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THE FEDERAL GOVERNMENT'S "OTHER TRANSACTION" AUTHORITY

*By Armani Vadiee and Todd M. Garland**

Agreements entered into under a federal agency's "other transaction" authority are not procurement contracts,[1] cooperative agreements,[2] or grants. The agreements are not subject to the Federal Acquisition Regulation (FAR),[3] which typically governs acquisitions by Executive Branch agencies.[4] Nor are other transaction agreements (OTAs) subject to additional onerous laws and regulations applicable to federal contracts.[5] For example, the Cost Accounting Standards,[6] Truth in Negotiations Act,[7] and Competition in Contracting Act (CICA)[8] do not apply to the agreements. Nonetheless, OTAs are enforceable contract vehicles and appropriate use of OTAs can facilitate engagement between the Federal Government and contractors.

The use of OTAs can expedite the acquisition process and entice nontraditional contractors to conduct business with the Federal Government by providing flexibility[9] and by allowing for a procurement that more closely resembles commercial engagements.[10] Congress has authorized 11 federal agencies to use OTAs. Primarily, agencies use OTAs to acquire advanced technology from private sector companies that traditionally have been reluctant to contract with the Federal Government.[11]

In recent years, agencies' use of OTAs has accelerated. According to one analysis, use of OTAs "has more than doubled in the past five years, to $2.3 billion in fiscal 2017 from $1 billion in fiscal 2012."[12] In addition, agencies are increasingly awarding large contracts through the OTA process, including a $750 million agreement in 2017.[13]

To assist companies considering OTA opportunities with the U.S. Government, this Briefing Paper discusses (a) the background and history of OTAs, (b) U.S. Government agencies with authority to enter into OTAs and the scope of that authority, (c) key provisions applicable to OTAs and best practices, and (d) recent changes in the law affecting OTAs.

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Background & History

"The U.S. Government is the largest single purchaser of goods and services in the world, awarding approximately $500 billion in contracts every year."[14] For information technology (IT) alone, the U.S. Government spends approximately $95 billion per year.[15] Of the $95 billion, approximately $42 billion in federal IT spending will be made by the Department of Defense (DOD).[16] The other $53 billion in federal IT spending will be through nondefense agencies.[17]

The typical process by which the Federal Government procures goods and services "can be complex, involving a multitude of decisions and actions."[18] For decades, the federal procurement regulatory framework has been described as "a burdensome mass and maze of procurement and procurement related regulations including 'numerous levels of implementing and supplementing regulations.' "[19]

The FAR governs most procurements made by Executive Branch agencies.[20] Spanning 2,225 pages and encompassing Parts 1–53 of Title 48 of the *Code of Federal Regulations* (C.F.R.), the FAR imposes a heavy regulatory framework for federal acquisitions.[21] In addition, numerous agencies issue their own procurement regulations "that implement or supplement the FAR."[22] For example, DOD has promulgated the Defense Federal Acquisition Regulation Supplement (DFARS).[23] Similar to the FAR, the DFARS consists of more than 1,500 pages. For DOD acquisitions, both the FAR and DFARS apply.[24]

In fact, the FAR "authorizes agency heads to issue agency-specific procurement regulations" to supplement the FAR.[25] Many agencies have done so, resulting in an extensive set of supplemental regulations.[26] In addition to the FAR, DFARS, and other agency supplements, there are numerous statutes that, "directly or indirectly, address the acquisition of goods and services by executive branch agencies," primarily found in Titles 10 and 41 of the U.S. Code.[27]

Moreover, "there are a number of executive agencies to which the FAR does not apply, including the Federal Aviation Administration (within the Department of Transportation), the Patent and Trademarks Office (within the Department of Commerce), the U.S. Mint (within the Department of Treasury), the Tennessee Valley Authority (a wholly owned Government corporation), and the Bonneville Power Administration (within the Department of Energy), to name only some."[28] Ultimately, the maze of statutes, regulations, and other rules has created a complex procurement system. Potential acquisitions can "take up to two years to ultimately select a vendor," leading to situations where "technologies that are considered state-of-the-art when a new procurement is envisioned are often outdated by the time a contract is awarded."[29]

Companies often cite these regulatory burdens, and others, as the bases for avoiding business with the U.S. Government.[30] OTAs provide "flexibility" for prospective contractors to avoid these requirements by allowing federal agencies to (1) attract nontraditional contractors that engage in cutting-edge research and development without requiring the entities to change most of their existing business practices, and (2) enter into innovative arrangements with contractors that would not be feasible under procurement contracts, grants, or cooperative agreements.[31]

"Other transactions" are difficult to define, often characterized by what they are not. Other transactions are *not* procurement contracts,[32] cooperative agreements,[33] or grants.[34] According to the Government Accountability Office (GAO):

> An "other transaction" agreement is a special type of legal instrument used for various purposes by federal agencies that have been granted statutory authority to use "other

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> transactions." GAO's audit reports to the Congress have repeatedly reported that "other transactions" are "other than contracts, grants, or cooperative agreements that generally are not subject to federal laws and regulations applicable to procurement contracts."[35]

Stated differently, other transactions are not typical contract types that Executive Branch agencies use to procure goods or services.

Congress has provided 11 federal agencies with authority to use OTAs. But, for each agency, the scope of that authority varies. Some agencies, such as the Federal Aviation Administration (FAA), have broad authority to use OTAs "as may be necessary to carry out the functions of " FAA and "on such terms and conditions as the [FAA] Administrator may consider appropriate."[36] Other agencies, such as DOD, have more restricted authority, "generally limited to basic, applied, and advanced research projects."[37] Agencies must receive specific authority to award OTAs. Agencies such as the Federal Bureau of Investigation and some departments, such as Veterans Affairs, lack authority to enter into OTAs.

OTAs have existed for 60 years but risk-averse agencies have not fully embraced the contractual instruments to meet critical needs. Further, many companies remain unaware of OTAs and the alternative approach OTAs present to the traditional procurement process.

