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FEATURE COMMENT: Other Transactions At DHS—A Good Idea That Needs Time To Evolve

The Homeland Security Act of 2002 authorized the Department of Homeland Security to use “Other Transactions” as part of a five-year pilot program. Previously, “OTs” had been the province first of the National Aeronautics and Space Administration and then mainly of the Department of Defense. OTs are an attractive mechanism for leveraging commercial enterprise in indirect support of Government programs because entities that work under OTs typically do not face many of the statutory and regulatory requirements associated with traditional “procurement” contracts. Indeed, because they are not FAR-based procurement contracts, OTs are thought to promote the involvement of small, innovative companies, i.e., so-called “nontraditional defense contractors” and “nontraditional Government contractors,” in Government work. Moreover, because OTs allow the Government to harness the research and development prowess of private industry, when OT programs are successful, the Government—and by extension, the public—potentially can have access to advanced technology at an expedited pace.

Recently, as required by § 831 of the Homeland Security Act, the Government Accountability Office issued an audit report entitled *Homeland Security: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority* (GAO-05-136) which concluded that DHS OT practices and policies are in need of further

refinement. This FEATURE COMMENT will provide a brief history of OTs at other agencies and then synopsise GAO’s comments regarding OTs at DHS. It will then explain why OTs are good for the DHS “contracting” community, and why both industry and DHS should work together to enhance the OT process at the agency.

Brief History of Other Transactions—OTs first originated in the 1958 National Aeronautics and Space Act, P.L. 85-569, 72 Stat. 426, 42 USCA §§ 2451 et seq. In relevant part, the Act authorized NASA to “enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such other terms as it may deem appropriate....” 42 USCA § 2473(c)(5). Prior to the enactment of several other laws and regulations that promoted the use of grants and cooperative agreements at NASA, the agency used its OT authority extensively to facilitate early research in the U.S. space program.

More recently, however, OTs have mainly been a DOD “contracting” vehicle. They were initially authorized pursuant to 10 USCA § 2371 for use by the Defense Advance Research Projects Agency (DARPA) starting in 1989 and, from the early 1990s, authorized for use by DOD more generally. (They are now also available at the Department of Transportation.)

Two types of DOD OTs were available pursuant to 10 USCA § 2371. The first was known as a “research” or “science and technology” OTs. These OTs were used primarily for research and development of dual-use technologies and had a contractor cost-sharing component because of their obvious commercial applications. Currently, research OTs are frequently referred to as Technology Investment Agreements (TIAs) and are often entered into by consortia of entities. (It is important to note, however, that the term TIA also encompasses certain types of cooperative agreements.) Apart from research OTs, § 845 of the 1994 Defense Authorization Act authorized “prototype” OTs, which were used for projects directly relevant to weapons or weapons systems, including subsystems, compo-

nents, etc. Prototype OTs did not always include a cost-share.

There were—and are—many positive aspects to DOD’s OT program. OTs have allowed the Government to have access to high technology, but with less of a procurement bureaucracy. Moreover, because of Government-industry partnership, the timetable associated with complicated research and development programs has diminished. In addition, and perhaps most importantly for the companies involved, DOD OTs were not subject to the Federal Acquisition Regulation or cost-accounting standards, while at the same time generally providing greater intellectual property protections to contractors. Indeed, some companies that would never have thought to be involved in Government programs were able to help promote national security as a result of these OTs.

While DOD OTs have generally been a successful vehicle, there has always been some confusion as to exactly which statutory regimes did or did not apply to OTs and how they were to be entered into and administered. Indeed, because of the rather arcane nature of OTs, from the mid-1990s onward, DARPA, GAO, DOD Inspector General and others have issued a variety of reports regarding OTs. Moreover, in December 1996, Under Secretary of Defense for Acquisition and Technology Paul Kaminski also issued an influential memorandum regarding the use of prototype OTs, which offered DOD’s insights on which statutes did not apply to such OTs. On the heels of the so-called “Kaminski Memorandum,” there was also an excellent—and extensive—ABA Public Contract Section working group report and resulting monograph on the subject. In short, although companies that worked under OTs have generally faced significantly fewer compliance burdens than companies performing procurement contracts, the precise legal framework under which companies perform OT work has always been perhaps slightly unclear.

