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Congressional Research Service
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Subcommittee on Emerging Threats, Cybersecurity, and Science and Technology
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Other Transaction Authority: Flexibility at the Expense of Accountability?

Mr. Chairman and members of the Subcommittee, thank you for inviting me here today to offer testimony regarding the subject matter of this hearing, other transaction authority. I am Elaine Halchin, an Analyst in American National Government with the Congressional Research Service of the Library of Congress.

Origin and Expansion of Other Transaction (OT) Authority

Other transaction (OT) authority originated 50 years ago.[1] The Space Act of 1958, as amended, authorized the National Aeronautics and Space Administration (NASA) to "enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work ...." However, other transaction authority, as it exists today, began in 1989.[2] With the enactment of Public Law 101-189, the Department of Defense (DOD) was authorized to use cooperative agreements and "other transactions," through the Defense Advanced Research Projects Agency (DARPA), for advanced research projects.[3] Subsequent legislation broadened this authority so that, first, it could be used for prototype projects and, second, it could be used throughout DOD, including the military departments.[4]

Other executive departments that have been authorized, by statute, to engage in "other transactions" are the Department of Transportation (DOT), the Department of Energy (DOE), and the Department of Homeland Security (DHS).[5] Additionally, executive agencies that engage in research as well as research and development projects that have the potential to facilitate defense

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[1] 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 (Chicago: 2000), p. 3. The statutory authority for NASA to engage in "other transactions" may be found at 42 U.S.C. §2473 (P.L. 85-569; 72 Stat. 426, at 430).

[2] Nancy O. Dix, Fernand A. Lavallee, 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, fall 2003, p. 25. The statutory authority for DOD to engage in "other transactions" may be found at 10 U.S.C. §2371 (P.L. 101-189, as amended; 103 Stat. 1352, at 1403).

[3] Sec. 251(a) of P.L. 101-189.

[4] Sec. 845 of P.L. 103-160; 107 Stat. 1547, at 1721. The authority for DOD to use other transaction authority for advanced research and prototype projects is codified in 10 U.S.C. §2371 and 10 U.S.C. §2371 note, respectively.

[5] The statutory authority for each department is as follows: Department of Transportation, 23 U.S.C. §502; P.L. 105-178; 112 Stat. 107, at 422; the Department of Homeland Security, P.L. 107-296; 116 Stat. 2135, at 2224; and the Department of Energy, 42 U.S.C. §7256; P.L. 109-58; 119 Stat. 594, at 932.

against, or recovery from, acts of terrorism or nuclear, biological, chemical, or radiological attacks are authorized to engage in "other transactions."[6]

Rationale for Other Transaction Authority

Providing OT authority to DARPA and, later, expanding the authority for use within DOD, was part of an effort by the Defense Department and Congress to seek ways to better capitalize on the commercial technology and industrial base. This effort was based on the argument that the technical capabilities of the commercial technology and industrial base exceeded those of the traditional defense sector in some areas, and cost less due to greater economies of scale and pre-existing investments.[7] One element of this effort was to encourage greater cooperation between DOD and companies (or vendors) in developing new technologies of mutual interest. Specifically, the purpose of OT authority for DOD, in particular, was, and "is to enhance the state of the art, demonstrate technology, transfer technology, establish industrial capabilities, and otherwise advance national capabilities so that the United States' technological base will be capable of supporting the most advanced defense systems in the future."[8]

However, the regulations and statutes governing traditional procurement methods were a barrier to some businesses. Companies that were unable, or unwilling, to comply with the *Federal Acquisition Regulation* (FAR) and procurement statutes did not enter into contracts with the federal government. For example, prior to the enactment of OT authority, DARPA missed "numerous opportunities to contract with companies that were developing some of the most promising new technologies" reportedly because they had "neither the capability nor the desire to do business with the Government through the procurement process."[9] Two particular areas of concern for some companies were data rights and the federal government's cost accounting standards. As the value of intellectual property, or data, has grown, companies are said to be less willing "to accept the standard clauses [on data rights] required by ... federal procurement laws and regulations."[10] As for cost accounting standards, the often-heard complaint was that commercially oriented firms would have to establish separate divisions or contracting functions to accommodate the relatively unique federal cost accounting standards.[11] Other transaction authority was a wholesale way of waiving

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[6] 41 U.S.C. §428a note; Sec. 1441(a)(B) of P.L. 108-136; 117 Stat.1392, at 1673.