In 1958, the National Aeronautics and Space Administration (NASA) became the first federal agency to receive other transaction authority.[38] Congress provided NASA with other transaction authority in response to the "Soviets lead in astronautics" through the Sputnik program, which had "made clear that 'business as usual' [was] not going to close the gap."[39]

After Sputnik, the United States was no longer "leading in the vital field of space research and in the development of astronautics."[40] In response Congress provided NASA with authority to enter into and perform "other transactions" on such terms and for such periods as NASA deemed appropriate with any public or private agency, firm, educational institution, or other person.[41] At the time, the Armed Services Procurement Act of 1947 (ASPA)[42] and the Federal Property and Administrative Services Act of 1949 (FPASA)[43] governed federal procurements. Since then, Congress has provided five executive departments with authority to enter into OTAs: the departments of Defense (DOD), Energy (DOE), Health and Human Services (HHS), Homeland Security (DHS), and Transportation (DOT). In addition, Congress has provided independent agencies, such as the National Transportation Safety Board (NTSB), with authority to enter into OTAs.[44]

In 1972, OT authority was extended to HHS, as the National Institutes of Health National Heart, Blood Vessel, Lung, and Blood Diseases and Blood Resources Program received other transaction authority.[45]

In 1989, Congress provided DOD with its first other transaction authority, which applied to advanced research projects performed by the Defense Advanced Research Projects Agency (DARPA).[46] In 1991, Congress provided DOD with permanent other transaction authority and expanded the authority to use the agreements for advanced research projects, previously limited to DARPA, throughout DOD.[47] Congress further expanded DARPA's other transaction authority for weapons and weapons systems prototype projects in 1993.[48] And in 1996, Congress expanded use of prototype projects to the entire department.[49]

Also in 1996, Congress provided FAA with authority to use OTAs "as may be necessary" to carry out the agency's functions.[50] One year earlier, in 1995, the Department of Transportation received authority to enter into OTAs.[51]

In 2002, Congress established the Department of Homeland Security[52] and, in the same Act, authorized DHS to establish a five-year pilot program for the use of OTAs.[53] DHS' other transaction authority applies to the department's research and development or prototype project requirements and mission needs.[54] Although Congress initially provided DHS with other transaction authority for five years, Congress has repeatedly extended that authority.

DOD's Other Transaction Authority

Perhaps unsurprisingly, DOD acquisitions account for the largest volume of other transaction use by the U.S. Government, totaling $5.5 billion and accounting "for more than two-thirds of OTA spending from fiscal 2012 through 2017."[55] For DOD, there are two types of commonly used other transactions—research and prototype projects.[56] DOD's statutory authority to use OTAs is set forth in 10 U.S.C.A. §§ 2371 and 2371b.

Section 2371 provides DOD with authority to use OTAs for "basic, applied, and advanced research projects."[57] Under § 2371b, DOD can use its other transaction authority to "carry out prototype projects that are directly relevant to

enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces."[58] The DOD *Other Transactions Guide for Prototype Projects* defines "prototype project":

> A prototype project can generally be described as a preliminary pilot, test, evaluation, demonstration, or agile development activity used to evaluate the *technical or manufacturing feasibility or military utility of a particular technology, process, concept, end item, effect, or other discrete feature*. Prototype projects may include systems, subsystems, components, materials, methodology, technology, or processes. By way of illustration, a prototype project may involve: a proof of concept; a pilot; a novel application of commercial technologies for defense purposes; a creation, design, development, demonstration of technical or operational utility; or combinations of the foregoing, related to a prototype. The quantity should generally be limited to that needed to prove technical or manufacturing feasibility or evaluate military utility.[59]

DOD can only use its other transaction authority for prototype projects under four conditions:

(1) At least one nontraditional defense contractor or nonprofit research institution participates to a significant extent in the prototype project.[60] A "nontraditional defense contractor" is defined as an entity not currently performing and that has not, for at least one-year before the solicitation of sources by DOD for the transaction, performed any contract or subcontract for DOD subject to full coverage under the Cost Accounting Standards.[61] This provision is intended to engage businesses that are hesitant to contract with the U.S. Government.

(2) All significant participants in the transaction other than the Government are small businesses—as defined in the Small Business Act—or are nontraditional defense contractors.[62]

(3) At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government;[63] or

(4) The agency's senior procurement executive determines exceptional circumstances justify use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a typical procurement contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.[64]

Since 1994, DOD had temporary authority to use OTAs to obtain prototypes.[65] Every few years Congress extended that authority.

Section 815 of the National Defense Authorization Act for Fiscal Year 2016 (FY 2016 NDAA) created permanent authority for DOD to use OTAs for prototyping and production purposes.[66] Congress wrote these provisions "in an intentionally broad manner."[67] Congress did so to counter what has historically been a dearth of knowledge about OTAs, leading to "an overly narrow interpretation of when OTAs may be used, narrow delegations of authority to make use of OTAs, a belief that OTAs are options of last resort for when [FAR] based alternatives have been exhausted, and restrictive, risk averse interpretations of how OTAs may be used."[68] Thus, the broadly written statutory authority is meant for DOD to use OTAs more often, and to "[recognize] that it has the authority to use OTAs with the most flexible possible interpretation unless otherwise specified in those particular sections."[69] In line with this congressional "goal of encouraging (or demanding) greater use of OTAs,"[70] the FY 2018 NDAA contains several sections designed to expand use of OTAs and to give DOD more flexibility in using OTAs as opposed to traditional procurement contracts.[71]

In January 2017, DOD issued updated guidance regarding use of OTAs for prototype projects under 10 U.S.C.A. § 2371b.[72] For prototype OTAs, Congress has encouraged DOD to use "competitive procedures" in awarding an OTA.[73] Companies that receive prototype OTAs under competitive procedures are permitted to receive a follow-on production contract on a noncompetitive basis due to the competition in awarding the prototype OTA.[74]

Civilian Agencies' Other Transaction Authority

Department Of Energy

The DOE Advanced Research Projects Agency-Energy (ARPA-E) is authorized to issue OTAs for its research mission.[75] Similarly, the national security-related mission has other transaction authority pursuant to the National Defense Authorization Act, and its authorization language is modelled on that of DOD.[76] Under ARPA-E parlance, OTAs

are called "technology investment agreements," reflecting the purpose for which they are used. DOE is one of four agencies (along with NASA, FAA, and the Transportation Security Administration (TSA)) without limitations or requirements on the types of projects for which OTAs are permitted.

