contract with the government is to protect their intellectual property rights. Alternatively, insufficient intellectual property rights could hinder the government’s ability to adapt developed technology for use outside of the initial scope of the project. Limiting the government’s intellectual property rights may require a trade-off. On the one hand, this may encourage companies to work with the government and apply their own resources to efforts that advance the government’s interests. However, it also could limit the government’s production options for items that incorporate technology created under an other transaction agreement.” (U.S. Government Accountability Office, *Status and Accountability Challenges Associated with the Use of Special DHS Acquisition Authority*, GAO-08-471T, Feb. 7, 2008, p. 10.)

<sup>18</sup> 41 U.S.C. §254b; P.L. 87-653; 76 Stat. 528.

<sup>19</sup> U.S. General Accounting Office, *DOD’s Guidance on Using Section 845 Agreements Could Be Improved*, pp. 38-39.

<sup>20</sup> Richard N. Kuyath, “The Untapped Potential of the Department of Defense’s ‘Other Transaction’ Authority,” *Public Contract Law Journal*, vol. 24, no. 4 (summer 1995), p. 543.

<sup>21</sup> Nancy O. Dix, Fernand A. Lavalée, and Kimberly C. Welch, “Fear and Loathing of Federal Contracting: Are Commercial Companies Really Afraid To Do Business With the Federal Government? Should They Be?” p. 9.

<sup>22</sup> *Ibid.*, p. 25.



- 104<sup>th</sup> Congress: Federal Aviation Administration (FAA)
- 105<sup>th</sup> Congress: Department of Transportation (DOT)
- 107<sup>th</sup> Congress: Transportation Security Administration (TSA) and the Department of Homeland Security (DHS)
- 108<sup>th</sup> Congress: Department of Health and Human Services (HHS), National Institutes of Health (NIH), and other agencies
- 109<sup>th</sup> Congress: Department of Energy (DOE)

Most of what is known about the rationale for, and use of, other transactions is based on DOD's experiences with OT authority. Aside from NASA, DOD has had OT authority longer than any other government agency, and NASA "has not developed or used the instrument in the same way that has the Department of Defense."<sup>23</sup> It does not appear that any of the other agencies that have received OT authority have comparable experience using OTs. Additionally, several agencies' OT authority is based on DOD's authority, and DOD figures prominently in the literature on other transactions. Additionally, the history of DOD's efforts to obtain OT authority is well documented. Accordingly, the information regarding DOD's OT authority is more extensive, both in this section and throughout the report, than the information presented for other agencies. The following information regarding the expansion of OT authority to specific agencies is presented in chronological order. The final section covers OT authority for other agencies.

## National Aeronautics and Space Administration

Other transaction authority originated with the passage of the National Aeronautics and Space Act of 1958,<sup>24</sup> which authorized NASA to

... enter into and perform such contracts, leases, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution.<sup>25</sup>

Relevant congressional documents from the 85<sup>th</sup> Congress do not indicate what was meant by "other transaction" and do not explain why this term was included in the Space Act.<sup>26</sup> Reportedly, the former General Counsel for NASA, Paul Dembling, coined the term "other transaction."<sup>27</sup>

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<sup>23</sup> Ibid., pp. 23-24.

<sup>24</sup> P.L. 85-569; 42 U.S.C. §2473; 72 Stat. 426, at 430. This statute came to be called the "Space Act." (John M. Logsdon, moderator, *Legislative Origins of the National Aeronautics and Space Act of 1958, Proceedings of an Oral History Workshop*, Monographs in Aerospace History, Number 8 (Washington: National Aeronautics and Space Administration, 1998), p. iii.)

<sup>25</sup> 42 U.S.C. §2473(c)(5).

<sup>26</sup> U.S. Congress, Senate Special Committee on Space and Astronautics, *National Aeronautics and Space Act of 1958*, report to accompany S. 3609, 85<sup>th</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 1701 (Washington: GPO, 1958); U.S. Congress, House Select Committee on Astronautics and Space Exploration, *Comparison of H.R. 12575 As Passed the House (The National Aeronautics and Astronautics Act of 1958) and As Passed the Senate (The National Aeronautics and Space Act of 1958)*, committee print, 85<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 18, 1958 (Washington: GPO, 1958); U.S. Congress, Conference Committee, *National Aeronautics and Space Act of 1958*, conference report to accompany H.R. 12575, 85<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 2166 (Washington: GPO, 1958).

<sup>27</sup> Nancy K. Sumption, "Meeting the Department of Defense's Objectives," *Public Contract Law Journal*, vol. 28, no. 3 (continued...)

Although the conference report did not explain the term or provide a rationale for “other transactions,” it included the following statement: “The conferees adopted the Senate version of the provision authorizing the Administration to enter into contracts, leases, and other agreements and transactions, on the grounds that the omitted House provisions are covered by existing law.”<sup>28</sup>

## Department of Defense

At DOD, OT authority originated with the passage of legislation during the 101<sup>st</sup> Congress, which provided the Defense Advanced Research Projects Agency (DARPA) OT authority for R&D projects.<sup>29</sup> Subsequent legislation, which was enacted during the 103<sup>rd</sup> Congress, provided DOD OT authority for prototypes. Although the applicable statutes are comprehensive in terms of establishing requirements for the use of OTs, neither statute defined “other transaction,” and the latter statute did not define “prototype.”<sup>30</sup>

Prior to 1989, “DoD interpreted its authority to enter into R&D [research and development] agreements as limited to procurement contracts and grants,” and, according to department policy, it could use grants only for arrangements with universities and nonprofit organizations.<sup>31</sup> The other vehicles available to DARPA—in particular, contracts—were inadequate, and some companies were reluctant to enter into a contract with the government. The following passage describes some problems DARPA encountered in using government contracts for R&D:

It became apparent in the late 1980s ... that the standard government contract and standard DOD grant were inadequate for DARPA to carry out its advanced research mission. For example, DARPA missed out on opportunities to contract with some of the most innovative companies, including small start-ups and large commercial companies, that developed some of the most promising new technologies. Many of these companies lacked either the desire or the government-required systems to perform a contract under the government procurement regulations. In addition, when DARPA used a standard government procurement contract to form a consortium, it created an awkward contractual relationship.<sup>32</sup> DARPA needed a contractual vehicle that would allow it to set up a multiparty agreement where consortium members would be equal. In 1988 DARPA concluded that it “needed additional flexibility in its approaches to support advanced R&D.” DARPA turned toward the National Aeronautics and Space Administration (NASA) for inspiration in obtaining a new statutory authority to fill the void discussed above.<sup>33</sup>

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(...continued)

(spring 1999), p. 384.

<sup>28</sup> U.S. Congress, Conference Committee, *National Aeronautics and Space Act of 1958*, p. 19.

<sup>29</sup> DARPA used to be known as the Advanced Research Projects Agency, or ARPA.

<sup>30</sup> U.S. General Accounting Office, *DOD's Guidance on Using Section 845 Agreements Could Be Improved*, p. 6.

<sup>31</sup> Kuyath, “The Untapped Potential of the Department of Defense’s ‘Other Transaction’ Authority,” p. 526.

<sup>32</sup> DARPA needed to form consortia to address “the development of certain technologies,” and using contracts for this purpose resulted in “awkward and inappropriate contractual relationships.” A contract is not well suited for an arrangement in which “each consortium member [is] equivalent to a co-prime contractor with the Government.” (Ibid., pp. 526-527.) In the case of a government procurement that involves one or more subcontractors, a government agency awards a contract to the prime contractor, and the prime contractor awards a contract to one or more subcontractors.

<sup>33</sup> Sumption, “Meeting the Department of Defense’s Objectives,” pp. 381-382.

Additionally, DARPA realized that R&D contracts “often result[ed] in no deliverables, except reports, to the Government,” and the reports were of “little direct value to DoD....”<sup>34</sup> Instead, R&D contracts benefitted the government by advancing research, or by showing whether a particular approach or line of inquiry was fruitful.<sup>35</sup>

By the late 1980s, DARPA, DOD, and a group of retired military and government officials shared an interest in providing DARPA with a new approach for R&D work.

By 1988, Dr. Raymond Colladay, then director of DARPA, concluded that DARPA needed additional flexibility in its approaches to supporting advanced R&D. The House Appropriations Committee had directed that DARPA submit a report to Congress on alternative management systems by early 1989. Among other initiatives suggested in his report, Colladay advocated the creation of a new and flexible R&D agreement authority for DARPA. The report was never sent directly to Congress. However, the biennial review of Defense Agencies required by the Goldwater-Nichols Act was performed during 1989. In October 1989 the Office of the Secretary of Defense (OSD) Study Team issued its report, which recommended that DoD prepare legislation that would give DARPA authority to enter into innovative contractual agreements.

About the same time, a group of retired flag officers and other former government officials lobbied Congress for additional authority for DARPA to enter into innovative contractual agreements so that DARPA could contract with the best and brightest companies in the research community. This group included individuals well known to the administration and Capitol Hill, who convinced Congress to add appropriate language to the Defense Authorization Bill for FY 1990.<sup>36</sup>

Apparently, one or more of these efforts was successful as OT authority for DARPA was included in S. 1352, which was incorporated into H.R. 2461 as an amendment on August 4, 1989. The following passage is from the Senate report that accompanied S. 1352:

The [Senate Armed Services] committee recognizes that the maturation of many technologies funded by the Defense Advanced Research Projects Agency may have significant commercial application. The committee applauds the efforts of DARPA in this area and supports a broadening of this effort. Current law does not authorize DARPA to enter into “cooperative agreement” or “other transactions” as distinct from “grants” or “contracts.” Additionally, current law does not allow for any proceeds of such arrangements to be applied to a fund for the development of other advanced technologies. Accordingly, section [222] clearly establishes the legal authority of DARPA to enter into cooperative arrangements and other transactions. In granting the authority to enter into “other transactions,” the committee enjoins the Department to utilize this unique authority only in those instances in which traditional authorities are clearly not appropriate.<sup>37</sup>

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<sup>34</sup> Kuyath, “The Untapped Potential of the Department of Defense’s ‘Other Transaction’ Authority,” p. 527.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid., pp. 527-528.

<sup>37</sup> U.S. Congress, Senate Committee on Armed Services, *National Defense Authorization Act for Fiscal Years 1990 and 1991*, report to accompany S. 1352, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., S.Rept. 101-81 (Washington: GPO, 1989), pp. 126-127. The remainder of the section, “Cooperative Research and Other Transactions Authority,” is as follows: “The legislation would also permit DARPA to recoup the fruits of such arrangements, when there is a “dual use” potential for commercial application, for reinvestment in the development of other technologies with the potential for military utility. The committee further recommends the authorization of \$25 million for the establishment of a fund for this purpose with the intention that DARPA should enter into such agreements on a cost-share basis with the private sector (continued...)”