[7] One of the many influential recommendations of the President's Blue Ribbon Commission on Defense Management (known as the Packard Commission), in its report *A Quest for Excellence* (June 1986),was that the Department of Defense should expand the use of commercial products. See also Defense Science Board, *Use of Commercial Components in Military Equipment*, 1986 and 1989; The Center for Strategic and International Studies, *Integrating Commercial and Military Technologies for National Strength: An Agenda for Change* (Washington: 1991); and U.S. Office of Technology Assessment, *Assessing the Potential for Civil-Military Integration*, OTA-ISS-611, 1994.

[8] Nancy O. Dix, Fernand A. Lavallee, 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. 26.

[9] Richard N. Kuyath, "The Untapped Potential of the Department of Defense's 'Other Transaction' Authority," *Public Contract Law Journal*, vol. 24, summer 1995, pp. 526-527.

[10] Diane M. Sidebottom, "Intellectual Property in Federal Government Contracts: The Past, the Present, and One Possible Future," *Public Contract Law Journal*, vol. 33, fall 2003, p. 65.

[11] See Center for Strategic and International Studies, *Integrating Commercial and Military Technologies for*

(continued...)

these and other procurement requirements that served as barriers to some companies. In addition, it was anticipated that "other transactions" would encourage cost sharing, which would result in savings. Commercial firms agree to cost sharing because the technology under development benefits the company commercially, and, typically, commercial markets are much larger than the government market.

Applicability of the *Federal Acquisition Regulation* and Procurement Statutes to Other Transactions

Since an "other transaction" is not a contract, the *Federal Acquisition Regulation*, a number of procurement statutes, and the government's Cost Accounting Standards do not apply to such transactions.[12] Determining which procurement statutes do not apply to "other transactions" is a lengthy, involved process. In 2000, an ad hoc working group affiliated with the Public Contract Law Section of the American Bar Association (ABA) published a monograph on the applicability of relevant statutes to DOD's other transaction authority. Although the monograph includes some statutes and provisions that apply only to DOD procurement, the analysis of other statutes is applicable to non-DOD agencies.

Upon analyzing 30 statutes or statutory provisions, the working group determined that 20 of them do not apply to "other transactions," and two others that do not apply to research OTs may apply to prototype OTs.[13] The list of statutes, shown in **Table 1**, includes, for example, the Competition in Contracting Act, the Procurement Protest System, and the Procurement Integrity Act. Finally, it should be noted that, in describing the challenges of analyzing each statute, the Ad Hoc Working Group pointed out that its analysis of statutes may not be conclusive in some cases.[14]

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

Statute or Statutory Provision[a]	Purpose of Statute or Statutory Provision[b]
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."

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[11] (...continued)
National Strength: An Agenda for Change. Another barrier was the use of military specifications (MilSpecs).

[12] Executive agencies, contractors, and subcontractors are required to use the cost accounting standards developed by the Cost Accounting Standards Board (CASB) "in estimating, accumulating, and reporting costs in connection with pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurement within the United States in excess of $500,000." (U.S. Office of Management and Budget, "Cost Accounting Standards Board," available at [http://www.whitehouse.gov/omb/procurement/casb.html].) The CASB is located within the Office of Management and Budget, Office of Federal Procurement Policy.

[13] 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*, pp. 27-31.

[14] Ibid., p. 26.