DOE's other transaction authority, unlike all but one other agency, is temporary, being reinstated periodically by Congress since the first grant in 2002, with the most recent reauthorization extending this contracting authority through 2020.[77] DOE's power to enter into OTAs is subject to a finding by the Secretary of Energy that a standard contract, grant, or cooperative agreement is not appropriate or feasible for the envisioned project.

Department Of Health & Human Services

HHS conducts its other transaction procurements through the National Institutes of Health (NIH). Since 1972, NIH's National Heart, Blood Vessel, Lung, and Blood Diseases and Blood Resources Program has had authorization to enter into OTAs.[78] NIH was also the last of the 11 authorized agencies to complete its policy guidelines for other transaction awards, releasing its guidelines for the Precision Medicine Initiative in November of 2015,[79] and the Common Fund in December of 2017.[80] The Common Fund is limited in that no more than 50% of its funds may be used to engage in OTAs.[81]

NIH's statutory authority to conduct OTAs is intended to "conduct or support high impact cutting-edge research."[82] Proposals for use of NIH's other transaction authority require explanation of why using OTAs "is essential to promoting the success of the project." Additionally, whenever NIH uses other transaction authority, it must provide an annual report to the NIH Director "on the activities of the institute, center, or office relating to such research."[83]

HHS has cited the flexibility of OTAs in enabling it to work with companies that otherwise would not engage with the Government. For example, in 2013, HHS and a pharmaceutical company entered into an OTA "to conduct research to evaluate the efficacy and safety of the company's portfolio of antibiotic candidates under development for treating hospital and biological threat infections, such as staph infections" unable to be treated with existing antibiotics.[84] The OTA provided the parties with the opportunity to "mitigate risk by directing funds to the most promising antibiotic candidate during the project, which would have been more difficult and untimely under a traditional contracting mechanism."[85] Under the OTA, "if an antibiotic candidate was not successful, HHS and the company would be able to move funding from the unsuccessful antibiotic candidate to a different, more promising one without having to enter into a new agreement."[86] The company did not have a Federal Government-approved cost accounting system. Because the research was conducted through an OTA rather than a traditional procurement contract subject to the FAR and other regulations, the project could move forward.[87] The OTA structure similarly alleviated the company's concerns about contracting with the Government due to loss of control over its intellectual property.[88]

Department Of Homeland Security

DHS' other transaction authority is primarily exercised by two contracting activities: (1) TSA (discussed below) and (2) the Office of Procurement Operations (OPO) in support of DHS' Science & Technology Directorate. These two activities exercise "very different" other transaction authority,[89] set forth at 49 U.S.C.A. § 114(m) and 6 U.S.C.A. § 391, respectively.

According to DHS policy, under 6 U.S.C.A. § 391, the department may enter into two forms of OTAs: (1) research OTAs and (2) prototype OTAs.[90] DHS uses research OTAs to provide assistance to nonfederal participants to broaden the collective homeland security technology knowledge base rather than a deliverable to satisfy an existing or immediate Government need.[91] DHS uses research OTAs "in situations such as multi-party technology development arrangements without traditional prime–subcontractor relationships, and transactions for which the government's acquisition of goods and services is not the principal purpose."[92] DHS uses the OTAs to "reduce contractual barriers to encourage participation by for-profit firms that traditionally have not done business with the government."[93]

According to the most recently available data, DHS "had 11 OTAs with activity between fiscal years 2014 and 2016."[94]

Transportation Security Administration

In response to the terrorist attacks of September 11, 2001, Congress established TSA, and, in the same act, provided the agency with other transaction authority.[95] TSA's other transaction authority is the same authority to use the agreements as Congress provided to FAA.[96] TSA thus has broad

authority to use OTAs "as may be necessary to carry out the functions of" TSA.[97] It is one of "only a few agencies" with "unrestricted authority to award OTAs." [98] TSA can enter into "other transactions with any Federal agency. . .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 [head of TSA] may consider appropriate."[99]

TSA uses it other transaction authority "primarily. . .to reimburse airports and law enforcement agencies for the costs associated with TSA security programs."[100] This includes partial salary reimbursement to hundreds of airports "to offset the costs of carrying out aviation law enforcement responsibilities in support of passenger screening activities."[101] In addition, TSA awards OTAs for construction projects, including reimbursement of airports for design and construction costs associated with installing, updating, or replacing checked baggage screening systems.[102]

During fiscal years 2012 through 2016, TSA "awarded at least 1,039 OTAs and obligated at least $1.4 billion on them."[103] Approximately 79% of these obligations were awards by the Electronic Baggage Screening Program and Advanced Surveillance Program.[104] By 2016, most "agencies had fewer than 90 active OTAs per fiscal year," whereas TSA and NASA "had hundreds, and thousands, respectively."[105]

NASA

NASA's other transaction authority is set forth at 51 U.S.C.A. § 20113. The statute provides NASA with broad discretion 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 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.[106]

NASA uses its other transaction authority "to enter into a wide range of agreements with numerous entities to advance the NASA mission through its activities and programs."[107]

Under its other transaction authority, NASA enters into various OTAs, such as "Space Act" agreements (SAAs).[108] Under these agreements, NASA transfers appropriated funds "to a domestic agreement partner to accomplish an Agency mission, but whose objective cannot be accomplished by the use of a contract, grant, or Chiles Act cooperative agreement."[109] Although OTAs are often used for research and development (R&D), "NASA does not acquire [research, development, and demonstration (RD&D)] services using [OTAs], but it does conduct collaborative RD&D activities with outside entities."[110] Compared to other agencies, "NASA's authority to enter into" these agreements "is extraordinarily broad," as it does not restrict "the types of projects and research for which OTAs may be used."[111]

