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DEPARTMENT OF
HOMELAND SECURITY
Status and Accountability
Challenges Associated
with the Use of Special
DHS Acquisition Authority

Statement of John K. Needham, Acting Director,
Acquisition and Sourcing Management





Highlights of [GAO-08-471T](#), a report to the Subcommittee on Emerging Threats, Cybersecurity, and Science and Technology, Committee on Homeland Security Committee, House of Representatives

Why GAO Did This Study

Other transaction authority was created to enhance the federal government's ability to acquire cutting-edge science and technology by attracting nontraditional contractors that have not typically pursued government contracts. The Homeland Security Act of 2002 granted the department the temporary authority to enter into other transactions for research and prototype projects for a period of 5 years. The Consolidated Appropriations Act of 2008 extended this authority until September 30, 2008.

This testimony discusses (1) the extent to which DHS has used its other transaction authority, (2) the status of DHS's implementation of GAO's previous recommendations, and (3) the accountability challenges associated with the use of these agreements.

What GAO Recommends

While GAO is not making recommendations in this testimony, GAO has made recommendations over the past few years to help improve DHS's Science and Technology Directorate's use its other transaction authority. The department has generally concurred with these recommendations and has taken action to improve its use of other transaction authority, but has not fully addressed all of GAO's recommendations.

To view the full product, including the scope and methodology, click on [GAO-08-471T](#). For more information, contact John K. Needham at (202) 512-4841 or needhamjk1@gao.gov

DEPARTMENT OF HOMELAND SECURITY

Status and Accountability Challenges Associated with the Use of Special DHS Acquisition Authority

What GAO Found

DHS entered into 37 other transaction agreements between fiscal years 2004 and 2007, most of which were entered into in the first 2 years. Though it has since used this authority less frequently, it continues to obligate funds for its earliest agreements. Furthermore, about 77 percent of the dollars spent on these agreements have been for 7 of DHS's 37 agreements. Contracting representatives also told us that all of the agreements to date were for prototype projects and that each agreement included at least one nontraditional contractor. GAO plans further review of DHS's use of other transaction agreements as required by the Homeland Security Act of 2002.

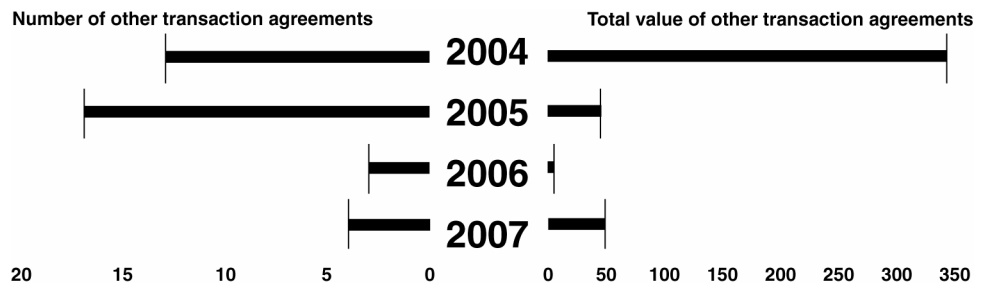
DHS has made efforts to improve its use of other transaction agreements and to prevent conflicts of interest. The department has taken the following steps to address prior GAO recommendations including:

- creating guidance on when to include audit provisions in other transaction agreements;
- creating a training program on using these agreements; and
- improving controls over conflicts of interest.

GAO also recommended that DHS capture knowledge gained from the agreements it has entered into. The department has compiled lessons learned from the Department of Defense, but the document is not related to DHS's experience. Furthermore, while DHS created guidance on when to include audit provisions in agreements, its guidance only applies to certain prototype projects and only in certain circumstances.

Risks inherent with the use of other transaction agreements create several accountability challenges. These challenges include attracting and ensuring the use of nontraditional contractors, acquiring intellectual property rights, ensuring financial control, and maintaining a skilled acquisition workforce with the expertise to create and maintain these agreements.

DHS's Other Transaction Agreements and Related Spending from Fiscal Year 2004 to 2007 (in millions)



Source: GAO analysis of DHS data.