The OT program continues in DOD to the present date, and indeed § 847 of the 2004 Defense Authorization Act, P.L. 108-136, extended DOD’s prototype OT authority until 2008. DARPA’s Contracts Management Office Web site (<http://www.darpa.mil/cmo>), in particular, provides a range of details about the number and nature of OTs in the past few years. Although guidance regarding research OTs is not necessarily abundant, various

DOD entities have published numerous resources regarding prototype OTs, including the Office of the Undersecretary of Defense for Acquisition, Technology and Logistics, which published “*Other Transactions*” (OT) *Guide for Prototype Projects* in 2001.

Over the years, there have been various initiatives to extend DOD OT authority to production. Some of these issues were addressed in § 1441 of the 2004 Defense Authorization Act, and more recently, DOD has issued regulations codified at 32 CFR § 3.9 and in the DFARS Subparts 206.0 and 212.7000 which, when certain conditions are met, facilitate the award of follow-on production contracts for items first developed under prototype OTs. In addition, apart from DHS’ authority under § 831 of the Homeland Security Act, § 1441 of the 2004 Defense Authorization Act (which relates to Services Acquisition Reform) also provides authority to other federal agencies to use OTs—upon authorization from the Director of OMB—if the OTs have the potential to facilitate defense against or recovery from terrorism or nuclear, biological, chemical or radiological attack.

With respect to DHS, in relevant part, § 831 of the Homeland Security Act states:

(a) AUTHORITY—During the 5-year period following the effective date of this Act, the Secretary may carry out a pilot program under which the Secretary may exercise the following authorities:

(1) IN GENERAL—When the Secretary carries out basic, applied, and advanced research and development projects, including the expenditure of funds for such projects, the Secretary may exercise the same authority (subject to the same limitations and conditions) with respect to such research and projects as the Secretary of Defense may exercise under section 2371 of title 10, United States Code (except for subsections (b) and (f)), after making a determination that the use of a contract, grant, or cooperative agreement for such project is not feasible or appropriate. The annual report required under subsection (b) of this section, as applied to the Secretary by this paragraph, shall be submitted to the President of the Senate and the Speaker of the House of Representatives.

(2) PROTOTYPE PROJECTS—The Secretary may, under the authority of paragraph

(1), carry out prototype projects in accordance with the requirements and conditions provided for carrying out prototype projects under section 845 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 103-160). In applying the authorities of that section 845, subsection (c) of that section shall apply with respect to prototype projects under this paragraph, and the Secretary shall perform the functions of the Secretary of Defense under subsection (d) thereof.

(b) REPORT—Not later than 2 years after the effective date of this Act, and annually thereafter, the Comptroller General shall report to the Committee on Government Reform of the House of Representatives and the Committee on Governmental Affairs of the Senate on—

(1) whether use of the authorities described in subsection (a) attracts nontraditional Government contractors and results in the acquisition of needed technologies; and

(2) if such authorities were to be made permanent, whether additional safeguards are needed with respect to the use of such authorities.

* * *

(d) DEFINITION OF NONTRADITIONAL GOVERNMENT CONTRACTOR—In this section, the term “nontraditional Government contractor” has the same meaning as the term “nontraditional defense contractor” as defined in section 845(e) of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160, [10 USCA 2371 note.])

It is pursuant to this statutory framework that DHS began entering into OTs, and pursuant to which GAO issued its report.

GAO’s Audit Report—While GAO’s audit report makes several specific recommendations regarding aspects of DHS’ OT program that need further refinement, it also serves as a good background primer regarding the OT program at DHS more generally. Indeed, in this regard, the GAO report goes a long way in providing some of the much-needed publicity for OTs that GAO says DHS may not necessarily have fully accomplished. Moreover, as a preliminary matter, the GAO report is also helpful in that it distills information from DHS itself as to what laws the agency believes are generally inapplicable to its OTs.