NASA's other transaction authority enables the agency to entice "nontraditional Government contractors to participate in [its] R&D efforts."[112] NASA uses SAAs "to contribute personnel, funding, services, equipment, expertise, information, and facilities to a wide range of R&D efforts."[113]

NASA is the most active agency with respect to executing OTAs. NASA had 2,217 OTAs in 2010, increasing the number to 3,223 in 2014.[114] By way of comparison, DOD managed only 79 OTAs as of 2014.[115] TSA was the second most active agency, managing 637 OTAs in 2014.[116]

Department Of Transportation

DOT's authority to enter into OTAs is limited to "three types of RD&D projects that focus on public transportation."[117]

Within DOT, FAA possesses authorization to enter into OTAs.[118] Other than FAA, the Pipeline and Hazardous Materials Safety Administration (PHMSA) is the only other DOT agency actively exercising authority to enter into OTAs.[119]

PHMSA has limited other transaction authority.[120] Its statutory authority provides that "PHMSA's OTAs are for a specific purpose: to further pipeline safety, including development, improvement, and promotion of one-call damage prevention programs, research, risk assessment, and mapping."[121]

Key Provisions & Other Considerations

Congress has repeatedly expressed its preference for increased use of OTAs. According to Congress, the agreements provide "flexibility" that "can make them attractive to firms and organizations that do not usually participate in government contracting due to the typical overhead burden and 'one size fits all' rules" applicable to Government

contracts.[122] Expanded use of OTAs, will, according to Congress, allow Executive Branch agencies to "access new source[s] of technical innovation, such as Silicon Valley startup companies and small commercial firms."[123] Although a key objective of OTAs is attracting companies that do not typically do business with the Federal Government, traditional Government contractors compete for, and are often awarded, OTAs.[124]

In addition to flexibility offered by OTAs, the agreements are "outside the constraints of the [FAR] and other sources of normally applicable federal procurement law."[125] Nevertheless, despite a lack of any *statutory* requirement that OTAs incorporate FAR clauses, the FAR and agency supplements often appear in OTAs because Government contracting personnel are trained under, and are accustomed to, the FAR system for procuring goods and services. Contracting Officers (COs) are often "risk-averse when selecting procurement strategies,"[126] limiting use of innovate procurement vehicles such as OTAs. Procurement personnel familiar with FAR terminology and concepts can be the same individuals with authority to award, execute, or oversee the OTA. For example, DOD guidelines for prototype OTAs provide: "Agreements Officers for prototype projects must be warranted DOD COs with a level of responsibility, business acumen, and judgment that enables them to operate in this relatively unstructured environment."[127] DOD's guidelines also note that its Agreement Officers are "well-versed in the FAR."[128]

Accordingly, companies seeking OTAs should anticipate the inclusion of contract clauses typically used in procurement contracts and should negotiate with the agency to remove nonmandatory provisions. Because agencies are not required to follow the many onerous rules and regulations applicable to typical agency procurements, tailored terms and conditions may be negotiated that protect the Government's interests and incentivize the contractor to engage.

Use Of Consortia

A notable difference between OTAs and typical procurement contracts is that OTAs are often awarded by federal agencies to a consortium.[129] In a consortium, the contract recipient manages the OTA's administrative requirements and serves as the general contractor. For example, the managing firm will ensure that nontraditional contractors or small business participants are engaged and will negotiate terms and conditions though subcontracts. Under this arrangement, companies including nontraditional Government contractors, or academia representatives, form the consortium.

The consortium is responsible for creating rules applicable to members. Typically, members execute a consortium agreement or articles of collaboration governing interactions between the members.[130] Membership terms may include dues, the requirement to comply with the OTA's terms and conditions, and attendance at consortium meetings.

Similar to an indefinite-delivery, indefinite-quantity (IDIQ) contract used in federal procurements,[131] the agencies often issue orders to the consortium under a "master" OTA. With respect to funding, the "master" OTA typically provides an estimated or ceiling value for the other transaction. The estimated or ceiling value does not obligate the agency to spend the total amount.[132] The agency will issue orders via smaller agreements, similar to task orders under an IDIQ contract. Funds for each order or separate agreement will be provided separately by the agency using funds obligated for the "master" OTA.

Contract Type

Executive Branch agencies are limited in the type of contract they can use to procure goods or services.[133] For example, the FAR prescribes when agencies can use cost-reimbursement,[134] time-and-materials, [135] or labor-hour type contracts.[136] When procuring commercial items, agencies must use firm-fixed-price type contracts.[137] Similarly, agencies procuring commercial services can use time-and-materials and labor-hour type contracts only under limited circumstances.[138]Although agencies have authority to conduct procurements using "simplified acquisition procedures,"[139] this authority is limited to the acquisition of supplies or services not exceeding the simplified acquisition threshold, or commercial items not exceeding $7 million.[140] These restrictions do not apply to OTAs. For DOD prototype OTAs, for example, the department provides for contract types such as "fixed amount," "expenditure-based," or "hybrid."[141]

Intellectual Property

In addition to the FAR, various statutes address intellectual property rights for entities that do business with the Federal Government, such as the Bayh-Dole Act,[142] which relates to patent rights, and 10 U.S.C.A. §§ 2320 and 2321, which relate to technical data. These statutes do not apply to OTAs.[143]

In traditional procurement contracts, agencies seek to protect proprietary interests in data, as the protection of data is considered necessary to "encourage qualified contractors to participate in and apply innovative concepts to Government programs."[144] Agencies must therefore "balance the Government's needs and the contractor's legitimate proprietary interests" in the data.[145] The extent of the Federal Government's rights in technical data and computer software created by a contractor typically hinge on whether Government funds were used during development. Generally, the Government obtains more rights when its funds were used than when the contractor develops data or software at private expense. When data is first produced in performance of a contract, the Government often obtains "unlimited rights."[146] Through unlimited rights the Government can "use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so."[147]