Although H.R. 2461 did not include a provision similar to Section 222 of S. 1352 (prior to the incorporation of S. 1352 into H.R. 2461 by amendment), the House Committee on Armed Services noted that, of two legislative proposals “raised too late for thorough consideration by the committee” for inclusion in H.R. 2461, one of them

would authorize the Director of DARPA to enter into cooperative agreements and the Secretary of Defense to provide ‘proceeds or other payments to the United States arising out of such agreements’ to a fund set up in the Treasury for such activities. Apparently, the National Aeronautics and Space Administration has such authority, and similar authority was previously granted to the Department of Defense for the semiconductor industry consortium, SEMATECH, in sections 271-278 of the fiscal years 1988/1989 Defense Authorization Act (P.L. 100-180).<sup>38</sup>

In another section of this report, the House Armed Services Committee discussed DOD’s need for a robust technology base. Although OT authority was not mentioned in this section, which is reproduced here, in part, OTs are related to the enhancement of DOD’s technology base.<sup>39</sup>

U.S. forces rely on modern technology and industrial strength as fundamental components of our deterrent by providing superior defense systems as force multipliers against the larger number of weapons fielded by our adversaries. Therefore, it is mandatory that the Department of Defense maintain a healthy technology base that keeps pace with technology opportunity and the military’s long range plan to defeat current and potential future threats to national security.

... the United States needs new initiatives to invigorate the technology base to ensure that invention and innovation will remain in our industry, which has been a cornerstone of our free enterprise system and national strength.

Distinguished scientific experts advised the committee that the component of RDT&E [research, development, test, and evaluation] with greatest opportunity to help maintain a strong defense industrial and technology base are the research ... and the exploratory development ... categories. If defense is critically dependent on the industrial technology base, then the Department of Defense cannot expect to continue to survive with the research investments of the past, but must re-invest its proportionate share in the common pool of technical knowledge and human technical talent.

The committee intends both to correct trends and redirect certain efforts in the fiscal year 1990 DoD technology base program to ensure a vigorous, modern and advancing pool of

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(...continued)

under appropriate circumstances. The committee directs the Secretary to ensure that a review of all DARPA activities is conducted on an annual basis with a view towards terminating those arrangements which do not appear to have a reasonable expectation of success. The committee directs that any cooperative agreement or other transaction entered into between DARPA and other parties be structured to achieve set objectives for a limited duration. This authority should not be used to establish permanent partnerships or other relationships involving continuing financial support from DARPA.” (Ibid., p. 127.)

<sup>38</sup> U.S. Congress, House Committee on Armed Services, *National Defense Authorization Act for Fiscal Years 1990-1991*, report to accompany H.R. 2461, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., H.Rept. 101-121 (Washington: GPO, 1989), pp. 177-178.

<sup>39</sup> An article written in 2002 noted that “Other Transactions authority was created to further three specific Department of Defense missions: (1) enhancing American military technological superiority, (2) streamlining the acquisition process, and (3) integrating civilian and military technology industries.” (David S. Bloch and James G. McEwen, “‘Other Transactions’ with Uncle Sam: A Solution to the High-Tech Government Contracting Crisis,” *Texas Intellectual Property Journal*, vol. 10, no. 2 (winter 2002), p. 210.)

technology that will be available to provide the needs of the nation's defense in the future. Furthermore, the committee intends to foster and encourage linkages among the Department of Defense, industry and universities; and to bolster the defense industrial base and provide greater opportunity to "spin off" technology into the civilian sector."<sup>40</sup>

The conference report accompanying H.R. 2461 noted that the House bill did not contain a provision similar to the one found in S. 1352 which provided DARPA OT authority, and stated that the House receded "with an amendment that would establish ... authority [for other transactions and cooperative agreements] on a two-year trial basis."<sup>41</sup>

On November 29, 1989, the President signed H.R. 2461, which was enacted as P.L. 101-189, National Defense Authorization Act for FY1990 and FY1991. Section 251 of P.L. 101-189 amended Chapter 139 of Title 10 by adding a new section, Section 2371. Section 251(a) authorized the "Secretary of Defense, in carrying out advanced research projects through the Defense Advanced Research Projects Agency, [to] enter into cooperative agreements and other transactions with any person, any agency or instrumentality of the United States, any unit of State or local government, any educational institution, and any other entity." Several years after the passage of P.L. 101-189, DOD's Office of Inspector General (IG) summarized why DOD was given OT authority:

Congress authorized the use of 'other transactions' to increase involvement in DoD programs by commercial firms that traditionally have not entered into contracts or agreements with the DoD. DoD officials requested the authority to stimulate or support research and development by commercial firms and consortia that were believed to be reluctant to conduct research for DoD because they would be subject to the FAR and DOD procurement regulations. Congress authorized the use of 'other transactions' and allowed DoD officials a considerable degree of flexibility in negotiating terms and conditions. The intent of 'other transactions' was to obtain research from traditionally non-DoD commercial firms and to capitalize on commercial firms' research investments.<sup>42</sup>

In 1993, DARPA's OT authority was expanded, through the enactment of P.L. 103-160, National Defense Authorization Act for FY1994, to include prototypes relevant to weapons or weapon systems.<sup>43</sup> (The authority was provided in Section 845. Hence, prototype OTs are also known as "Section 845" (or "845") projects or OTs.) Subsequent to the passage of P.L. 103-160, GAO

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<sup>40</sup> U.S. Congress, House Committee on Armed Services, *National Defense Authorization Act for Fiscal Years 1990-1991*, pp. 127-128.

<sup>41</sup> U.S. Congress, Conference Committee, *Authorizing Appropriations for Fiscal Year 1990 for Military Activities of the Department of Defense, for Military Construction, and for Defense Activities of the Department of Energy, to Prescribe Personnel Strengths for Such Fiscal Year for the Armed Forces, and for Other Purposes*, conference report to accompany H.R. 2461, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., H.Rept. 101-331 (Washington: GPO, 1989), p. 531.

<sup>42</sup> U.S. Department of Defense, Office of the Inspector General, *Award and Administration of Contracts, Grants, and Other Transactions Issued By the Defense Advanced Research Projects Agency*, Report No. 97-114, Mar. 28, 1997, p. 39. The authors of the RAND study conducted for DOD considered factors that might contribute to the success of OTs. The "research to date suggests that when at least one of the following conditions is met, OT [authority] will likely be beneficial": "When DoD desires access to technology that is predominantly the result of commercial development, OT [authority] provides a mechanism for nonintrusive, value-added protection. When there is considerable uncertainty regarding both performance goals and what is technically achievable and affordable, OT [authority] provides the necessary flexibility to manage high-risk projects. When DoD might benefit from innovative business relationships with industry, or among industry participants, OT [authority] provides the mechanism to define those relationships." (Giles Smith, Jeffrey Drezner, and Irving Lachow, *Assessing the Use of "Other Transactions" Authority for Prototype Projects* (Santa Monica, CA: RAND Corporation, 2002), p. 33.)

<sup>43</sup> 10 U.S.C. §2371 note; 107 Stat. 1547, at 1721.

wrote: “While the intent [of the 1994 congressional authorization for OT prototypes] is never spelled out explicitly in congressional documents, it is apparent that one major goal was to improve DoD access to technologies that were being developed for the commercial market.”<sup>44</sup>

Notable changes to DOD’s OT authority were effected by P.L. 103-355 and P.L. 108-136. Section 1301 of P.L. 103-355, Federal Acquisition Streamlining Act of 1994, provided authority to the Secretary of Defense and the service secretaries to enter into OTs for “carrying out basic, applied, and advanced research projects.”<sup>45</sup> Under Section 1601 of P.L. 108-136,<sup>46</sup> National Defense Authorization Act for FY2004, the Secretary may use the procedures authorized in 10 U.S.C. §2371 and Section 845 of P.L. 103-160 to procure “property or services for use ... in performing, administering, or supporting biomedical countermeasures research and development....”<sup>47</sup>

The following is a summary of selected provisions of 10 U.S.C. §2371, which governs R&D OTs:

- The Secretary of Defense and the Secretary of each military department may, under the authority of 10 U.S.C. §2371, enter into other transactions for the purpose carrying out basic, applied, and advanced research projects. In using OT authority, the Secretary of Defense shall act through DARPA or any other DOD element the Secretary designates.
- Advance payments may be permitted.<sup>48</sup>
- An “other transaction” “may include a clause that requires a person or other entity to make payments to the Department of Defense or any other department or agency of the Federal Government as a condition for receiving support under the ... other transaction.”<sup>49</sup>
- The Secretary of Defense shall ensure, “to the maximum extent practicable,” that an “other transaction” does not provide for research that would duplicate research already being conducted by DOD programs.<sup>50</sup>
- The Secretary of Defense shall ensure, to the extent that he or she determines practicable, that funds provided for a transaction “do not exceed the total amount provided by other parties to the ... other transaction.”<sup>51</sup> This provision does not apply to prototype OTs.<sup>52</sup>
- The Secretary of Defense shall ensure that a transaction “may be used for a research project when the use of a standard contract, grant, or cooperative

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<sup>44</sup> U.S. General Accounting Office, *Acquiring Research by Nontraditional Means*, pp. 5-6.

<sup>45</sup> Sec. 1301(b) of P.L. 103-355.

<sup>46</sup> 10 U.S.C. §2370a note; 117 Stat. 1392, at 1680.

<sup>47</sup> Sec. 1601(c) of P.L. 108-136.

<sup>48</sup> 10 U.S.C. §2371(c).

<sup>49</sup> 10 U.S.C. §2371(d)(1).

<sup>50</sup> 10 U.S.C. §2371(e)(1)(A).

<sup>51</sup> 10 U.S.C. §2371(e)(1)(B).

<sup>52</sup> 10 U.S.C. §2371 note.

agreement for such project is not feasible or appropriate.”<sup>53</sup> This provision does not apply to prototype OTs.<sup>54</sup>

The following is a summary of selected provisions of 10 U.S.C. §2371 note, which governs prototype projects:

- Under 10 U.S.C. §2371 note, as amended by Section 855 of P.L. 109-364, the Director of DARPA, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority 10 U.S.C. §2371, “carry out prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense, or to improvement of weapons or weapon systems in use by the Armed Forces.”
- For prototype projects expected to cost at least \$20 million but no more than \$100 million, the agency’s senior procurement executive (or, for DARPA or the Missile Defense Agency, the director of the agency) is required to prepare a written determination that addresses the items listed in Section 845(a)(2)(A) of P.L. 103-160. For prototype projects expected to exceed \$100 million, the Under Secretary of Defense for Acquisition, Technology, and Logistics is required to prepare a written determination that addresses the items listed in Section 845(a)(2)(B).<sup>55</sup>
- “To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out projects....”<sup>56</sup>
- For a prototype project that has payments in excess of \$5 million, a clause shall be included in the agreement that provides for the Comptroller General to examine certain records “of any party to the agreement or any entity that participates in the performance of the agreement.” Certain conditions apply to such reviews.<sup>57</sup>
- A prototype OT is to include at least one nontraditional defense contractor who participates “to a significant extent in the prototype project.”<sup>58</sup> If none of the parties is a nontraditional defense contractor, then the parties other than the federal government must provide at least one-third of the total cost of the project, or the agency’s senior procurement executive is to determine “in writing that exceptional circumstances justify the use of a transaction that provides for

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<sup>53</sup> 10 U.S.C. §2371(e)(2).