As indicated above, one of the most useful aspects of the report is the fact that DHS apparently provided GAO with a list of statutory regimes that it believed are generally inapplicable to its OTs. This list is as follows:

- (1) the Bayh-Dole Act, 35 USCA §§ 200-212;
- (2) the Competition in Contracting Act, 41 USCA §§ 251 et seq.;
- (3) the Contract Disputes Act, 41 USCA §§ 601 et seq.;
- (4) the Procurement Protest System, 31 USCA §§ 3551 et seq.;
- (5) the Limitation on the Use of Appropriated Funds to Influence Procurement Transactions, 31 USCA § 1352;
- (6) the Anti-Kickback Act, 41 USCA §§ 51-58;
- (7) the Procurement Integrity Act, 41 USCA § 423;
- (8) the Service Contract Act, 41 USCA §§ 351 et seq.; Walsh Healy Act, 41 USCA §§ 35-45; Fair Labor Standards Act of 1938, 29 USCA §§ 201-219;
- (9) Drug-free Workplace Act of 1988, 41 USCA §§ 701-707; and
- (10) Buy American Act, 41 USCA § 10a-d.

GAO was careful to note, of course, that this list should not be construed as representing GAO’s views regarding the applicability of these statutes to DHS OTs. In fact, the list provided by DHS contains judgments on far fewer statutes than were analyzed in the ABA working group’s original assessment of DOD OTs or by DOD in its guide to prototype OTs. Accordingly, although companies wishing to obtain OTs from DHS should review this list carefully, it would be prudent for them also to consider independently assessing the extent to which some other federal contracting laws may or may not be applicable to their work, and even the extent to which some of above-listed statutes might nonetheless be applicable to their OTs. (The ABA report, for instance, identifies various distinctions between research OTs and prototype OTs, and with respect to several of the statutes listed by DHS, reaches different conclusions than apparently reached by DHS.) Indeed, as with DOD’s earlier guide to prototype OTs, DHS’ judgments regarding each of the statutes mentioned is caveated, because according to GAO, DHS’ OT policy instructs Contracting Officers to review each statute with regard to any particular arrangement using other trans-

actions and consult their general counsel to determine its applicability.

The GAO report goes on to note that DHS views the use of other transactions as key to attracting nontraditional Government contractors, e.g., high technology firms that do not work with the Government. It states that the Homeland Security Act defines nontraditional Government contractor as a business unit that has not, for at least a period of one year prior to the date of entering into or performing an other transactions agreement, entered into or performed

- (1) any contract subject to full coverage under the cost accounting standards; or
- (2) 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 FAR.

GAO further indicates that after DHS' establishment in 2003, the agency rapidly created a Science and Technology Directorate, which issued several solicitations using OTs. The S&T Directorate includes the Homeland Security Advanced Research Projects Agency (HSARPA) and the Office of Systems Engineering and Development (SED), both of which have played a role in DHS' initial OTs. GAO notes that as of September 2004, OTs accounted for approximately 18 percent of the S&T Directorate's FY 2004 acquisition activity.

In addition to incorporating many procurement contracting principles, the S&T Directorate also, according to GAO, utilized additional acquisition tools commonly used by DARPA and other defense agencies, such as

- (1) Broad agency announcements (BAA) to serve as general announcements of the Directorate's research interest;
- (2) A white paper process under which firms submit to S&T brief synopses of the main concepts of a proposal introducing technological innovations or solutions; and
- (3) Payable milestone evaluations under which the S&T Directorate's managers measure the progress of its projects at key points before making payments to contractors.

The GAO report then describes the overall OT procurement process at DHS, and in that regard, contains a short discussion of several of the first OT programs, such as Countermeasures for Man

Portable Air Defense System and the Detection Systems for Chemical and Biological Countermeasures, highlighting the involvement of non-traditional Government contractors in these programs.