One of the primary attractions of OTAs for companies is the flexibility "to address concerns regarding intellectual property" in comparison to traditional procurement contracts.[148] Agencies have recognized that by seeking unnecessary data rights, "the Government might. . .dissuade firms from doing business with the Government."[149]

OTAs "allow the federal government flexibility in negotiating intellectual property and data rights, which stipulate whether the Government or the contractor will own the rights to technology developed under the [OTA]."[150] Unlike procurement contracts, agencies need not obtain rights to the "prototype, hardware, or other property" funded under the OTA, and agencies may seek "only the minimum Government-purpose data rights" required by law.[151] In fact, to incentivize private sector participation, agencies using OTAs may allow "firms to retain the maximum intellectual property rights" otherwise required by law.[152]

Generally, agencies awarding OTAs do not seek to own or otherwise maintain control over intellectual property developed through the agreement. Instead, agencies aim to ensure that the technology reaches those entities, including commercial firms, that can make best use of it.

Documentation & Records

Another aspect of OTAs that makes them attractive to nontraditional contractors is that the agreements are not subject to rigid regulations controlling cost and pricing information contractors must provide, and records they must keep, when contracting with the Federal Government. As noted, OTAs are not subject to the FAR and the cost principles set forth at FAR Part 31 do not automatically apply. Further, OTAs are not subject to the Cost Accounting Standards[153]— accounting requirements for the measurement, assignment, and allocation of costs to procurement contracts.

Although these provisions are not required by statute, some agencies mandate that OTAs include clauses requiring OTA recipients to retain records. Stated differently, to protect the Government's interests, "implementing regulations for certain agencies' [other transactions] establish[] minimum requirements, such as auditing and reporting requirements."[154]

For example, DOD's guidance for other transactions for prototype projects provides:

> Each agreement that provides for payments in a total amount in excess of $5,000,000 shall include a clause that provides for the Comptroller General, in the discretion of the Comptroller General, to examine the records of any party to the agreement or any entity that participates in the performance of the agreement.[155]

Dispute Resolution

It is often expressed that contractors must "turn square corners" in their dealings with the Government.[156] The Government is entitled to the goods or services as set forth in the OTA terms. An OTA recipient, in turn, is entitled to hold the Government to its contractual obligations.[157]

Typical Government contract disputes are governed by the Contracts Disputes Act of 1978 (CDA).[158] But OTAs are not considered "contracts" subject to the CDA. The CDA "applies to any express or implied contract" made by Executive Branch agencies for property, services, construction, or disposal of personal property.[159] Agreements issued by an agency under its other transaction authority are not procurement contracts.[160] Instead, the agreements are the sort of "new type of contractual relationship" established by Congress "with the specific intent" that the agreements not be considered contracts under the CDA.[161] Thus, procedures for resolving disputes between the agency and the OTA recipient are typically addressed in the OTA.[162] OTA recipients must seek to resolve any disputes with the agency according to the procedures set forth in the OTA.

Entities contracting with the Federal Government should be aware of potential defenses that could result in denial of

a claim. The OTA may provide procedures the OTA holder must follow before seeking judicial relief. "When a claim arising under a contract is not subject to the Contract Disputes Act, the Court looks to the contract's disputes clause to resolve the claim."[163] Thus, if the OTA "provides a specific administrative remedy for a particular dispute," the OTA recipient "must exhaust its administrative contractual remedies prior to seeking judicial relief."[164]

With respect to timeliness, the OTA will likely be subject to 28 U.S.C.A. § 2401, "Time for commencing action against United States." This statute provides that, except for claims brought under the CDA, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[165] State courts possess jurisdiction to adjudicate most civil actions against the U.S. Government. But if an entity holding an OTA brings suit in state court, the U.S. Government will likely remove the case to a federal district court.[166] Suit may also be brought in the U.S. Court of Federal Claims.[167]

Subcontractors, vendors, or suppliers of an OTA recipient cannot bring suit for breach of contract against the U.S. Government.[168] An entity without a direct contract with the Government cannot sue the Government even if its actions caused the damage.[169]

As another example, most typical procurement contracts include a "Changes" clause that provides the Government with the unilateral right to order changes in contract work during performance.[170] OTAs may similarly include a clause to address how changes will be handled.[171] The clause should address "whether the Government should have the right to make a unilateral change to the agreement, or whether all changes should be bilateral."[172]

False Claims Act Liability

The civil False Claims Act (FCA)[173] "imposes significant penalties on those who defraud the Government."[174] The FCA targets "those who present or directly induce the submission of false or fraudulent claims" to the Federal Government.[175] Under the FCA, a "claim" includes any direct request to the Government for payment.[176] For each false claim submitted, the FCA imposes (1) a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990,[177] and (2) three times the amount of damages the Government sustains.[178] The defendant is liable "for civil penalties regardless of whether the government shows that the submission of that claim caused the government damages."[179] Each invoice submitted for payment constitutes a separate claim under the FCA.[180]

Companies that perform services for the Government under OTAs are not subject to laws typically used to combat fraud, such as the Truth in Negotiations Act[181] or the CDA's anti-fraud provision.[182] Unlike those laws, which are limited to typical contracting actions under which federal agencies procure supplies, materials, equipment, or services,[183] the FCA applies broadly and is not limited to typical procurement contracts.[184] Companies operating under OTAs are subject to liability under the FCA, as are subcontractors,[185] suppliers, and vendors.