<sup>54</sup> 10 U.S.C. §2371 note.

<sup>55</sup> 10 U.S.C. §2371 note; Sec. 845(a)(2) of P.L. 103-160, as amended. To aid in finding the referenced text, citations for material from 10 U.S.C. §2371 note refer to Sec. 845 of P.L. 103-160.

<sup>56</sup> 10 U.S.C. §2371 note; Sec. 845(b)(2) of P.L. 103-160, as amended.

<sup>57</sup> 10 U.S.C. §2371 note; Sec. 845(c) of P.L. 103-160, as amended.

<sup>58</sup> A “nontraditional defense contractor” is “an entity that has not, for a period of at least one year prior to the date that a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section is entered into, entered into or performed with respect to—(1) any contract that is subject to full coverage under the cost accounting standards prescribed pursuant to section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 422) and the regulations implementing such section; or (2) any other contract in excess of \$500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency, that is subject to the Federal Acquisition Regulation.” (10 U.S.C. §2371 note.)

innovative business arrangements or structures that would not be feasible or appropriate under a contract.”<sup>59</sup>

- A transaction involving a prototype project “that satisfies the conditions set forth in ... [Section 845](d)(1)(B)(I) of P.L. 103-160, as amended] may provide for the award of a follow-on production contract to the participants in the transaction for a specific number of units at specific target prices.” Competitive procedures do not have to be used if the conditions in Section 845(g)(2) of P.L. 103-160, as amended, are met.”<sup>60</sup>
- 41 U.S.C. §423 applies to agreements for prototype “other transactions.” This section of the *U.S. Code* prohibits the disclosure and acquisition of certain procurement information; addresses certain circumstances under which a procurement officer might be contacted regarding non-federal employment; prohibits a former agency official from receiving compensation from a contractor under certain circumstances; and provides for criminal and civil penalties and administrative actions for violations of this section.<sup>61</sup>

## Federal Aviation Administration

A reauthorization act for the FAA provided OT authority to the agency. As the following excerpt from the conference report suggests, OT authority was part of a package of reforms aimed at providing the FAA with additional authority:

Senate provision: The managers recognize that to provide reform of the FAA, additional autonomy in decision-making in a number of areas is needed. For this reason, the managers agreed to give the FAA authority in the regulatory, personnel, and procurement areas. This change should result in a new way of doing business for the FAA, with less oversight by DOT.<sup>62</sup>

Section 226 of P.L. 104-264, Federal Aviation Reauthorization Act of 1996, amended Title 49 of the *U.S. Code* by adding a subsection to Section 106(l). Section 106(l)(6) states, in part, that the Administrator of the FAA has the authority to enter into “... other transactions as may be necessary to carry out the functions of the Administrator and the [Federal Aviation] Administration.” In using this authority, the Administrator “may enter into ... other transactions with any Federal Agency (as such term is defined in section 551(1) of title 5) or any instrumentality of the United States, any State, territory, or possession, or political subdivision thereof, any other governmental entity, or any person, firm, association, corporation, or educational institution, on such terms and conditions as the Administrator may consider appropriate.”<sup>63</sup>

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<sup>59</sup> 10 U.S.C. §2371 note; Sec. 845(d)(1) of P.L. 103-160, as amended.

<sup>60</sup> 10 U.S.C. §2371 note; Sec. 845 (g) of P.L. 103-160, as amended.

<sup>61</sup> 10 U.S.C. §2371 note; Sec. 845(h) of P.L. 103-160, as amended.

<sup>62</sup> U.S. Congress, Conference Committee, *Federal Aviation Authorization Act of 1996*, conference report to accompany H.R. 3539, 104<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 104-848 (Washington: GPO, 1996), p. 107.

<sup>63</sup> Sec. 226 of P.L. 104-264; 110 Stat. 3213, at 3233.



## Department of Transportation

Section 5102 of P.L. 105-178, Transportation Equity Act for the 21<sup>st</sup> Century, amended Chapter 5 of Title 23 of the *U.S. Code* by adding a section (Section 502) regarding surface transportation research. Section 5102 authorizes the Secretary of Transportation to use, among other vehicles, other transactions for carrying out research, development, and technology transfer activities with respect to “motor carrier transportation; all phases of transportation planning and development ...; and ... the effect of State laws” on motor carrier transportation and transportation planning and development. The Secretary may enter into other transactions with “the National Academy of Sciences, the American Association of State Highway and Transportation Officials, or any Federal laboratory, State agency, authority, association, institution, for-profit or nonprofit corporation, organization, foreign country, or person.”<sup>64</sup>

Neither the House Committee on Transportation and Infrastructure’s report nor the conference committee’s report on H.R. 2400 (which was enacted as P.L. 105-178) discussed why the Secretary of Transportation was given authority to enter into other transactions.<sup>65</sup>

## Department of Homeland Security

Among the federal agencies that have other transaction authority, the Department of Homeland Security is one of two agencies that was provided OT authority in its authorizing legislation, P.L. 107-296 (H.R. 5005), Homeland Security Act of 2002.<sup>66</sup> (The other is the Transportation Security Administration (TSA).) The committee report that accompanied H.R. 5005 does not include an explanation for providing OT authority to DHS, but, under the heading “Research and Development Projects,” the report provided the following description of acquisition procedures to be used by the department:

This section gives the Secretary the authority to carry out a pilot program with streamlined procedures for the acquisition of goods and services that the Secretary determines are essential to the Department’s mission of fighting terror. It would provide the Secretary with enhanced, but specifically defined, flexibilities while maintaining adequate safeguards. The provisions are based on procedures that are currently part of the Government’s acquisition system such as micro purchases, simplified acquisition procedures, and special simplified commercial item acquisitions. The procedures are in the current version of part 13 of the government-wide Federal Acquisition Regulation. The Department is to use current government-wide authorities for its “normal” procurements.<sup>67</sup>

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<sup>64</sup> Sec. 5102 of P.L. 105-178; 112 Stat. 423.

<sup>65</sup> U.S. Congress, House Committee on Transportation and Infrastructure, *Building Efficient Surface Transportation and Equity Act of 1998*, report to accompany H.R. 2400, 105<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 105-467, part 1 (Washington: GPO, 1998), p. 223; U.S. Congress, Conference Committee, *Transportation Equity Act for the 21<sup>st</sup> Century*, conference report to accompany H.R. 2400, 105<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 105-550 (Washington: GPO, 1998).

<sup>66</sup> 116 Stat. 2135, at 2224; 6 U.S.C. §391. The department’s other transaction authority initially was for a five-year period, ending in January 2008. However, subsequent statutory provisions have extended the authority in increments of one year or less. Sec. 572 of P.L. 110-161 changed the expiration date to September 30, 2008; Sec. 537 of P.L. 110-329 extended the authority one year, to September 30, 2009; Sec. 531 of P.L. 111-83 moved the expiration date to September 30, 2010; and Sec. 1651 of P.L. 112-10 changed the expiration date to September 30, 2011.

<sup>67</sup> U.S. Congress, House Select Committee on Homeland Security, *Homeland Security Act of 2002*, report to accompany H.R. 5005, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 107-609, Part 1 (Washington: GPO, 2002), p. 116.

The following is a summary of selected provisions of Section 831 of P.L. 107-296:

- After determining that the use of a contract, grant, or cooperative agreement is neither feasible nor appropriate, the Homeland Security Secretary may exercise the same authority that the Secretary of Defense may exercise under 10 U.S.C. §2371 for the purpose of carrying out basic, applied, and advanced R&D projects.<sup>68</sup>
- The Homeland Security Secretary also may carry out prototype projects in accordance with Section 845 of P.L. 103-160 (10 U.S.C. §2371 note).<sup>69</sup>
- GAO is required to produce annual reports on certain aspects of the department's use of OT authority and provide the report to the appropriate congressional committees.<sup>70</sup>
- The Secretary may procure "the temporary or intermittent services of experts or consultants (or organizations thereof) in accordance with section 3109(b) of title 5, United States Code ...." If there is an urgent homeland security need, the Secretary may procure temporary or intermittent personal services for a period of one year or less "without regard to the pay limitations" of 5 USC §3109.<sup>71</sup>
- "Nontraditional government contractor" has the same meaning as the term "nontraditional defense contractor" as it is defined in Section 845(e) of P.L. 103-160.<sup>72</sup>

In addition to having OT authority, DHS's Science and Technology Directorate has established a commercialization initiative, which is headed by a Chief Commercialization Officer (CCO).<sup>73</sup> A DHS publication describes this initiative as follows: "The mission of S&T's commercialization efforts is to identify, evaluate, and commercialize technologies that meet the specific operational requirements of DHS operating components and first responder communities. The commercialization efforts actively reach out to the private sector to establish mutually beneficial working relationships to facilitate cost-effective and efficient product development efforts."<sup>74</sup> Reportedly, this initiative

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<sup>68</sup> Sec. 831(a)(1) of P.L. 107-296. 10 U.S.C. §2371(b) and (f) do not apply to the Homeland Security Secretary's use of OT authority. Subsection (b) identifies the DOD components through which the Secretary of Defense may exercise OT authority, and Subsection (f) establishes separate U.S. Treasury accounts for each military department and DARPA.

<sup>69</sup> Sec. 831(a)(2) of P.L. 107-296. It seems unlikely that the limitation on DOD's OT authority for prototypes—the authority may be used only for weapons and weapon systems—applies to DHS. "[I]t is reasonable to assume that Congress did not mean to limit the DHS's authority to weapon systems, but rather to technology relevant to the DHS's homeland security mission." (Walter F. Zenner, Jeffrey L. Handwerker, and Joseph M. Catoe, *Fundamentals of Contracting with the Department of Homeland Security*, Thomson West, Briefing Papers, No. 03-4, March 2003, p. 9.)

<sup>70</sup> Sec. 831(b) of P.L. 107-296. The initial GAO report was due no later than two years after the effective date of the Homeland Security Act. (Ibid.)

<sup>71</sup> Sec. 831(c) of P.L. 107-296. It is unclear how this provision relates to the use of other transaction authority, particularly since essentially the same language is found in the following section (Sec. 832) of this bill.