United States Government Accountability Office
Washington, DC 20548

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me here today to discuss the Department of Homeland Security's (DHS) use of its other transaction authority. According to DHS officials, this authority, which is set to expire in September 2008, is a critical tool because it has given the department the flexibility to attract new contractors to help develop and manage the mission of an integrated program of science and technology from basic research to production. However, the flexibility afforded by other transaction authority also carries the risk of reduced accountability and transparency. For this reason, it is important to monitor the use of this authority to help ensure that the benefits outweigh the risks to the government. We have previously reviewed DHS's use of this authority and ethics related management controls and made recommendations for improvements.

My statement today will focus on (1) the extent to which DHS has used its other transaction authority, (2) the status of DHS's implementation of GAO's previous recommendations, and (3) the accountability challenges associated with the use of these agreements. In preparation for this hearing, we obtained recent data on other transaction agreements from DHS and looked at several of these agreements, interviewed DHS representatives from the Science and Technology Directorate, reviewed related reports and studies, and identified the efforts DHS has made to address our previous recommendations.¹ We conducted our work from January to February 2008 and in accordance with the generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We

¹We followed up on recommendations made in GAO, *Homeland Security: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority*; and [GAO-05-136](#) (Washington, D.C.: Dec. 15, 2004), and GAO, *Homeland Security: DHS Needs to Improve Ethics-Related Management Controls for the Science and Technology Directorate*, [GAO-06-206](#) (Washington, D.C.: Dec. 22, 2005).

plan to conduct additional audit work on DHS's use of other transaction authority as required by the Homeland Security Act of 2002.

Summary

In fiscal years 2004 through 2007, DHS entered into 37 other transaction agreements with a total value of \$443 million. DHS entered into most of the agreements in the first 2 fiscal years, with only seven new agreements in 2006 and 2007 combined. Most of the spending was for a small number of its earliest agreements. Science and Technology (S&T) Directorate contracting representatives stated that all of the 37 agreements were for prototype projects and included at least one nontraditional contractor.

DHS has taken steps to improve its use of other transaction agreements and to avoid conflicts of interest. Specifically, the department has developed guidance on when to include audit provisions in agreements, developed an other transaction agreement training program, and improved management controls over conflicts of interest. DHS also created a document on lessons learned to capture knowledge gained from using other transactions, but the document is not specific to DHS's experience.

Risks inherent with the use of other transaction agreements create several accountability challenges. These challenges include attracting and ensuring the use of nontraditional contractors, acquiring intellectual property rights, ensuring financial control, and maintaining a skilled acquisition workforce.

Background

Other transaction authority was created to enhance the federal government's ability to acquire cutting-edge science and technology by attracting nontraditional contractors that have not typically pursued government contracts. Other transactions are agreements other than government contracts, grants, or cooperative agreements and may take a number of forms. These agreements are generally not subject to the FAR. This authority originated in 1958 when Congress gave the National Aeronautics and Space Administration (NASA) the authority to enter into contracts, leases, cooperative agreements, or "other transactions." In 1989, Congress granted the Defense Advanced Research Projects Agency (DARPA) temporary authority to use other transactions for advanced research projects. In 1991, Congress made this authority permanent and extended it to the military services. In 1993, Congress temporarily expanded DARPA's other transaction authority, allowing the agency to use the agreements for prototype projects. The Homeland Security Act of 2002 created DHS and granted the agency the authority to enter into other

transactions for research and development and prototype projects for a period of 5 years. Congress granted DHS this authority to attract nontraditional² firms that have not worked with the federal government, such as high-tech commercial firms that have resisted doing business with the government because of the requirements mandated by the laws and regulations that apply to traditional FAR contracts. The Consolidated Appropriations Act for 2008 extended this authority until September 30, 2008.³