Companies seeking OTAs should be aware that fraud or false certifications used to obtain the OTA permits the Government to void the agreement and avoid payment for services rendered.[186] In *Long Island Savings Bank, FSB v. United States*, the court denied a claim that the Government failed to pay $435 million owing under a contract because the plaintiff "obtained the contract by knowingly making a false certification."[187] The court denied the plaintiff any recovery despite clear evidence that (a) the company fully performed the contract to the substantial benefit of the Government, which was not harmed by the fraud, and (b) the contractor and Government were both unaware of the fraud when the Government breached the contract.[188]

In recent years, the Government has been aggressively asserting the affirmative defense that a contractor's fraud—in obtaining the contract or during performance—permits the Government "to walk away from a contract without paying for supplies or services that it has received."[189] Decisions accepting the defense provide the Government with a "powerful tool" to avoid paying contractors based on purported erroneous certifications made before award of the OTA.[190]

Competition

When Executive Branch agencies procure goods and services, the agencies typically must do so using "competitive procedures."[191] Congress enacted the requirement for competition through the Competition in Contracting Act of 1984 (CICA).[192] CICA "generally requires 'full and open competition' for government procurements."[193] CICA is meant to ensure that procurements are open to all responsible sources and to provide the Government with the opportunity to

receive fair and reasonable prices.[194] Under CICA, "a contracting agency has the affirmative obligation to use reasonable methods to publicize its procurement needs and to timely disseminate solicitation documents to those entitled to receive them."[195] CICA does not apply to the award of OTAs.[196] Thus, agencies are not required to use competitive procedures before awarding OTAs. Nor are agencies otherwise required to ensure that the procurement is open to all reasonable sources. Unlike a typical procurement, agencies are not under "a duty to consider all responses fairly and honestly."[197] Although CICA's provisions do not govern award of OTAs, agencies often attempt to use competitive procedures "to the maximum extent practicable."[198] However, a significant number of OTAs are awarded on a sole-source basis.

Bid Protests

Because OTAs are not procurement contracts, GAO has repeatedly held that it lacks jurisdiction to review protests of the award of OTAs or solicitations for OTAs. Instead, GAO considers an OTA to be a "nonprocurement instrument" not subject to CICA.[199]

But GAO will review "a timely protest that an agency is improperly using its 'other transaction' authority."[200] Specifically, GAO will review a protest challenging that an agency is "improperly using a. . .non-procurement instrument, such as [an OTA], where a procurement contract is required."[201] GAO's review is limited to ensuring that by using an OTA, the "agency is not attempting to avoid the requirements of procurement statutes and regulations," such as the Federal Grants and Cooperative Agreement Act,[202] which provides when an executive agency must use a procurement contract.[203]

GAO's review of an agency's use of its other transaction authority is deferential. If an agency is authorized by statute to use OTAs, GAO "will not make an independent determination of the matter."[204]

Antitrust Issues

As stated, companies seeking to obtain OTAs may form consortia consisting of companies that may otherwise compete against each other. Forming a consortium or otherwise teaming to obtain an OTA will not raise antitrust issues if the arrangement provides pro-competition or pro-market benefits.[205] But combining resources under an OTA is not permissible if the arrangement is a "naked restraint of trade with no purpose except stifling competition."[206] Typically, companies joining forces to obtain an OTA do so to provide an enhanced offer at a lower price. Similarly, companies should avoid working together to obtain an OTA if they are the only competitors in the market.[207]

Financing

One issue that may arise in OTAs is delayed payments by the Government. Entities unfamiliar with Government contracting might anticipate shorter payment schedules than in a typical Government contract. Accordingly, it may be necessary for the OTA recipient to obtain financing from a third party. Third-party financing can allow the OTA recipient to meet its payroll. Or third-party financing will allow the recipient pay subcontractors, suppliers, or vendors providing services under the OTA.

Under a typical financing agreement, the third-party financier agrees to pay the OTA recipient before the Government does so. In exchange for early payment, the third party might provide an amount less than what the OTA recipient submits in its invoice. For example, the third party would pay $99 for a $100 invoice. The OTA recipient, in turn, assigns its right to payment to the third party. Financing contracts with the Government can be attractive due to the Prompt Payment Act.[208] Under the act, the Government must pay interest for invoices not paid within a specified period after the due date.[209]

Generally, two statutes control assignments under typical Government contracts: the Assignment of Contracts Act[210] and the Assignment of Claims Act.[211] Collectively, the acts are known as the "Anti-Assignment Acts."[212] For decades, Congress has encouraged private financing of Government contracts.[213] The Acts thus permit entities doing business with the Government to assign amounts due or that become due.[214] In return for financing, OTA recipients can assign amounts due under the OTA to a bank, trust company, federal lending agency, or other financing institution.[215] A "financing institution" under the Acts is defined as an institution that—

> deals in money as distinguished from other commodities as the primary function of its business activity. A firm—be it a corporation, a partnership or a sole proprietorship—which as a primary function is regularly engaged in the financing business may be regarded as a financing institution. However, a firm whose credit extension and lending operations, although carried on regularly, are merely incidental or subsidiary to another end, in the light of the firm's overall operations, more important purpose, is not a financing institution.[216]

Assignments for lower-tier entities will be governed by the contract between the OTA recipient and the subcontractor, supplier, or vendor.

Payment terms for lower-tier entities will not usually be set forth in the OTA. Typically, the entity holding the OTA negotiates a clause providing that lower-tier entities are only entitled to payment after the OTA holder is paid by the Government. Thus, the OTA recipient—and subcontractors, suppliers, and vendors—should understand the difference between pay "if" paid and pay "when" paid clauses. The difference is significant. Although state law varies, a "pay when paid" clause gives an entity contracting with the Government a reasonable amount of time to pay subcontractors.[217] But a "pay if paid" clause allows the OTA recipient to withhold payment entirely until the Government pays.