<sup>72</sup> Sec. 831(d) of P.L. 107-296.

<sup>73</sup> U.S. Department of Homeland Security, *High-Priority Technology Needs*, version 2.0, June 2008, available at [http://www.dhs.gov/xlibrary/assets/High\\_Priority\\_Technology\\_Needs.pdf](http://www.dhs.gov/xlibrary/assets/High_Priority_Technology_Needs.pdf), p. 17. The Commercialization Office's website may be found at [http://www.dhs.gov/files/programs/gc\\_1234200779149.shtm](http://www.dhs.gov/files/programs/gc_1234200779149.shtm).

<sup>74</sup> Ibid.

would cut down S&T's role—and funding—in research and development, leaving industry with the task of fully developing products for DHS to purchase. “Why would you pay so much for product development and technology development?” [Thomas Cellucci, the Chief Commercialization Officer, reportedly] said.<sup>75</sup> “We have something much more to offer the private sector. We don't need to pay them when you have a market this size.” ... [O]ne contribution [Cellucci] said he can make is to move S&T away from a development system that too closely resembles the Department of Defense's acquisition process, with significant sums dedicated to funding research better left in the hands of companies. “We don't have to reinvent the wheel,” he said. “We're utilizing the free market system. Why wouldn't we leverage the skill, the experience, the brain power of the private sector, who are experts in commercialization?”<sup>76</sup>

It is unclear what relationship, if any, exists between the department's use of OT authority and its commercialization initiative.

## Transportation Security Administration

It is unclear why the Transportation Security Administration (TSA) was provided OT authority. A committee report did not accompany H.R. 3150 (107<sup>th</sup> Congress), which is where the applicable legislative provision originated, and the conference report was silent on OT authority.<sup>77</sup> It is possible, since the authorizing statute exempted TSA from the FAR and applied the FAA's acquisition management system to TSA, that a decision was made to provide TSA with the same “personnel and services” authority—which includes OT authority—that the FAA has.<sup>78</sup>

The source of TSA's OT authority is Section 101(a) of P.L. 107-71, Aviation and Transportation Security Act, which states that the head of TSA “shall have the same authority as is provided to the Administrator of the Federal Aviation Administration under subsection (l) and (m) of section 106 [of Title 49 of the *U.S. Code*].”<sup>79</sup> 49 U.S.C. §106(l)(6) authorizes the FAA Administrator “to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the functions of the Administration and the Administration.”

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<sup>75</sup> According to a biography of Thomas Cellucci posted on the IEEE website for a homeland security conference it sponsored, DHS appointed Thomas Cellucci to a five-year “administrative appointment” as chief commercialization officer of DHS's Science and Technology Directorate in 2007. (“U.S. Department of Homeland Security, Science and Technology Directorate, Thomas A. Cellucci, PhD, MBA, Chief Commercialization Officer,” n.d., available at [http://www.ieeehomelandsecurityconference.org/biography/Cellucci%20Bio-DHS\\_2%20casual\\_.pdf](http://www.ieeehomelandsecurityconference.org/biography/Cellucci%20Bio-DHS_2%20casual_.pdf).) The original name of this organization, IEEE, was the Institute of Electrical and Electronics Engineers, Inc. (IEEE, “About IEEE,” available at <http://www.ieee.org/web/aboutus/home/index.html>.) A news article reported that Cellucci had a “limited-term administrative appointment.” (Ben Bain, “DHS Allows Industry Liaison to Keep His Business Ties,” *FCW.COM*, Feb. 26, 2008, available at <http://www.fcw.com/online/news/151749-1.html>.)

<sup>76</sup> Rob Margetta, “S&T Official Working to Move Product Development Out of DHS, Into Private Sector,” *CQ Homeland Security*, June 27, 2008, available at <http://homeland.cq.com>.

<sup>77</sup> U.S. Congress, Conference Committee, *Aviation and Transportation Security Act*, conference report to accompany S. 1447, 107<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 107-296 (Washington: GPO, 2001).

<sup>78</sup> 49 U.S.C. §106(l).

<sup>79</sup> 115 Stat. 597, at 601. Thus, the TSA's exemption from the FAR, which was terminated as of June 23, 2008, has no bearing on the agency's authority to engage in other transactions. (Sec. 568 of P.L. 110-161; U.S. Department of Homeland Security, “Office of the Chief Procurement Officer; Revision of Department of Homeland Security Acquisition Regulation; Technical Amendments (HSAR Case 2008—001),” *73 Federal Register* 30317, May 27, 2008.)

## Department of Health and Human Services, National Institutes of Health

Section 221 of P.L. 108-199<sup>80</sup>, Consolidated Appropriations Act for FY2004, authorized the Director of the National Institutes of Health (NIH) to use certain funds “to enter into transactions (other than contracts, cooperative agreements, or grants)” to conduct research for the NIH Roadmap Initiative.<sup>81</sup> The applicable committee report did not include any mention of this provision.<sup>82</sup>

## Department of Energy

Section 1007 of P.L. 109-58, Energy Policy Act of 2005, amended Section 646 of the Department of Energy Organization Act (42 U.S.C. §7256) by adding a paragraph at the end of 42 U.S.C. §7256.<sup>83</sup> The conference committee report did not include any discussion of Section 1007.<sup>84</sup> The following is a summary of selected provisions of Section 1007:

- The Secretary of Energy may exercise the same authority to enter into other transactions as the Secretary of Defense has under 10 U.S.C. §2371, subject to the same terms and conditions that apply to the Secretary of Defense.<sup>85</sup>
- In applying 10 U.S.C. §2371, the word “basic” is replaced by “research”; the word “applied” is replaced by “development”; and the terms “advanced research projects” and “advanced research” are replaced by “demonstration projects.”<sup>86</sup>
- The Secretary is required to use competitive, merit-based selection procedures for other transactions that she or he determines are practicable.
- In using OT authority for research, development, or a demonstration project, the Secretary must provide written determination that the use of a contract, grant, or cooperative agreement is neither feasible nor appropriate.
- Any information that is developed pursuant to an OT and that would be protected from disclosure under 5 U.S.C. §552(b)(4) may be protected by the Secretary from disclosure for up to five years from the date of development if the information was obtained from a person other than a federal agency.
- “Nontraditional Government contractor” has the same meaning as the term “nontraditional defense contractor” in 10 U.S.C. §2371 note.

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<sup>80</sup> 118 Stat. 3, at 256.

<sup>81</sup> Sec. 221(a) of P.L. 108-199.

<sup>82</sup> U.S. Congress, Conference Committee, “Making Appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies for the Fiscal Year Ending September 30, 2004, and For Other Purposes,” report to accompany H.R. 2673, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 108-401 (Washington: GPO, 2003).

<sup>83</sup> The department’s other transaction authority expired as of September 30, 2010. (Sec. 1007 of P.L. 109-58.) Subsequently, the authority was extended to September 30, 2015, by Sec. 3118 of P.L. 111-383.

<sup>84</sup> U.S. Congress, Conference Committee, *Energy Policy Act of 2005*, report to accompany H.R. 6, 109<sup>th</sup> Cong., 1<sup>st</sup> sess. H.Rept. 109-190 (Washington: GPO, 2005).

<sup>85</sup> Sec. 1007 of P.L. 109-58.

<sup>86</sup> Sec. 1007 of P.L. 109-58.

- The Secretary's OT authority may be delegated only to other DOE officials who were appointed by the President with the advice and consent of the Senate. (These are known as "PAS" positions.)

## **Other Agencies**

With the enactment of P.L. 108-136,<sup>87</sup> National Defense Authorization Act for FY2004, other executive agencies were authorized, under certain conditions, to engage in other transactions.<sup>88</sup> Neither the House committee report nor the conference report that accompanied H.R. 1588 (108<sup>th</sup> Congress), which was enacted as P.L. 108-136, includes a rationale for providing OT authority to other agencies under certain circumstances.<sup>89</sup> The conference report did note that the Senate receded with an amendment "that would conform the authority provided to civilian agencies with the existing authority under section 845 [of P.L. 103-160] and would clarify that the Director of the Office of Management and Budget must authorize the use of this authority by civilian agencies on a case-by-case basis."<sup>90</sup>

The following is a summary of selected provisions of Section 1441:

- The head of an executive agency that engages in basic, applied, advanced research, and development projects that are necessary to the agency's research and development and that have the potential to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack may use OT authority. The agency head may use the same authority as the Secretary of Defense may exercise under 10 U.S.C. §2371, except for the subsections having to do with DARPA (subsection (b)) and support accounts (subsection (f)).
- The head of an executive agency may use OT authority for the purpose of carrying out prototype projects which meet the conditions listed above. This use of OT authority must be in accordance with the requirements and conditions provided in Section 845 of P.L. 103-160 (10 U.S.C. §2371 note).
- The head of an executive agency may use OT authority under this provision only if authorized by the Director of the Office of Management and Budget.

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<sup>87</sup> 41 U.S.C. §428a note; 117 Stat. 1392, at 1673.

<sup>88</sup> The applicable provision, Sec. 1441 of P.L. 108-136, expired September 30, 2008. Additionally, Sec. 1441 was repealed by P.L. 111-350.

<sup>89</sup> U. S. Congress, House Committee on Armed Services, *National Defense Authorization Act for Fiscal Year 2004*, report to accompany H.R. 1588, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 108-106 (Washington: GPO, 2003); U.S. Congress, Conference Committee, *National Defense Authorization Act for Fiscal Year 2004*, conference report to accompany H.R. 1588, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 108-354 (Washington: GPO, 2003).

<sup>90</sup> U.S. Congress, Conference Committee, *National Defense Authorization Act for Fiscal Year 2004*, p. 778.

## Applicability of the FAR and Procurement Statutes to Other Transactions

As noted above, OTs are not subject to the FAR. Additionally, a significant number of procurement statutes and the government's cost accounting standards do not apply to other transactions.<sup>91</sup> However, an agency is "required to comply with any other statute that applies to contractual transactions in general. To make this determination, the terms of each statute must be analyzed closely. There is no uniform guidance as to which statutes apply to these other transactions."<sup>92</sup>

In 2000, the American Bar Association (ABA) published a monograph produced by the Ad Hoc Working Group on Other Transactions, which addressed the question of the applicability of procurement statutes to other transactions. The ABA's Section of Public Contract Law had convened the working group. The monograph, which included analyses of 30 statutes, indicated which statutes apply to OTs and which do not. The statutes and statutory provisions that do not apply to OTs may be found in **Table 1**. Some of the statutes may apply only to DOD (the monograph focused on DOD's OT authority), but this analysis indicates the applicability of certain procurement statutes to other agencies' use of OT authority.