DHS began operations in March 2003 incorporating 22 federal agencies to coordinate and centralize the leadership of many homeland security activities under a single department.⁴ Since then, DHS has become the third largest agency for procurement spending in the U.S. government. DHS's acquisition needs range from basic services to complex investments, such as sophisticated screening equipment for air passenger security and upgrading the Coast Guard's offshore fleet of surface and air assets. In fiscal year 2006, according to agency data, the department obligated \$15.9 billion for goods and services to support its broad and complex acquisition portfolio. DHS's S&T Directorate supports the department's mission by serving as its primary research and development arm. In fiscal year 2006, according to S&T data, S&T obligated over \$1.16 billion dollars to fund and develop technology in support of homeland security missions. The directorate has funded technology research and development in part through the use of other transaction authority. According to agency officials, S&T is the only component within DHS that uses this authority. Because of their flexibility, other transactions give DHS considerable latitude in negotiating with contractors on issues such as intellectual property, reporting on cost, and data rights. In addition, it

²DHS's Management Directive No. 0771.1, July 8, 2005, defines a nontraditional government contractor as a business unit that has not, for at least a period of 1 year prior to the date of entering into or performing an other transaction agreement, entered into or performed: any contract subject to full coverage under federal Cost Accounting Standards (CAS); or any 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 compliance with the Federal Acquisition Regulation (FAR).

³Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Dec. 26, 2007.

⁴The Homeland Security Act of 2002, Pub. L. 107-296, Sec. 101, Nov. 25, 2002, defined the department's missions to include preventing terrorist attacks within the United States; reducing U.S. vulnerability to terrorism; and minimizing the damages, and assisting in the recovery from, attacks that occur within the United States.

may relieve the parties from certain contract administration requirements that nontraditional contractors find burdensome.

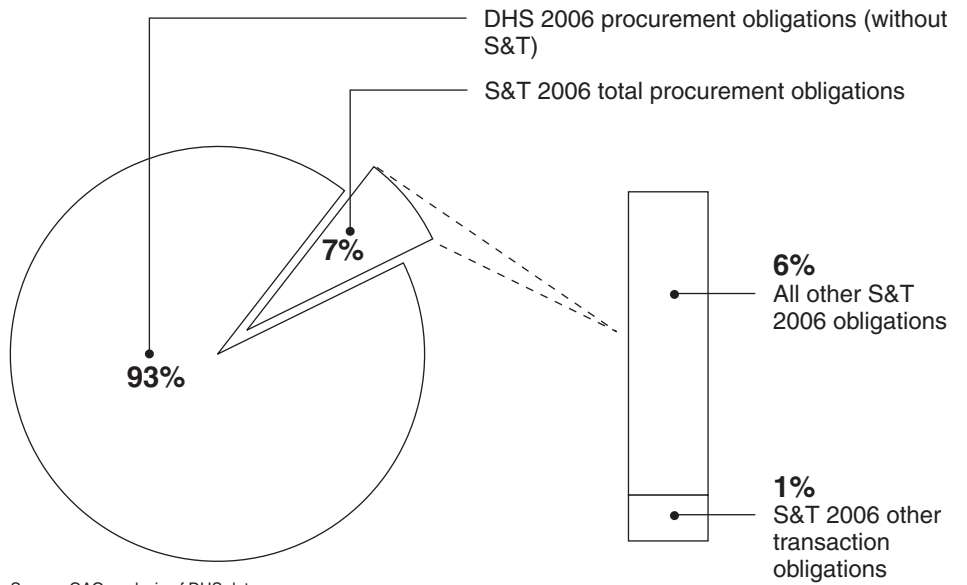
DHS's Use of Other Transaction Authority Has Declined Since Fiscal Year 2005

The number and value of DHS's other transaction agreements has decreased since 2005. Its recent other transaction agreements represent just a small portion of its total procurement spending. Most of the department's use of other transaction authority to date occurred between fiscal years 2004 and 2005. Though it has since used this authority less frequently, it continues to obligate funds for its earliest agreements. About 77 percent of the \$443 million spent on DHS's agreements has been on 7 of the 37 agreements. S&T contracting representatives reported that all of these agreements were for prototype projects.