Another issue that can arise is if the third-party financier asks for a complete copy of the OTA. The financier might do so to ensure that the proceeds of the OTA are assignable.[218] But an entity holding an OTA cannot provide a copy if the agreement is classified. If an entity seeking an OTA anticipates that it will need financing and that the agreement might be classified, the entity and the Government should negotiate a solution before executing the agreement. Another solution is to obtain financing from a financier that has a security clearance.[219]

Recent Developments

Challenges & Prizes

For decades, federal agencies have been seeking avenues around the FAR and other procurement regulations. More recently, the Obama administration urged agencies to offer prizes and challenges "to promote and harness innovation."[220] Agencies with other transaction authority are thus encouraged "to structure prize competitions" for innovative companies that do not traditionally do business with the Government.[221] "To date, federal agencies have offered more than $250 million in prize money along with other valuable and unique incentive prizes"—including with use of OTAs.[222]

FY 2018 NDAA

The FY 2018 NDAA[223] reflects Congress' preference for the increased use of OTAs. Section 867, "Preference for the Use of Other Transactions and Experimental Authority," provides:

> In the execution of science and technology and prototyping programs, the Secretary of Defense shall establish a preference, to be applied in circumstances determined appropriate by the Secretary, for using transactions other than contracts, cooperative agreements, and grants entered into pursuant to [10 U.S.C.A. §§ 2371 and 2371b], and authority for procurement for experimental purposes pursuant to [10 U.S.C.A. § 2373].[224]

The Senate Report accompanying the FY 2018 NDAA includes a lengthy discussion expressing frustration that OTAs are not more commonly used by contracting officials.[225] According to the report, there is "an ongoing lack of awareness and education regarding other transactions, particularly among senior leaders, contracting professionals, and lawyers."[226] The lack of awareness "leads to an overly narrow interpretation of when OTAs may be used, narrow delegations of authority to make use of OTAs, a belief that OTAs are options of last resort for when Federal Acquisition Regulation (FAR) based alternatives have been exhausted, and restrictive, risk averse interpretations of how OTAs may be used."[227] OTAs are appropriate for "innovative projects and programs" that should not be encumbered by "unnecessarily restrictive contracting methods."[228] The Senate Report noted that DOD has "authority to use OTAs with the most flexible possible interpretation unless otherwise specified in [10 U.S.C.A. §§ 2371 and 2371b]" and encouraged contracting officials to "to tolerate more risk" in using OTAs.[229]

Section 864 of the FY 2018 NDAA doubled the maximum OTA that can be made without special permission for prototypes under the DOD statute, from $50 million to $100 million. A senior procurement executive can provide authority for other transactions up to $500 million.[230] Under the FY 2018 NDAA, OTAs for prototypes can exceed $500 million if approved by the undersecretary for acquisition, technology, and logistics. In addition, DOD must implement training to encourage increased use of OTAs[231] and provide for OTAs to be used for research.[232]

Guidelines

The following *Guidelines* are for companies considering whether to enter into "other transaction" agreements and those that have already been awarded an OTA. They are not, however, a substitute for professional representation in any specific situation.

1. In seeking to obtain an OTA, determine if the target agency has authority to enter into an OTA. If the agency has

other transaction authority, determine the scope of the authority. Some agencies have broad authority to enter into OTAs; other agencies can only use OTAs for limited purposes.

2. Congress provided certain agencies with other transaction authority to acquire advanced services from private sector companies that traditionally do not conduct business with the Government. However, agencies often award OTAs to experienced Government contractors. Traditional and "nontraditional" contractors should consider teaming to enhance their ability to pursue OTAs.

3. Companies negotiating OTAs should anticipate the inclusion of nonmandatory FAR and agency supplement provisions due to the absence of terms and conditions specific to OTAs. Keep in mind that OTA terms and conditions are negotiable even if the agency solicits the OTA using a standard procurement "template" typically used in traditional contracts.

4. Companies should negotiate the minimum Government-purpose intellectual property rights required by law, allowing the company and its subcontractors to retain maximum intellectual property rights. Although the FAR intellectual property clauses may serve as a guideline, they often impose intellectual property burdens that do not apply to and are contrary to the purpose of OTAs.

5. Companies unfamiliar with Government contracting may consider joining a consortium under an OTA. Typically, the managing firm deals directly with the Government, handling administrative tasks and ensuring all obligations under the OTA are met. Member companies are afforded greater latitude to provide their products and services while dealing solely with the managing firm, which is typically a commercial entity.

6. OTAs are not typically subject to many of the statutes and regulations applicable to typical procurement contracts with the Federal Government. However, companies must remember that other laws—such as the FCA and antitrust laws—still apply. Companies seeking OTAs, particularly those not accustomed to federal contracting, should implement an OTA compliance program to ensure compliance with applicable laws and the terms of the OTA.

ENDNOTES:

[1]Red River Waste Sols., Inc., Comp. Gen. Dec. B-414367, Mar. 21, 2017, 2017 CPD ¶ 97 ("agreements issued by the agency under its 'other transaction' authority 'are not procurement contracts" (citing Rocketplane Kistler, Comp. Gen. Dec. B-310741, Jan. 28, 2008, 2008 CPD ¶ 22, at 3)).

[2]See 31 U.S.C.A. § 6305; Hymas v. United States, 810 F.3d 1312, 1324 (Fed. Cir. 2016), cert. denied, 137 S. Ct. 2196, (2017) (discussing use of cooperative agreements and difference between cooperative agreements and procurement contracts).

[3]"Federal Acquisition Regulations are codified in Title 48 of the Code of Federal Regulations." Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1276 n.1 (Fed. Cir. 2002); Engineered Demolition, Inc. v. United States, 60 Fed. Cl. 822, 824 n.2 (2004) ("The Federal Acquisition Regulations are codified in title 48 of the Code of Federal Regulations ('C.F.R.').").

[4]ATK Thiokol, Inc. v. United States, 68 Fed. Cl. 612, 629 (2005), aff'd, 598 F.3d 1329 (Fed. Cir. 2010) ("The FAR codified and published 'uniform policies and procedures for acquisition by all executive agencies.' " (citing FAR 1.101)).

[5]See generally Dunn, "Other Transaction Agreements: What Applies?," 32 Nash & Cibinic Rep. NL ¶ 22 (May 2018).

[6]48 C.F.R. ch. 99; Perry v. Martin Marietta Corp., 47 F.3d 1134, 1135 (Fed. Cir. 1995) ("the Cost Accounting Standards (CAS) [are] a set of accounting standards for government contracts promulgated by the Cost Accounting Standards Board (CASB).").