**Table 1. Statutes and Statutory Provisions That Do Not Apply to Other Transactions**

Statute or Statutory Provision <sup>a</sup>	Purpose of Statute or Statutory Provision <sup>b</sup>
Competition in Contracting Act (CICA) 10 U.S.C. §§2301 et seq.; 41 U.S.C. §§253 et seq.	"To promote the use of competitive procedures and prescribe uniform Government-wide policies and procedures regarding contract formation, award, publication, and submission of cost or pricing data."
Contract Disputes Act 41 U.S.C. §§601 et seq.	"To create a comprehensive, fair, and balanced statutory scheme of administrative and legal remedies for claims under Government contracts."
Procurement Protest System (Subtitle D of CICA)	"To provide a statutory basis for procurement protests by interested parties to the Comptroller General."
Kinds of Contracts 10 U.S.C. §2306	"To establish various restrictions on the terms and conditions of contracts."
Examination of records of contractor 10 U.S.C. §2313	"To provide authority to the contracting agency to access a contractor's records or plants in order to perform audits of the contractor."
Contracts: acquisition, construction, or furnishing of test facilities and equipment [to	"To provide authority for acquisition, construction, or furnishing of test facilities or equipment in connection with R&D contracts."

<sup>91</sup> U.S. Government Accountability Office, *Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority*, GAO Report GAO-05-136, Dec. 2004, p. 1; John Cibinic, Jr., and Ralph C. Nash, Jr., *Formation of Government Contracts*, 3<sup>rd</sup> ed. (Washington: George Washington University Law School, Government Contracts Program, 1998), p. 20.

<sup>92</sup> Cibinic and Nash, *Formation of Government Contracts*, p. 20.

<b>Statute or Statutory Provision<sup>a</sup></b>	<b>Purpose of Statute or Statutory Provision<sup>b</sup></b>
R&D contractors]	
10 U.S.C. §2353	
Contracts: indemnification provision	“To authorize the Military Departments to include provisions in DOD R&D contracts indemnifying the contractor for certain claims and losses.”
10 U.S.C. §2354	
Prohibition against doing business with certain offerors	“To prohibit the award by the Department of Defense of contracts, or in some cases subcontracts, to firms that have been debarred or suspended by another agency.”
10 U.S.C. §2393	
Major weapon systems: Contractor guarantees	“To provide warranty protection to the Government for major weapons systems it acquires.”
10 U.S.C. §2403	
Prohibition on persons convicted of defense contract related felonies and related criminal penalty as defense contractors	“To prevent persons convicted of fraud or any other felony arising out of a defense contract from further participating in contracts with the Department of Defense for a specified statutory period.”
10 U.S.C. §2408	
Contractor employees: protection from reprisal for disclosure of certain information	“To prohibit contractors from discharging, demoting, or discriminating against employees who disclose substantial violations of law related to contracts.”
10 U.S.C. §2409	
Limitation on the use of appropriated funds to influence certain Federal contracting and financial transactions	“To prohibit recipients and requesters of Federal contracts, grants, or cooperative agreements from using appropriated funds to pay any person to influence or to attempt to influence executive or legislative decision-making in connection with the awarding of any Federal contract or grant, the making of any Federal loan, or the entering into of any cooperative agreement.”
31 U.S.C. §1352	
Anti-Kickback Act	“To eliminate the practice of subcontractors paying kickbacks in the form of fees, gifts, gratuities, or credits to higher tier subcontractors or prime contractors for the purpose of securing the award of subcontracts or orders.”
41 U.S.C. §§51-58 <sup>c</sup>	
Procurement Integrity Act	“To ensure the ethical conduct of Federal agency procurements by prohibiting certain Government officials from accepting compensation from or discussing future employment with bidders or offerors, and prohibiting the unauthorized receipt or disclosure of contractor bid and proposal information or source selection information before the award of a Federal agency procurement contract.”
41 U.S.C. §423	
Walsh-Healey Act,	“To require all covered contracts to contain stipulations regarding minimum wages, maximum hours, safe and sanitary working conditions, child labor, and convict labor requirements.”
41 U.S.C. §§35-45 <sup>c</sup>	
Drug-Free Workplace Act	“To eliminate any connection between drug use or distribution and Federal contracts, cooperative agreements, or grants.”
41 U.S.C. §§701-707	
Buy American Act	“To provide a preference for domestic products in government acquisition for public use.”
41 U.S.C. §10a-10d	
Bayh-Dole Act	“To set forth Government’s policy regarding allocation of patent rights to inventions conceived or first actually reduced to practice under contracts, grants, and cooperative agreements with small business firms and educational and other nonprofit organizations.”
35 U.S.C. §§200-212	

Statute or Statutory Provision <sup>a</sup>	Purpose of Statute or Statutory Provision <sup>b</sup>
Technical data provisions applicable to DOD 10 U.S.C. §§2320 and 2321	“To provide for regulations to define the legitimate interest of the U.S. and of a contractor or subcontractor in technical data pertaining to an item or process.”
Truth in Negotiations Act 10 U.S.C. §2306a	“To require the submission of cost or pricing data on negotiated contracts in excess of \$500,000, as well as for certain subcontracts and contract modifications.”
Cost Accounting Standards 41 U.S.C. §422	“To provide for the promulgation of uniform standards for allocating costs to Government contracts.”
Cost Principles 10 U.S.C. §2324	“To provide for the disallowance of certain costs under flexibly priced contracts and prescribe penalties for the submission of claims for unallowable costs.”

**Source:** American Bar Association, Section of Public Contract Law, *Ad Hoc Working Group on Other Transactions, Department of Defense “Other Transactions”: An Analysis of Applicable Laws*, American Bar Association, 2000, p. 26.

**Notes:**

- a. The source of the name or descriptive information in this column is American Bar Association, Section of Public Contract Law, *Ad Hoc Working Group on Other Transactions, Department of Defense “Other Transactions”: An Analysis of Applicable Laws*, American Bar Association, 2000, pp. 27-29.
- b. *Ibid.*, pp. A-1-A-57.
- c. This provision or statute may apply to prototype OTs, but it does not apply to OTs involving research and development. (*Ibid.*, pp. 30-31.)

As reported by GAO, DHS’s list of laws inapplicable to its OTs includes several of the same statutes and statutory provisions listed in **Table 1**. They are as follows:

- Bayh-Dole Act
- Competition in Contracting Act
- Contract Disputes Act
- Procurement Protest System
- Limitation on the use of appropriated funds to influence certain federal contracting and financial transactions
- Anti-Kickback Act of 1986
- Procurement Integrity Provisions
- Walsh Healey Act
- Drug-Free Workplace Act of 1988
- Buy American Act<sup>93</sup>

<sup>93</sup> U.S. Government Accountability Office, *Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority*, p. 6.



The DHS list included two statutes that are not found in **Table 1**: the Service Contract Act (41 U.S.C. §351 et seq.) and the Fair Labor Standards Act of 1938 (29 U.S.C. §§201-219).<sup>94</sup>

As the ABA's Ad Hoc Working Group noted, there is "no uniform guidance" regarding the applicability of statutes to OTs. In the following passage, the working group described some of the challenges involved in determining the applicability of procurement statutes to OTs:

Although the Working Group considers its analyses to be correct, in a number of cases the conclusions are somewhat tenuous. For example, in many cases it is simply not clear from the text of the statute whether it applies only to procurement contracts, or whether it applies more broadly. In such cases the analysis turns on factors such as the placement of the statute in a particular statutory scheme, its legislative history, etc. This uncertainty may lead to unnecessary litigation.<sup>95</sup>

DOD and DHS also have acknowledged the challenge of determining whether a statute applies, or does not apply, to an OT. In its OT guide for prototype projects, DOD indicated that the list of statutes inapplicable to prototype OTs "is provided for guidance only, and is not intended to be definitive."<sup>96</sup> In a report on DHS's use of OT authority, GAO noted that "DHS's other transaction policy states that contracting officers should review each statute [in the list of statutes considered to be inapplicable to OTs] with regard [to] any particular arrangement using other transactions and consult their General Counsel to determine its applicability."<sup>97</sup> DOD and DHS also have advised their personnel that requirements or statutes that are not tied to the type of instrument used probably would apply to an OT. DHS guidance is as follows: "To the extent a particular statute is funding- or program-related (e.g., fiscal and property laws), or is not tied to the type of instrument used, it generally *will* apply to an OT. OTCOs [other transactions contracting officers] should consult with their General Counsel on these matters."<sup>98</sup>

As noted by the ABA's Ad Hoc Working Group (see above), a possible implication of the uncertainty involved in determining which procurement statutes do not apply to OTs is "unnecessary litigation." Another possible implication of this uncertainty is that it might lead to confusion for some OT participants. A business (or other entity) that participates in OTs with two or more agencies might not understand why their lists of inapplicable statutes are not the same. Possibly, a lack of consistency could pose an administrative burden for an OT participant.

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<sup>94</sup> Ibid.

<sup>95</sup> American Bar Association, Section of Public Contract Law, *Ad Hoc Working Group on Other Transactions, Department of Defense "Other Transactions": An Analysis of Applicable Laws*, American Bar Association, 2000, p. 26.

<sup>96</sup> Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, "Other Transactions" (OT) *Guide for Prototype Projects*, Jan. 2001, p. 41.

<sup>97</sup> U.S. Government Accountability Office, *Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority*, p. 6.

<sup>98</sup> U.S. Department of Homeland Security, *Other Transaction Authority*, Management Directive 0771.1, July 8, 2005, p. 4-1. (Italics in original.) DOD's language is slightly different: "To the extent that a particular requirement is a funding or program requirement or is not tied to the type of instrument used, it would generally apply to an OT, e.g., fiscal and property laws. Each statute must be looked at to assure it does or does not apply to a particular funding arrangement using an OT." (Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, "Other Transactions" (OT) *Guide for Prototype Projects*, p. 41.)

## Evaluating the Use of OT Authority

The nature of other transaction authority contributes to the challenge of evaluating OTs. Freed from adhering to the FAR and certain procurement statutes, an agency can tailor an OT to the needs and circumstances of a particular project and the participants, which means the usual methods or vehicles for monitoring contractor performance—such as contract administration and audit services (Part 42 of the FAR) and quality assurance (Part 46 of the FAR)—are not required. Additionally, aside from counting the number of traditional contractors, it is unclear what features of other transactions can be readily measured or evaluated. As discussed below, it is particularly challenging to evaluate the benefits of OTs.

The Federal Procurement Data System (FPDS), a governmentwide database available online to the public, is a tool for tracking agencies' contract actions.<sup>99</sup> Until the passage of P.L. 110-417, Duncan Hunter National Defense Authorization Act, FY2009, however, there was no requirement for agencies to submit OT data to FPDS. Section 874 of this statute requires, in effect, that DOD and DHS submit OT data to FPDS. Other agencies are not subject to this provision, because it states that data are to be submitted to FPDS for other transactions (and grants and cooperative agreements) that were “issued pursuant” to 10 U.S.C. §2371, which applies only to DOD and DHS.