Overall, the GAO report had three main recommendations. Specifically, the GAO report states that the Secretary should direct the Under Secretary for Science and Technology to:

(1) *Establish guidance on when it is appropriate to include audit provisions in other transactions agreements.* In this regard, GAO notes that although DHS' management directive regarding OTs covers Comptroller General access to contractor records under certain conditions, the directive does not address audits by other entities or specify the circumstances when audits of other transactions may be needed to protect the Government's interest. GAO notes, for example, that audits may be needed in certain other transactions agreements to help ensure that payments to contractors are accurate, further stating that DOD's policy for auditing prototype other transactions projects—which was issued in May 2003 and is available at 68 Fed. Reg. 27,452, provides more complete audit guidance. GAO also mentions that DOD's OTs prototype projects policy has provisions for its COs to use DCAA or another independent auditor to audit OTs agreements. While DHS has an MOU with DCAA, GAO indicated that it was unclear from DHS' policies as to the specific conditions when COs should use DCAA's or another independent auditor's services.

(2) *Develop a training program for DHS staff in the use of other transactions to help ensure the appropriate use of this authority.* In this regard, GAO appears primarily concerned that DHS is simply ensuring that experienced COs be made responsible for OTs, rather than providing more specific training to such COs. GAO seems concerned that DHS may not be equipping its staff to fully understand and leverage the benefits of other transactions.

(3) *Capture knowledge obtained during the acquisition process for use in planning and implementing future OTs projects.* In this regard, GAO states that the S&T Directorate's capacity to build and sustain knowledge for use in its future acquisitions involving OTs is in the early stages of development, but the Directorate has not yet developed policies or procedures to ensure that program

or portfolio managers are capturing and assessing critical information and knowledge for future projects. GAO further encourages DHS to utilize systemic methods to collect, verify, store, and disseminate information for use by current and former employees.

In sum, upon reading the report in its entirety, GAO's basic gloss appears to be that OTs at DHS are a good idea, but there are additional aspects that—if improved—would benefit both Government and industry. DHS' response to the draft audit report is included, and for the most part, DHS concurred with GAO's initial assessment, although it did not entirely concur on some of the "knowledge management" issues.

The Big Picture: Why OTs Matter for DHS—The events of September 11, 2001, and the ensuing Global War on Terror gave rise to the creation of DHS. At the time, it was argued that the U.S. needed to have a new way of meeting new threats, and DHS was to be one of the cornerstones of that new way of thinking. Indeed, while "old economy" weaponry and systems are still an important element of the overall national defense, they are now but one facet of what is needed to protect against a potentially more diffuse and elusive enemy.

That means that although many so-called "new economy" companies did not necessarily have too long a shelf life in the commercial marketplace, it is conceivable that in the brave new world in which we find ourselves, existing or emergent "new economy" companies with creative/innovative technologies and approaches may be best situated to help plug any gaps in the nation's security. Some of those companies have already realized that the Federal Government is a potentially large and uniquely attractive customer. But many others may be intimidated about entering the U.S. Government market based on a justified concern that it would be difficult for them to implement the systems necessary to comply with the rules that typically apply to procurement contracts, and because of concerns regarding protection of their intellectual property. OTs, therefore, are potentially the ideal mechanism to allow such companies to take the first, and—from the public's perspective—necessary steps to partnering with the Government. Thus, expanding OTs to DHS makes good sense.

GAO's modest criticisms of DHS, likewise, are not unexpected. No federal agency can be expected to run a contracting program seamlessly from its inception, particularly a new agency with such a leviathan portfolio. GAO is correct, however, that additional clarity and guidance, both within the agency and with respect to the contractor community would be helpful. In short, the Government needs to be able to best leverage the capabilities of commercial industry, and contractors need to have a good and transparent sense of what they are getting into before they commit to collaborate with the Government.



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Andrew D. Irwin, a Special Counsel with Steptoe & Johnson LLP in Washington, D.C. (www.steptoec.com). Mr. Irwin is a member of the firm's Government Contracts Team and works closely with its International Department. A significant component of his practice involves counseling high-tech clients regarding government contract compliance issues.