In fiscal year 2006, other transactions accounted for almost \$153 million of DHS's reported \$15.9 billion in procurement obligations, approximately 1 percent (see fig. 1). In addition, other transactions represent only a small portion of S&T spending. For example, the department estimates that from fiscal years 2004 through 2007, S&T spent 13 percent of its total obligations on its other transaction agreements.⁵

⁵According to S&T, total spending through other transaction agreements includes four that are managed by DHS's Domestic Nuclear Detection Office (DNDO). S&T contracting representatives told us that these agreements were entered into by the S&T Directorate before DNDO was created.

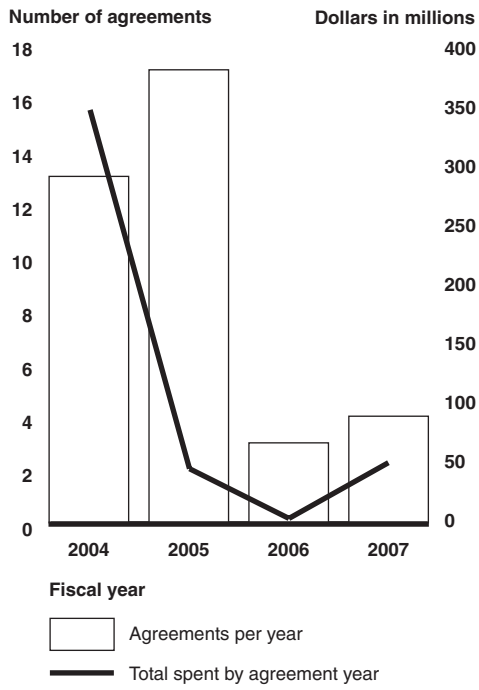
Figure 1: DHS Other Transaction Spending as a Portion of Science & Technology and Overall Procurement Spending, Fiscal Year 2006



Source: GAO analysis of DHS data.

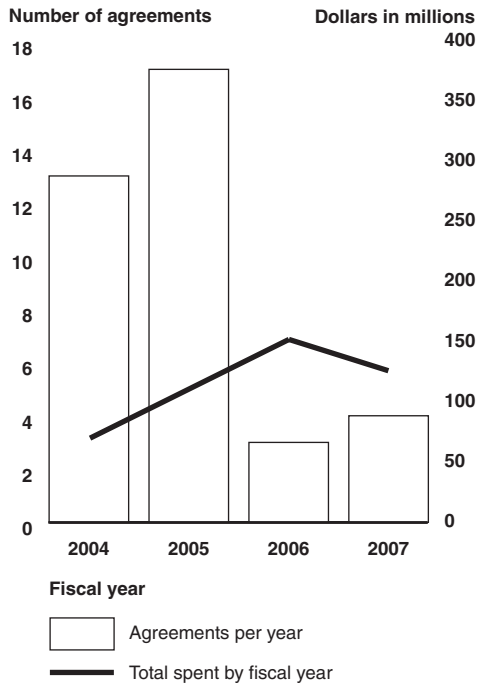
DHS reported a total of 37 other transaction agreements, 30 of which were entered into in fiscal years 2004 and 2005. Accordingly, 88 percent of total spending was for agreements reached in fiscal years 2004 and 2005 (see fig. 2). While the total number of new agreements has decreased since 2005, the total obligations under these agreements have generally increased because funds are obligated for agreements made in prior years (see fig. 3).

Figure 2: DHS's Other Transaction Agreements by Agreement Fiscal Year and Associated Obligations



Source: GAO analysis of DHS data.

Figure 3: DHS's Other Transaction Agreements and Associated Obligations by Fiscal Year



Source: GAO analysis of DHS data.

About 77 percent of obligations was for the seven largest other transaction agreements (see appendix I). According to S&T, all of these agreements included at least one nontraditional contractor, most commonly as a subcontractor.

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.