### Nontraditional Contractors

A key argument for using OTs is to attract nontraditional contractors who would not otherwise work for, or with, the government. According to a GAO report, for example, “DHS views the use of other transactions as key to attracting nontraditional government contractors—typically high-technology firms that do not work with the government—that can offer solutions to meet agency needs.”<sup>100</sup> 10 U.S.C. §2371 note requires that a prototype OT include at least one nontraditional defense contractor and includes a definition of “nontraditional defense contractor.” Given the emphasis on attracting nontraditional contractors, and since this is a relatively easily quantifiable measure, some assessments of the use of OT authority report the number and percentage of nontraditional contractors participating in OTs.

GAO reported in 2002 that the Secretary of Defense had “required a metric—the number of participating nontraditional defense contractors—which is measurable and directly related to each agreement.”<sup>101</sup> DOD had considered other metrics, “but concluded that the number of nontraditional contractors was the only one that was quantifiable to Section 845 [prototype] outcomes.”<sup>102</sup> (The GAO report focused on prototype OTs.) DOD “[o]fficials believe that this metric is key because involving firms that do not traditionally do business with DOD increases DOD’s opportunity to leverage commercial technology investments and to take advantage of

<sup>99</sup> Agencies are required to report contract actions that exceed the micro-purchase threshold to FPDS. (FAR 4.606.) Generally, the micro-purchase threshold is \$3,000, though there are exceptions. (FAR 2.101.)

<sup>100</sup> U.S. Government Accountability Office, *Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority*, p. 7.

<sup>101</sup> U.S. General Accounting Office, *DOD Has Implemented Section 845 Recommendations But Reporting Can Be Enhanced*, GAO-03-150, Oct. 2002, p. 2.

<sup>102</sup> *Ibid.*

commercial business processes, such as using an integrated team approach rather than a traditional prime-subcontractor structure.”<sup>103</sup>

A couple of DOD documents have shown that, at least historically, the number and percentage of traditional contractors have exceeded the number and percentage of nontraditional contractors participating in OTs. During the period 1990-1998, 203 new contractors (25%) and 607 traditional contractors (75%) participated in research OTs.<sup>104</sup> The same report revealed that 60 new contractors (21%) and 224 traditional contractors (79%) participated in prototype OTs from 1994 through 1998.<sup>105</sup> Another DOD IG report stated that, from FY1994 through FY2001, 94.5% of \$5.7 billion expended on 209 prototype OTs went to traditional government contractors.<sup>106</sup> Writing in the latter report, the IG stated that it had “found that other transactions have not attracted a significant number of nontraditional contractors to do business with the Government.... We find this trend disturbing, as other transactions do not provide the government a number of significant protections, ensure the prudent expenditure of taxpayer dollars, or prevent fraud.”<sup>107</sup>

In 2008, GAO reported that DHS officials had “confirmed that at least one nontraditional contractor participated in each other transaction agreement, generally as a partner to a traditional contractor,” adding that it (GAO) had not “assessed the extent of the involvement of nontraditional contractors or what portion of the funding they receive.”<sup>108</sup> Upon completing its review of 53 DHS OTs (for the period FY2004-FY2008), GAO reported that 44 involved nontraditional contractors.<sup>109</sup> The composition of project teams for phase one of DHS’s counter-man-portable air defense systems (MANPADS) project shows a mix of traditional and nontraditional contractors. The teams were as follows:

- Prime contractor: Northrop Grumman Systems Corporation. Other principal team members: FedEx Corporation and Northwest Airlines (both are nontraditional government contractors).
- Prime contractor: BAE Systems. Other principal team members: Honeywell International’s Air Transport Systems and Delta Airlines Technical Operations (both are nontraditional government contractors).

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<sup>103</sup> *Ibid.*, p. 7.

<sup>104</sup> U.S. Department of Defense, Office of the Inspector General, *Cost Charged to Other Transactions*, Report No. 2000-065, Dec. 27, 1999, available at <http://www.dodig.osd.mil/Audit/reports/fy00/00-065.pdf>, pp. i and 3. Although the report did not include a definition of “traditional contractor,” it identified new contractors as “contractors that had not done cost-based research and development with DoD previously.” (*Ibid.*, p. 5.)

<sup>105</sup> *Ibid.*

<sup>106</sup> Robert J. Lieberman, deputy inspector general, Department of Defense, statement for the record, House Committee on Government Reform, Subcommittee on Technology and Procurement Policy, “The Services Acquisition Reform Act (SARA) of 2002,” Report No. D-2002-064, Mar. 12, 2002, p. 11. The deputy inspector general did not attend the hearing, which was held on Mar. 7, 2002. A letter included in this report notes that the chairman of the subcommittee had agreed to the request of the subcommittee’s ranking member to include the deputy inspector general’s statement in the hearing record.

<sup>107</sup> *Ibid.*

<sup>108</sup> U.S. Government Accountability Office, *Status and Accountability Challenges Associated with the Use of Special DHS Acquisition Authority*, GAO-08-471T, Feb. 7, 2008, p. 10.

<sup>109</sup> U.S. Government Accountability Office, *Improvements Could Enhance Ability to Acquire Innovative Technologies Using Other Transaction Authority*, GAO-08-1088, Sept. 2008, p. 3.

- Prime contractor: United Airlines, Inc. (nontraditional government contractor).  
Other principal team members: Avisys, Inc. and ARINC Engineering Services.<sup>110</sup>

Some would argue, though, that the number of nontraditional contractors may have limited applicability as a metric or evaluation factor. Statutory OT authority for the FAA, DOT, TSA, and HHS does not require, let alone mention, the inclusion of nontraditional contractors in OTs. Additionally, for DOD, and the agencies whose statutory authority is based upon DOD's statute, the requirement to include a nontraditional contractor applies only to prototype OTs.

Although a statutory definition of "nontraditional defense contractor" does exist, it is unclear whether, and how, agencies with OT authority verify that a company is a nontraditional contractor.<sup>111</sup> GAO reported, in 2005, that DHS "relies on contractors to self-certify their status as ... nontraditional government contractors during agreement negotiation."<sup>112</sup> It is unclear whether DOD also permits self-certification, or verifies the status of participants in OT prototypes.

In response to GAO's statement that "84 of 97 agreements [for prototype OTs] went to traditional defense contractors," DOD officials noted that "the large number of traditional defense contractors at the prime contract level reflects the fact that Section 845 agreements are to be used on weapon or weapon systems-related projects."<sup>113</sup> Another possible explanation for the lower than expected number of nontraditional contractors, some might suggest, is that a group of traditional contractors would need to recruit only a single nontraditional contractor for their project in order for them to be eligible to participate in an other transaction.

In their study of DOD prototype OTs, Smith, Drezner, and Lachow encountered the same phenomenon: few nontraditional contractors were participating in OTs. Their research revealed, however, that "a major part of the new activity [that is, companies new to working with DOD] [came] from segments of large firms where the firm is a traditional supplier: names like 3M, Lucent, Motorola, Eastman Kodak, Oracle, and others. But major segments of those firms, using corporate funds to develop products for the commercial market, had previously been unwilling to work for DoD under the traditional contracting process."<sup>114</sup> In other words, a company that is a traditional contractor may have a segment or division that would be considered a nontraditional contractor, but the division's status as a nontraditional contractor is masked because it carries the name of a company that is known to be a traditional contractor. Authors of the RAND study advised that "[d]emonstrating that [new companies are working with DOD] cannot be done by simply counting new names on a list of contracts and instead requires a series of individual company studies."<sup>115</sup>

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<sup>110</sup> U.S. Government Accountability Office, *Homeland Security: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority*, GAO-05-136, Dec. 2004, p. 24.

<sup>111</sup> As noted above, "nontraditional government contractor" (or "nontraditional contractor") has the same meaning as the term "nontraditional defense contractor" as it is defined in Section 845(e) of P.L. 103-160.

<sup>112</sup> U.S. Government Accountability Office, *Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority*, p. 4.

<sup>113</sup> U.S. General Accounting Office, *DOD's Guidance on Using Section 845 Agreements Could Be Improved*, p. 14.

<sup>114</sup> Smith, Drezner, and Lachow, *Assessing the Use of "Other Transactions" Authority for Prototype Projects*, p. 17.

<sup>115</sup> *Ibid.*, p. 18.

## Other Assessments of OTs

In 2001, RAND published the results of a study that assessed DOD’s use of OT authority for prototype projects. The overarching question of the study, which had been requested by DOD, was: “Have the results justified the authority to perform projects without being required to comply with the historical accumulation of laws and procedures?”<sup>116</sup> In the following passage, the authors described the challenges they encountered in their effort to measure the outcomes of OTs:

One important element of our research was to develop a set of metrics that would measure the relative effects of OT on program outcomes and OT’s broader policy goals. While attempting to accomplish this, we were unable to develop any practical quantifiable metrics that others would find credible. The few quantifiable metrics we uncovered are either misleading (e.g., the number of nontraditional contractors) or unverifiable (e.g., cost avoidance). This result affects both the kind of information we can present and the kind of conclusions that can be drawn.

The reasons we did not find a practical approach to such metrics are classic in the field of acquisition policy analysis. We cannot perform a statistical comparison of a group of OT programs versus a group of conventional programs because there are too many variables and too few programs. Furthermore, the traditional metrics for such a comparison, and where we have a good historical database are elements such as cost growth and schedule slip; those are inappropriate for prototype programs that are inherently risky.

It is not practical to compare a single OT program with a counterpart conducted under traditional contracting methods because we never have an analog program that is remotely comparable. We do not have data on what the program would have been like under traditional methods. And finally, most of the programs in our rather small sample are still under way so we do not have true outcomes.

Thus, we rely largely on qualitative information in this analysis—the judgments and opinions of experienced managers who have run both kinds of programs. We are unable to analytically prove the validity of those judgments and opinions, for all the reasons noted here. For those same reasons, critics are unable to disprove the claimed benefits of OT agreements or to quantitatively demonstrate the superiority of another policy or process.<sup>117</sup>

Having catalogued the methodological challenges inherent in conducting quantitative research of OTs, the authors of the RAND study opted for a qualitative approach, relying on the “judgments and opinions of experienced managers.” Their assessment resulted in the following general conclusions:

- **“Important new industrial resources are now participating in DoD prototype projects because of the freedoms inherent in the OT process....** The important new industrial capability is drawn from segments of major firms that had been focusing exclusively on commercial projects but are now willing to apply their skills and products to military prototypes.”
- **“The benefits of OT are broader than just the addition of new industrial resources.** The flexibility of the OT process has been used to: (a) achieve better use of industry resources through innovative business arrangements and project

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<sup>116</sup> Ibid., p. 6.