Statute or Statutory Provision[a]	Purpose of Statute or Statutory Provision[b]
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 R&D contractors] 10 U.S.C. §2353	"To provide authority for acquisition, construction, or furnishing of test facilities or equipment in connection with R&D contracts."
Contracts: indemnification provision 10 U.S.C. §2354	"To authorize the Military Departments to include provisions in DOD R&D contracts indemnifying the contractor for certain claims and losses."
Prohibition against doing business with certain offerors 10 U.S.C. §2393	"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."
Major weapon systems: contractor guarantees 10 U.S.C. §2403	"To provide warranty protection to the Government for major weapons systems it acquires."
Prohibition on persons convicted of defense contract related felonies and related criminal penalties as defense contractors 10 U.S.C. §2408	"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."
Contractor employees: protection from reprisal for disclosure of certain information 10 U.S.C. §2409	"To prohibit contractors from discharging, demoting, or discriminating against employees who disclose substantial violations of law related to contracts."
Limitation on the use of appropriated funds to influence certain Federal contracting and financial transactions 31 U.S.C. §1352	"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."

Statute or Statutory Provision[a]	Purpose of Statute or Statutory Provision[b]
Anti-Kickback Act 41 U.S.C. §§51-58[c]	"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."
Procurement Integrity Act 41 U.S.C. §423	"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."
Walsh-Healey Act, 41 U.S.C. §§35-45[c]	"To require all covered contracts to contain stipulations regarding minimum wages, maximum hours, safe and sanitary working conditions, child labor, and convict labor requirements."
Drug-Free Workplace Act 41 U.S.C. §§701-707	"To eliminate any connection between drug use or distribution and Federal contracts, cooperative agreements, or grants."
Buy American Act 41 U.S.C. §10a-10d	"To provide a preference for domestic products in government acquisition for public use."
Bayh-Dole Act 35 U.S.C. §§200-212	"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."[d]
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, (Chicago: 2000), pp. 27-31.

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*, pp. 27-29.

b. Ibid., pp. A-1-A-57.

c. This provision or statute does not apply to "other transactions" involving research and development, but it may apply to "other transactions" involving prototypes. (Ibid., pp. 30-31.)
d. The phrase "first actually reduced to practice" refers to a working model of the idea or invention.

Concerns Regarding the Use of Other Transaction Authority

Freedom from federal procurement requirements is an overarching advantage of the use of OT authority, but, at the same time, problems associated with "other transactions" may follow from this exemption. In the absence of certain statutes and regulations that apply to traditional procurements, agencies and companies that engage in OTs might face uncertainties, and increased risk, with regard to some issues or procedures, such as funding limitations, dispute resolution, and data rights.[15] Additionally, the protections and tools that contracting officers have "to negotiate fair and reasonable prices, and to ensure that taxpayer dollars are expended for costs which are allowable and consistent with federal procurement policies" — such as the Truth in Negotiations Act, cost accounting standards, and various audit provisions — do not apply to "other transactions."[16] These are some of the tools "that have provided contracting officers' visibility into contractor costs and help the government ensure that prices negotiated and eventually paid are reasonable."[17] As the DOD Inspector General (IG) found, even within the contracting office, problems may arise. The IG reported that "some contracting officers [failed:] (a) to sufficiently document the justification for using [research and development] OTs, (b) to document the review of cost proposals, and (c) to monitor actual research costs."[18] Thus, the flexibility inherent in OT authority, which is a significant advantage of using this method, might also result in fewer protections and decreased transparency and accountability when compared to conventional procurements.

How Well Does OT Authority Work?

A DOD IG summary of several audits that it had conducted found that "other transactions" had not attracted a significant number of nontraditional defense contractors.[19] Data for the period FY1994 through FY2001 showed that traditional defense contractors received nearly 95% of the $5.7 billion in funds for 209 prototype "other transactions."[20]

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[15] Ibid., p. 2; U.S. Department of Defense, Office of the Inspector General, "Statement for the Record, Robert J. Lieberman, Deputy Inspector General, Department of Defense, to the Subcommittee on Technology and Procurement Policy, House Committee on Government Reform, on The Services Acquisition Reform Act (SARA) of 2002," Mar. 12, 2002, Report No. D-2002-064, p. 14.