DHS Has Made Progress in Improving Its Use of Its Other Transaction Authority, but Has Yet to Fully Address Prior GAO Recommendations

Soon after DHS established the S&T Directorate, S&T issued other transaction solicitations using some commonly accepted acquisition practices and knowledge-based acquisition principles. For example, DHS used integrated product teams and contractor payable milestone evaluations to manage other transaction agreements.⁶ To quickly implement its early projects, S&T relied on experienced staff from DARPA, other government agencies, and industry to help train S&T program and contracting staff in using other transactions and help DHS create and manage the acquisition process. S&T also brought in program managers, scientists, and experts from other government agencies on a temporary basis to provide assistance in other areas. Beyond these efforts, GAO found some areas for improvement and recommended that: DHS provide guidance on when to include audit provisions in agreements; provide more training on creating and managing agreements; capture knowledge gained from current agreements for future use; and take measures to help rotational staff avoid conflicts of interest. DHS has implemented some measures to address many of these recommendations; however, it has not addressed all of them.

- *Provide guidance:* We recommended that DHS develop guidance on when it is appropriate to include audit provisions in other transaction agreements. Subsequently, DHS modified its management directive to add guidance on including GAO audit provisions in agreements.⁷ However, the guidance only addresses prototype agreements over \$5 million. While S&T contracting officials recently told us that they have only issued other transaction agreements for prototypes, they noted that the department intends to issue agreements for research projects in the future. In addition, it is unclear how the \$5 million threshold is to be applied. In at least one agreement, the audit provision did not apply to subcontractors unless their work also exceeded the \$5 million threshold.
- *Provide additional training:* We recommended that DHS develop a training program for staff on the use of other transactions. DHS has developed a training program on other transactions, and S&T contracting representatives said they have plans to conduct additional sessions in 2008. The training includes topics such as intellectual

⁶ Payable milestones are predetermined, observable technical events or other measures of progress that the contractor and government agree upon in advance.

⁷The guidance grants GAO access for a period of 3 years after the final payment is made.

property rights, acquisition of property in other transactions, and foreign access to technology created under other transaction authority. An S&T contracting representative told us the Directorate currently has three staff with other transaction warrants and has additional in-house expertise to draw on as needed, and they said S&T no longer needs to rely on other agencies for contracting assistance.

- *Capture lessons learned:* We recommended that DHS capture knowledge obtained during the acquisition process for use in planning and implementing future other transaction projects. In 2005, DHS hired a consultant to develop a “lessons learned” document based on DOD’s experience using other transactions. This is included in DHS’s other transaction training. However, it was not evident based on our follow-up work that DHS has developed a system for capturing knowledge from its own experience regarding other transaction agreements the directorate has executed since it was created.
- *Ethics:* We made a number of recommendations regarding conflicts of interest and ethics within S&T. When the S&T Directorate was established in 2003, it hired scientists, engineers, and experts from federal laboratories, universities, and elsewhere in the federal government for a limited time under the Intergovernmental Personnel Act (IPA) with the understanding that these staff would eventually return to their “home” institution.⁸ This created potential conflicts of interest for those staff responsible for managing S&T portfolios as these staff could be put in a position to make decisions on their “home” institutions. We recommended that DHS help the portfolio managers assigned through IPA comply with conflict of interest laws by improving the S&T Directorate’s management controls related to ethics. DHS has complied with these recommendations to define and standardize the role of these portfolio managers in the research and development process; provide regular ethics training for these portfolio managers; and determine whether conflict of interest waivers are necessary. The only outstanding recommendation concerns establishing a monitoring and oversight program of ethics-related management controls. Furthermore, an S&T official told us the use of rotational portfolio managers has largely been eliminated with the exception of one portfolio manager who is currently serving a two-year term.

⁸The Intergovernmental Personnel Act (IPA) of 1970, 5 U.S.C. §§ 3371-76, allows employees to be temporarily assigned to a federal agency.

Inherent to Other Transactions' Flexibility Are Certain Accountability Challenges

With federal agencies' increased reliance on contractors to perform mission related functions comes an increased focus on the need to manage acquisitions in an efficient, effective, and accountable manner. The acquisition function is one area GAO has identified as vulnerable to fraud, waste, abuse, and mismanagement. An unintended consequence of the flexibility provided by other transaction authority is the potential loss of accountability and transparency. Accordingly, management controls are needed to ensure intended acquisition outcomes are achieved while minimizing operational challenges. Operational challenges to successfully making use of other transaction authority include: attracting and ensuring the use of non-traditional contractors; acquiring intellectual property rights; financial control; and maintaining a skilled acquisition workforce.