<sup>117</sup> Ibid., pp. 9-10.

designs; (b) improve management of risks and uncertainties through freedom to modify the program as it evolves; and (c) achieve better value through cost sharing and reduction of transaction costs. Overall, more effort is being devoted to product and less to process.”

- **“Some risks to the government are incurred, but we believe the immediate rewards substantially outweigh the risks.** Risks arise mainly through relaxing DoD demands for access to the firm’s financial records, and ownership of intellectual property (patents and data). However, such relaxation of DoD rights applies to only a few of the OT prototype projects, mainly those involving products with strong commercial market potential and where the firm contributes a significant portion of the development resources. Even in those few projects, we believe the risks to DoD are limited. Verification of cost records becomes relatively unimportant when a firm is contributing a large share of project costs. Less-than-complete government ownership of intellectual property might lead to increased costs in future phases of the project, but those risks are limited. This is in part because the possible future costs should be discounted to some degree as they are in the future, and in part because they typically apply in areas where the technology is moving fast and where the value of specific kinds of knowledge can rapidly decay. *Furthermore, if the flexibility in negotiating intellectual property and financial audit clauses is removed from the OT authority, most if not all of the new industrial resources would again become unavailable to DoD.*”<sup>118</sup>

Noting that “these benefits [of OTs] are impossible to quantify in an analytically rigorous manner,” and that their “conclusions are mostly subjective and interpretive,” the authors added that the conclusions “do, however, represent the views of a broad cross section of DoD and industry project managers and agreement officers who have been managing OT prototype projects. The rewards of creating and managing a more efficient and effective program structure and management process have led those participants to be uniformly enthusiastic about the OT process and also advocate for its further use.”<sup>119</sup>

While the results of the RAND study are encouraging regarding the use of OT authority, some would suggest that the conclusions are not robust and cannot be generalized to other OTs. (The authors of the study did not attempt to generalize their results or conclusions.) As the authors noted, they were not able to use quantitative data (that is, metrics), but, instead, used qualitative data. The sources were “program managers and agreement officers in both government and industry,” who probably are the most knowledgeable personnel about OTs, but who also are stakeholders in the use of OT authority. Finally, the study focused on one federal agency and included only prototype OTs.

Other reports that comment on the use of OT authority are similar to the RAND report in that they do not include quantitative data and they present a generally favorable assessment of other transactions. In 1996, GAO offered a generally positive assessment of DOD’s use of other transactions (and cooperative agreements):

Cooperative agreements and other transactions appear to have provided DOD a tool to leverage the private sector’s technological know-how and financial investment. The

<sup>118</sup> Ibid., pp. viii-ix. (Boldface and italics in original.)

<sup>119</sup> Ibid., pp. 9 and 31.

instruments have attracted firms that traditionally did not perform research for DOD by enabling more flexible terms and conditions than the standard financial management and intellectual property provisions typically found in DOD contracts and grants. Thus, the instruments have contributed to reducing some of the barriers between the defense and civilian industrial bases. These instruments also appear to be contributing to fostering new relationships and practices within the defense industry, especially under projects being undertaken by consortia. By sharing the costs of projects, DOD has partially offset its own costs while generally enabling recipients to expand the scope of the projects undertaken.<sup>120</sup>

Another GAO report noted that “DOD reported to Congress that Section 845 agreements provided numerous benefits, though DOD generally offered no quantified measures of the reported benefits or the extent that such benefits were derived from individual agreements....”<sup>121</sup> GAO also mentioned that its own work and work conducted by the DOD IG had “found that Section 845 agreements have achieved mixed results in attracting commercial firms at either the prime or subcontract level.”<sup>122</sup> Consistent with the reports on DOD’s use of OT authority, DHS’s chief procurement officer testified that his department has a favorable view of OTs, but interjected that it is “too soon” to assess the results. An excerpt from his testimony is as follows:

Though the acquisition outcomes related to DHS’s use of other transaction authority have not been formally assessed, the department estimates that at least some of these agreements have resulted in time and cost savings. According to an S&T contracting representative, all of its current agreements are for development of prototypes, but none of the projects have yet reached production. Therefore, it is too soon to evaluate the results. However, the department believes that some of these agreements have reduced the time it takes to develop its current programs, as compared to a traditional FAR-based contract. In addition, DHS has stated that its two cost-sharing agreements for development of its Counter-MANPADS technology have resulted in savings of over \$27 million and possibly more. However, the extent to which these savings accrue to the government or to the contractor is unclear.<sup>123</sup>

It appears that a favorable consensus exists regarding the use of OT authority, which seems to be based largely on the experiences and observations of individuals who participate, or have participated, in OTs. Yet, because of the nature of OTs and the types of work performed pursuant to them, it also appears that no one has been able to devise, let alone conduct, a study that has the methodological features and rigor sufficient for producing reliable and valid results.

## **Additional Considerations for Evaluating OTs**

Evaluating how an agency uses OT authority and whether a particular OT was successful could involve additional factors and issues, including how “success” is defined or interpreted. A comprehensive evaluation would be a complex, challenging undertaking, as demonstrated by the work done by RAND. The following questions are examples of other possible avenues of inquiry regarding the use of OT authority:

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<sup>120</sup> U.S. General Accounting Office, *Acquiring Research by Nontraditional Means*, pp. 3-4.

<sup>121</sup> U.S. General Accounting Office, *DOD’s Guidance on Using Section 845 Agreements Could Be Improved*, p. 12.

<sup>122</sup> *Ibid.*, p. 13.

<sup>123</sup> U.S. Government Accountability Office, *Status and Accountability Challenges Associated with the Use of Special DHS Acquisition Authority*, p. 7.

- What does each company or organization bring to the project in terms of technology, manufacturing, or engineering resources?
- Excluding government agencies, to what extent do OT participants' resources reside in, or take advantage of, the commercial market?
- What methods, if any, are agencies using to detect fraud, waste, and abuse in OTs?
- What unintended consequences, if any, have agencies experienced as a result of using OTs?
- How do agencies and their OT partners address certain elements of other transactions, including intellectual property rights, cost accounting standards, and oversight?
- Does the acquisition workforce in agencies that have OT authority have the requisite skills, training, and experience to develop and administer OTs?<sup>124</sup>
- Has the “[l]ack of [government] ownership of the intellectual property resulting from OT development activities” adversely affected innovation or cost “because of limits on licensing the technology?”<sup>125</sup>
- For OTs that have been completed, did the terms and results of the transactions match the rationale for, and expected benefits of, the transactions?
- Has OT authority enabled agencies to acquire research, technologies, and prototypes that they would not have been able to acquire otherwise?<sup>126</sup>

## **Is OT Authority Used Appropriately?**

For some agencies, the use of OT authority is permitted only if agency personnel have determined that a contract, grant, or cooperative agreement will not work. For example, under 10 U.S.C. 2371, DOD may use an OT “when the use of a standard contract, grant, or cooperative agreement

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<sup>124</sup> In the following passage, the Department of Homeland Security’s chief procurement officer, while noting that OTs are useful, cautions that they are appropriate in only certain situations and emphasizes the necessity of having capable personnel administer OTs: “OTs, however, are not right for every situation, as the rights provided to the Government under an OT differ significantly from those provided under a traditional contract. While OTs are an extremely useful tool, they should only be used in appropriate situations by personnel that are knowledgeable of the advantages and disadvantages of OTs versus contracts and who are able to make informed decisions regarding which method is anticipated to provide better value to the Government.” (U.S. Congress, House Committee on Homeland Security, Subcommittee on Emerging Threats, Cybersecurity and Science and Technology, “Other Transaction Authority: Flexibility at the Expense of Accountability?” statement of Thomas W. Essig, chief procurement officer, Department of Homeland Security, unpublished hearing, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., Feb. 7, 2008, p. 8.) Regarding the need for experienced, skilled acquisition personnel to establish and administer other transactions, GAO wrote: “The unique nature of other transaction agreements requires staff with experience in planning and conducting research and development acquisitions, strong business acumen, and sound judgment to enable them to operate in a relatively unstructured business environment.” (U.S. Government Accountability Office, *Improvements Could Further Enhance Ability to Acquire Innovative Technologies Using Other Transaction Authority*, p. 14.)

<sup>125</sup> Smith, Drezner, and Lachow, *Assessing the Use of “Other Transactions” Authority for Prototype Projects*, p. 3.

<sup>126</sup> The source of some items in this list was the following: U.S. Congress, House Committee on Homeland Security, Subcommittee on Emerging Threats, Cybersecurity, and Science and Technology, statement of L. Elaine Halchin, unpublished hearing, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., Feb. 7, 2008, pp. 8-9.



for such project is not feasible or appropriate.”<sup>127</sup> GAO has determined that its bid protest authority does not include non-procurement vehicles (such as OTs), but it will review “a timely protest that an agency is improperly using a cooperative agreement or other non-procurement instrument ... where a procurement contract is required....”<sup>128</sup> The purpose of the review is “to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations.”<sup>129</sup>

The Army’s Future Combat Systems (FCS) program is an example of a project in which, initially, the use of OT authority was considered appropriate, but, as the project progressed, questions arose, and, ultimately, the OT was replaced by a contract. The project began in May 2003, when

the Army and Boeing entered into an ‘other transaction agreement’ for the system development and demonstration phase of the FCS program.... The Army’s rationale for using such an agreement was to encourage innovation and to use its wide latitude in tailoring business, organizational, and technical relationships to achieve the program goals.<sup>130</sup>

Concerned about the continued use of an OT for the FCS program, Senator John McCain, then chairman of the Subcommittee on Airland, Senate Armed Services Committee, expressed his views at a hearing in 2005:

Since [the passage of the National Defense Authorization Act for 1994, which extended OT authority to prototype projects], DOD officials and industry have repeatedly requested that we extend “Other Transaction Authority” to production contracts. Congress has consistently refused to do so, because we have taken the view that with hundreds of millions or even billions of dollars at stake, the taxpayer needs the protections built into the traditional procurement system. While we recognize that there may be [a] need to continue doing business with non-traditional contractors in the production phase of a program, we have preferred to address this issue through targeted waivers that are limited to those companies who need them. Now, the Army has put forward a program that uses ‘Other Transaction Authority’ for a \$20 billion contract, a figure much greater than the Congress intended and [it is] unprecedented.<sup>131</sup>

Initially, the Army continued to defend its use of OT authority, but eventually concurred with the Senator McCain. As reported by *Federal Contracts Report*, the Assistant Secretary of the Army for Acquisition, Logistics and Technology “defended the Army’s use of OTA for FCS, explaining that DARPA initially used OTA to define an FCS concept for the Army, and that the Army had continued to use OTA because it ‘allows us to attract the best and brightest of our nation’s industry and their subcontractors in this endeavor.’”<sup>132</sup> Several weeks later, following a meeting

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<sup>127</sup> 10 U.S.C. §2371(e)(2).