[16] Ibid., p. 11.

[17] Ibid.

[18] Ibid., p. 12.

[19] 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 [Sec. 845 of P.L. 103-160] 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 $500,00 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.) Apparently, this definition also applies to "other transactions" that involve research.

[20] U.S. Department of Defense, Office of the Inspector General, "Statement for the Record, Robert J. (continued...)

The DOD IG also provided the following suggestions involving OT authority: (a) consider the use of OT authority only when it is clear that the agency cannot acquire the goods, services, and technologies through existing vehicles (for example, contracts, grants, or cooperative agreements); and (b) tailor OT legislation so that such transactions are used only to attract nontraditional contractors and only for transactions involving technologies, research capabilities, and processes that are not available through traditional procurement methods.[21] The DOD IG also recommended that audit access rights be given to the government for OTs, and that, for research OTs, agency heads be required to make a determination that an OT is necessary to convince a nontraditional contractor to engage in a project with the government. Additionally, the determination would include a finding that a contract, grant, or cooperative agreement is not appropriate or feasible and a statement that waivers to procurement regulations and statutes are not sufficient for meeting the agency's needs.[22]

In 2002, the RAND Corporation evaluated the effectiveness of using other transaction authority for prototypes within DOD.[23] Although the study focused on prototypes, it seems likely that most of the findings of the study might equally apply to research projects.[24] Specifically, the RAND study asked the following question: Do the benefits expected from waiving the *Federal Acquisition Regulation* justify the possible costs that might be incurred? The study examined 21 of the 72 prototype projects that, at the time of the study, had been awarded using other transaction authority. The study noted the difficulties involved in devising metrics for determining whether "other transaction" projects achieved policy objectives. In this study, the number of nontraditional contractors was ruled out as a potential metric for being an unreliable measure. Another potential metric, cost avoidance, was rejected for being unverifiable. Additionally, the authors of the study noted that it is not practical to compare "other transactions" with traditional procurements for two reasons: (a) it is impossible to find truly analogous projects; and, (b) there is no way to determine what would have occurred if a different procurement method had been used. Therefore, the study relied largely on the judgments and opinions provided by DOD and contractor program managers who had experience with both types of OTs.[25] The RAND study concluded that, (a) DOD had gained access to important new industrial resources; (b) the flexibility permitted by other transaction authority meant that more of the project cost was spent on the product than on the acquisition process; and, (c) the government did incur some risks, but those risks were low.

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[20] (...continued)
Lieberman, Deputy Inspector General, Department of Defense, to the Subcommittee on Technology and Procurement Policy, House Committee on Government Reform, on The Services Acquisition Reform Act (SARA) of 2002," Mar. 12, 2002, Report No. D-2002-064, pp. 11-12.

[21] Ibid., p. 12.

[22] Ibid.

[23] RAND, National Defense Research Institute, Document Briefing, *Assessing the Use of "Other Transactions" Authority for Prototyping Project* (Santa Monica: 2002).

[24] Another earlier assessment of DARPA's use of "other transactions" for research and development was prepared for DARPA by the Institute for Defense Analyses, *Participant Views of Advanced Research Projects Agency "Other Transactions*," IDA Document D-1793, Nov. 1995. The observations recorded in this report are generally similar to those in the RAND report; i.e., flexibility was important, and the work would not have occurred without using "other transactions" agreements.

[25] RAND, National Defense Research Institute, Document Briefing, *Assessing the Use of "Other Transactions" Authority for Prototyping Project*, pp. 9-10.