Nontraditional Contractors: One of the goals of using other transactions is to attract firms that traditionally have not worked with the federal government. S&T contracting officials confirmed that at least one nontraditional contractor participated in each other transaction agreement, generally as a partner to a traditional contractor. We have not assessed the extent of the involvement of nontraditional contractors or what portion of the funding they receive. However, we have reported in the past that DOD had a mixed record in attracting nontraditional contractors.⁹

Intellectual Property Rights: 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. For example, we previously reported that DARPA received an unsolicited proposal from a small commercial firm to develop and demonstrate an unmanned aerial vehicle capable of vertical take-off and landing based on the company's existing proprietary technology. DARPA agreed not to accept any technical data in the \$16.7 million agreement. To obtain

⁹GAO, *Acquisition Reform: DOD's Guidance on Using Section 845 Agreements Could Be Improved*, GAO/NSIAD-00-33 (Washington, D.C.: April, 2000).

government purpose rights,¹⁰ DOD would have to purchase 300 vehicles or pay an additional \$20 million to \$45 million.¹¹ Therefore, using an other transaction agreement could potentially limit competition and lead to additional costs for follow-on work.

Financial Controls and Cost Accounting: Other transactions are exempt from CAS. While other transaction recipients have flexibility in tracking costs, they still need to provide cost information and demonstrate that government funds are used responsibly. This is particularly true for traditional contractors that are performing work under both FAR-based contracts as well as other transaction agreements. For example, contractors may use in-kind donations to satisfy cost-sharing requirements; therefore, it is important that DHS has a means to ensure that companies do not satisfy their other transaction cost-sharing requirements with work funded under a FAR-based contract.

Maintaining a Skilled Acquisition Workforce: Other transactions do not have a standard structure based on regulatory guidelines and therefore can be challenging to create and administer. Prior GAO work has noted the importance of maintaining institutional knowledge sufficient to maintain government control. The unique nature of other transaction agreements means that federal government acquisition staff working with these agreements should have 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. Retaining a skilled acquisition workforce has been a continual challenge at DHS, and we have ongoing work in this area for this Committee.

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to any questions you or other Members of the Committee may have at this time.

¹⁰Government purpose rights enable the government to allow others to use the data for government purposes. See GAO, *Intellectual Property: Information on the Federal Framework and DOD's Other Transaction Authority*, [GAO-01-980T](#) (Washington, D.C.: July 2001).

¹¹[GAO-01-980T](#).

Contacts and Acknowledgements

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Appendix I: Selected DHS Other Transaction Agreements

Table 1: Seven Largest DHS Other Transaction Agreements Entered into Since Fiscal Year 2004 (dollars in millions)

Project	Prime contractor	Nontraditional contractor	Total obligations
Counter-Man Portable Air Defense System	Northrop Grumman Systems Corporation	FedEx	\$105.5
Counter-Man Portable Air Defense System	BAE Systems Information and Electronics Systems Integration I	American Airlines and ABX Air Inc.	105.4
Bioagent Autonomous Networked Detectors	U.S. Genomics, Inc.	Impact Technologies Consulting	37.0
Kentucky Critical Infrastructure Protection Institute	National Institute for Hometown Security, Inc.	Prime contractor is nontraditional	36.5
Bio Watch Gen 3 Detection Systems - A Microfluidic-Based Autonomous Pathogen Detection System	Microfluidic Systems Inc	Cycle Start	23.3
Bio Watch Gen 3 Detection Systems - Lab-in-a-Tube (LIAT) Bioagent Autonomous Networked Detector	IQuum LLC	Dyax Corporation	18.4
Bioagent Autonomous Networked Detectors	Science Applications International Corp (SAIC)	Genomic HealthCare (GHC)	15.4

Source: DHS reported data on other transaction as of January 2008.

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