<sup>128</sup> U.S. Government Accountability Office, Exploration Partners, LLC, GAO bid protest B-298804, Dec. 19, 2006, p. 5.

<sup>129</sup> Ibid.

<sup>130</sup> U.S. Government Accountability Office, *Role of Lead Systems Integrator on Future Combat Systems Program Poses Oversight Challenges*, GAO-07-380, June 2007, p. 4.

<sup>131</sup> Senator John McCain, “Opening Statement of Senator John McCain, Chairman, Subcommittee on Airland, Army Transformation and the Future Combat System,” Mar. 16, 2005, available at [http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord\\_id=8E05F19E-3521-4789-BC59-379C19F8CC29](http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord_id=8E05F19E-3521-4789-BC59-379C19F8CC29).

<sup>132</sup> “McCain Questions Army’s Use of OTA as FCS Contracting Vehicle,” *Federal Contracts Report*, Mar. 22, 2005, available at <http://www.bna.com>, p. 297.

with the Secretary of the Army, Senator McCain issued the following press release, which described the resolution of the issue:

In a March 31, 2005 letter to the Army Secretary, I outlined concerns about whether taxpayers' interests were adequately protected in the Army's Future Combat Systems (FCS) program. In a meeting today, the Army Secretary indicated to me that he completely agreed with my concerns. In so doing, the Army Secretary presented an aggressive strategy centered around reconstructing the 'other transaction authority' (OTA) agreement supporting this multi-billion dollar program. Most notably, the Army indicated that it would convert the OTA to a FAR-based contract, with provisions typically used to protect taxpayers' interests and help prevent fraud, waste and abuse specifically included.<sup>133</sup>

As reported by GAO, "[i]n March 2006, the Army definitized a FAR-based contract with Boeing for the remainder of FCS development.... All of the work performed from May 2003 through September 2005 is accounted for under the prior other transaction agreement, and all work after September 2005 is included under the new contract."<sup>134</sup>

It is unclear whether other OTs, if any, have been used when a contract (or cooperative agreement or grant) should have been used. The visibility of the FCS program may have aided in identifying the possible misuse of OT authority.

## Policy Options

Evidence of congressional interest in the use of other transaction authority includes a congressional hearing in 2008 on DHS's use of OT authority and, since the 104<sup>th</sup> Congress, the enactment of legislation that has provided OT authority to six specific agencies. Additionally, under P.L. 108-136, most, if not all, federal agencies may use OT authority under certain circumstances.

The inapplicability of the FAR, government cost accounting standards, and certain procurement statutes to other transactions may contribute, in part, to congressional interest in OT authority. Some might view the inapplicability of requirements and procedures designed to safeguard the government's interests and provide for transparency as a cause for concern, although individual OTs might incorporate measures designed to protect the government.<sup>135</sup> The challenges involved in developing and implementing a methodologically rigorous evaluation program for OTs, which was discussed above, might also contribute to congressional interest. In addition to maintaining the status quo, other policy options include the following:

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<sup>133</sup> Senator John McCain, "Statement from Senator John McCain on the Future Combat Systems Program," Apr. 5, 2005, available at [http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord\\_id=48146F40-7C53-4589-9185-963198F356FC](http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=48146F40-7C53-4589-9185-963198F356FC).

<sup>134</sup> U.S. Government Accountability Office, *Role of Lead Systems Integrator on Future Combat Systems Program Poses Oversight Challenges*, p. 4.

<sup>135</sup> For example, the Department of Homeland Security used firm-fixed price agreements with payable milestones in 44 of the 53 other transactions GAO reviewed for its 2008 report on DHS's use of OT authority. The use of such agreements helps to mitigate financial and program risks because "the costs are fixed at the time the agreements are established." Another example from DHS is the department's guidance on when to include financial audit provisions in OTs. (Ibid., pp. 3 and 11.)

- Eliminate OT authority for some or all agencies that now have the authority. While the elimination of this authority would address some critics' concerns, proponents might argue that the termination of OT authority could affect the ability of agencies to obtain, or advance, needed research, technologies, and prototypes.<sup>136</sup>
- Depending upon whether an agency's statutory authority for using OTs includes a sunset provision, add, or continue, a sunset provision. Inclusion of a sunset provision could trigger a periodic review of each applicable agency's use of OT authority and the associated benefits and challenges. On the other hand, agencies whose statutory authority does not include a sunset provision might argue that the possibility of not having their OT authority renewed (via a subsequent sunset provision) could affect the willingness of private sector partners to engage in OTs.
- Identify other agencies that might benefit from engaging in other transactions, and provide OT authority to them. This option could involve establishing a pilot program for one or more agencies. If feasible, the pilot program could be designed to facilitate the evaluation of the use of OT authority.
- Require all OTs to include at least one nontraditional contractor. Part of the argument for OT authority is that the government needs to be able to work with companies or organizations that are unable or unwilling to comply with the FAR and certain procurement statutes, which suggests that the inclusion of at least one nontraditional contractor in each OT might be a reasonable requirement. However, it is possible that this requirement could preclude the government from engaging in OTs that do not attract any nontraditional contractors.
- Develop accounting standards and intellectual property rights regulations specifically for other transactions. Ideally, OT-specific accounting standards would be less burdensome than the existing cost accounting standards while helping to ensure that there is a greater degree of accountability and transparency than might currently exist. IP regulations developed specifically for OTs would address the concerns of OT participants while helping to protect the government's interests.<sup>137</sup>

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<sup>136</sup> The following excerpt from a 2002 *Texas Intellectual Property Law Journal* article summarizes one argument for OT authority: "... the need for new weapon systems has increased: a modern generation of enemies (like Al Qaeda) requires different military responses and the speed of technological innovation has meant that legacy systems become obsolete at an increasingly rapid pace. In addition, the Department of Defense in recent years has suffered from a declining budget, and thus has financial incentives to outsource as much work as possible. This means that there are more outside contractors performing functions once performed by the government. Thus, while the defense community is growing smaller, the Department of Defense has become increasingly reliant on contractors, and the commercial sector in general, to fulfill its needs. Within the world of defense research and development, these same forces are at work. The need for new weapons systems has required more government-sponsored research and development. At the same time, as the number of government laboratories is reduced, there are fewer and fewer internal sources to which the Department of Defense can turn for advanced weapons systems. It is for this reason that the Department of Defense is increasingly interested in attracting new commercial partners.... Simply put, the federal government can no longer rely on traditional government contractors to perform all of the functions that it requires. In order to cope with this new scenario, the Department of Defense has actively recruited new contractors to produce its weapons systems—to fill the void left by the vanishing traditional contractors." (David S. Bloch and James G. McEwen, "'Other Transactions' with Uncle Sam: A Solution to the High-Tech Government Contracting Crisis," pp. 208-209.)

<sup>137</sup> Although some agencies with OT authority might already incorporate accounting standards or IP rights provisions in (continued...)

- Similar to the preceding option, develop a hybrid procurement vehicle that would incorporate some of the safeguards found in the FAR and certain procurement statutes (modified to be less burdensome than current requirements and procedures), yet would retain the desirable features of other transactions.
- Similar to the Commercial Activities Panel (CAP), which was convened by GAO to examine the government's competitive sourcing policies and procedures, establish a panel to examine the government's use of other transaction authority.<sup>138</sup>
- Establish a government website where agencies would disclose OT opportunities and provide information about established OTs.<sup>139</sup> This website would be similar to two of the government's procurement websites: Federal Business Opportunities (FedBizOpps), where agencies post solicitations; and the Federal Procurement Data System (FPDS), where agencies post information about contract actions.<sup>140</sup> A related option would be to modify FedBizOpps and FPDS to accommodate information regarding other transactions.
- Require agencies to submit reports on a regular basis to appropriate congressional committees regarding their use of OT authority, including benefits and challenges. While this option might ensure that Congress is provided regularly with information regarding agencies' use of OTs, this requirement might impose a burden on agencies.
- Similar to a requirement found in 10 U.S.C. §2371 note, link the level of approval authority for OTs within an agency to the expected cost of the other transaction.

In 2002, DOD's deputy inspector general offered a series of recommendations, which are as follows:

- If civilian agencies receive OT authority, the "legislation [should] be tailored so that the other transactions vehicle is only used to attract companies which have not traditionally done business with the Government and for technologies, research capabilities or other processes which are needed by the federal agency and are not available through traditional acquisition vehicles."
- "For research other transactions ... the agency head [should] be required to make a determination that an other transaction is necessary to induce a nontraditional contractor to provide technologies, research capabilities, or other processes which are needed by the agency."

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(...continued)

their other transactions, this policy option might, if implemented, ensure that all OTs include cost accounting standards and IP rights provisions.

<sup>138</sup> See Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* (Washington: U.S. General Accounting Office, 2002), available at <http://archive.gao.gov/f0502/a03209.pdf>.

<sup>139</sup> The Department of Homeland Security has updated its own procurement database "to include some information on other transaction agreements." However, "the capacity to capture information on nontraditional contractors is limited." (U.S. Government Accountability Office, *Improvements Could Further Enhance Ability to Acquire Innovative Technologies Using Other Transaction Authority*, p. 3.)

<sup>140</sup> The two websites are <http://www.fbo.gov> and <https://www.fpds.gov>, respectively.

- “Other transactions for prototype[s] should be limited to developing items which are ripe for development as the result of research conducted pursuant to a research other transaction.”
- “...[A]udit access rights [should] be given to the Government, to include the Comptroller General, the agency Inspectors General, and departmental contract audit agencies, such as the Defense Contract Audit Agency.”
- “If enacted, other transaction authority for civilian agencies should be provided as a pilot program of limited duration to ascertain whether it actually attracts significant numbers of nontraditional government contractors, whether it results in the acquisition of needed technologies and services, and whether additional safeguards should be enacted.”<sup>141</sup>

## Conclusion

Other transaction authority originated in 1958, but it has been expanded greatly in recent years, as seven specific agencies were also given statutory authority to engage in OTs. Although little, if any, information is publicly available regarding some agencies’ use of OT authority, articles and reports that comment on DOD’s and DHS’s use of OTs indicate that both of these agencies consider OT authority to be a valuable, useful tool. The authors of a RAND study appear to have reached the same conclusion yet, at the same time, they acknowledge and describe the methodological challenges involved in evaluating the use of OT authority. Thus, while some embrace OTs as useful to the federal government, it does not appear that anyone has yet devised a reliable method for conducting an evaluation that would yield quantifiable, objective data.

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<sup>141</sup> Lieberman, “The Services Acquisition Reform Act (SARA) of 2002,” p. 12.