Another finding of the study was that those transactions in which data rights and cost accounting standards had been loosened the most involved firms that expected the commercial sector to be the main market for the technology under development with the government. These firms had already expended their own resources on the technology, and they brought their own commercial assets and funds to the government project. The study suggested that applying acquisition regulations to this type of project would most probably mean that such projects would not be accomplished.[26]

On the one hand, it is not possible to determine conclusively whether the use of other transaction authority accomplishes what is intended, including higher performance and less expensive government end-products. However, the RAND study and the judgments of many people involved in OTs suggest that the use of OT authority does expand government access to commercial technology and production capacity and involves lower transaction costs and reduced risks for the projects.

DHS's Experience with Other Transaction Authority

Evaluating how DHS has used other transaction authority, and whether the use has been successful, would be a complex undertaking for several reasons, including some of the challenges encountered by RAND in the course of conducting its study. Adding to the complexity of such an undertaking would be the need to do field research to obtain information that is sufficiently detailed and comprehensive. An evaluation might include a series of questions such as these:

- What companies are involved in OT projects?
- What does each company bring to the project in terms of technology, manufacturing capability, or engineering resources?
- To what extent do each company's resources reside in, or take advantage of, the commercial market?
- How much cost sharing, if any, has occurred?
- Has the department experienced any unintended consequences as a result of using OT authority?
- How have DHS and its partners addressed certain elements of their transactions, such as data rights and cost accounting standards?
- For OTs that have been completed, did the terms and results of the transactions match the rationale for and expected benefits of the transactions?
- How many nontraditional government contractors and traditional contractors have participated in DHS transactions?[27]

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[26] Ibid., pp. 27-28.

[27] The term "nontraditional government contractor" has the same meaning as "nontraditional defense contractor," which is defined in Sec. 845(e) of P.L. 103-160 and 10 U.S.C. §2371 note. The definition also

(continued...)

- Finally, based on these questions and possibly others, has OT authority enabled DHS to acquire research, technologies, and prototypes that it would not have been able to acquire otherwise?

This concludes my remarks. Thank you for your attention. I am accompanied by a colleague, Dr. John Moteff, who is a Specialist in Science and Technology Policy with CRS. We welcome your questions.

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[27] (...continued)
is included above, in another footnote.

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Summary of Testimony

Other transaction (OT) authority originated 50 years ago, with the passage of the Space Act of 1958. The statutory OT authority that was granted then to the National Aeronautics and Space Administration has since been expanded to include the Department of Defense, the Department of Energy, the Department of Homeland Security, and the Department of Transportation. Other federal agencies that engage in research also may use OT authority for projects designed to facilitate defending against or recovering from acts of terrorism, or nuclear, biological, chemical, or radiological attacks. The rationale for OT authority is, in short, to induce companies with research capabilities, technologies, or prototypes that are needed by the federal government to enter into projects with the federal government. These are companies that are unwilling, or unable, to comply with the *Federal Acquisition Regulation* (FAR) and procurement statutes. The FAR and certain procurement statutes do not apply to "other transactions." An ad hoc working group associated with the Public Contract Law Section of the American Bar Association (ABA) analyzed 30 statutes and determined that 20 of them do not apply to "other transactions." Concerns regarding the use of OT authority flow from the loss of procurement requirements. For example, cost accounting standards and audit requirements do not apply to OTs. It is difficult to evaluate how successful such transactions have been. While a few studies have noted some problem areas and have suggested ways to improve the use of OT authority, some experts in the government and the private sector appear to agree generally that the use of OT authority does enable agencies to acquire needed technology, research, or prototypes. Evaluating how DHS has used OT authority, and the success of its OT projects, would be challenging.

Biographical Profile

L. Elaine Halchin is an Analyst in American National Government with the Congressional Research Service (CRS) of the Library of Congress. Her principal areas of research responsibility are government procurement, sports, the Senior Executive Service, and government travel policy. She received a B.A. from Bucknell University, an M.P.A. from the University of Pittsburgh, and a Ph.D. from Syracuse University. Previously, she served for 11 years as an officer in the U.S. Air Force.