[7]10 U.S.C.A. § 2306a; 41 U.S.C.A. §§ 3501–3509 (renamed "Truthful Cost or Pricing Data" statute).

[8]Deficit Reduction Act of 1984, Pub. L. No. 98-369, div. B., tit. VII, §§ 2701–2753, 98 Stat. 494, 1175 (1984) (codified as amended at 10 U.S.C.A. § 2304 et seq.; 41 U.S.C.A. § 3301 et seq.; 31 U.S.C.A. §§ 3551–3556).

[9]See S. Rep. No. 115-125, at 189 (2017) (noting OTAs are an "important and flexible contracting method").

[10]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 12 (2016) ("Most agencies cited flexibility as a primary reason for their use of other transaction agreements.").

[11]GAO, GAO-05-136, Homeland Security: Further Action Needed To Promote Successful Use of Special DHS Acquisition Authority 2 (2004) ("Because fewer government-unique requirements apply, other transactions can be useful in attracting private-sector entities that traditionally have not done business with the government.").

[12]Yeaney, "BGOV Identifies $2 Billion 'Other Transaction Authority' Market," 109 Fed. Cont. Rep. (BNA) No. 198 (Feb. 21, 2018).

[13]Press Release, World Wide Technology, Inc., Groundbreaking $750 Million-Ceiling Contract Open to All Federal Agencies, Starting With $35 Million Task Order for U.S. Army Cybersecurity Services (2017).

[14]See SBA, About the SBA, https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sba-bus

iness-opportunity-specialist-presents-federal-government-contracting-certification-programs.

[15]OMB, Budget of the United States Government, Fiscal Year 2018, at 191, available at https://www.gpo.gov/fdsys/pkg/BUDGET-2018-PER/pdf/BUDGET-2018-PER.pdf ("[T]he Federal Government Budget for IT is estimated to be $95.7 billion in FY 2018, an increase of 1.7 percent from FY 2017.").

[16]OMB, Budget of the United States Government, Fiscal Year 2018, at 191, available at https://www.gpo.gov/fdsys/pkg/BUDGET-2018-PER/pdf/BUDGET-2018-PER.pdf.

[17]OMB, Budget of the United States Government, Fiscal Year 2018, at 191, available at https://www.gpo.gov/fdsys/pkg/BUDGET-2018-PER/pdf/BUDGET-2018-PER.pdf.

[18]Cong. Research Serv., RS22536, Overview of the Federal Procurement Process and Resources 1 (2015).

[19]Hatch, "The New Federal Acquisition Regulation: An Improvement?," 56 N.Y. St. B.J., 13, 14 (Oct. 1984) (citing Federal Acquisition Regulation (FAR) Questions and Answers, September 1983).

[20]FAR 1.101 (noting FAR "established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies."); see also Saratoga Dev. Corp. v. United States, 21 F.3d 445, 458 (D.C. Cir. 1994).

[21]See Cong. Research Serv., RS22536, Overview of the Federal Procurement Process and Resources 1 (2015).

[22]FAR 1.101.

[23]See DFARS 201.104.

[24]See DFARS 201.104.

[25]Manuel et al., Cong. Research Serv., R42826, The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions 17 (2015).

[26]See GSA., Supplemental Regulations, available at https://www.acquisition.gov/Supplemental_Regulations.

[27]See Manuel et al., Cong. Research Serv., R42826, The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions 15 (2015).

[28]Edwards, "Free the DOD From the FAR: Bring Back the Defense Acquisition Regulation," 29 Nash & Cibinic Rep. NL ¶ 58 (Oct. 2015).

[29]CIO Council, "IT Acquisition and Contracts Management," 2016 State of Federal IT Report, at F-2, available at https://www.cio.gov/assets/files/sofit/02.06.acquisition.pdf.

[30]OMB Memorandum M-10-11, Guidance on the Use of Challenges and Prizes To Promote Open Government 9 (Mar. 8, 2010).

[31]OMB Memorandum M-10-11, Guidance on the Use of Challenges and Prizes To Promote Open Government 9 (Mar. 8, 2010).

[32]See, e.g., Expl. Partners, LLC, Comp. Gen. Dec. B-298804, Dec. 19, 2006, 2006 CPD ¶ 201 ("entering and performing 'other transactions' cannot be the same as entering and performing procurement contracts"); MorphoTrust USA, LLC, Comp. Gen. Dec. B-412711, May 16, 2016, 2016 CPD ¶ 133 (noting agency issued solicitations for " 'other transaction' agreements—rather than procurement contracts"); MorphoTrust USA, LLC, Comp. Gen. Dec. B-412711, May 16, 2016, 2016 CPD ¶ 133 (discussing protester's challenge that agency was required to "use a procurement contract, rather than an 'other transaction' agreement" to acquire services).

[33]See, e.g., FAR 31.205-18(e) (providing examples of cooperative agreements, which include "joint ventures, limited partnerships, teaming arrangements, and collaboration and consortium arrangements").

[34]See 10 U.S.C.A. § 2371(a).

[35]MorphoTrust USA, LLC, Comp. Gen. Dec. B-412711, May 16, 2016, 2016 CPD ¶ 133 (citing GAO, GAO–03–150, Defense Acquisitions: DOD Has Implemented Section 845 Recommendations but Reporting Can Be Enhanced 1 (2002)).

[36]49 U.S.C.A. § 106(l)(6).

[37]Red River Waste Sols., Inc., Comp. Gen. Dec. B-414367, Mar. 21, 2017, 2017 CPD ¶ 97 (citing MorphoTrust USA, LLC, May 16, 2016, 2016 CPD ¶ 133, at 8 n.14).

[38]National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § 203(b)(5), 72 Stat. 426, 430 (1958). NASA's OT authority was made permanent in 1990. National Aeronautics and Space Administration Authorization Act, Fiscal Year 1991, Pub. L. No. 101-611 (1990).

[39]H.R. Rep. No. 85-1770 (May 24, 1958).

[40]H.R. Rep. No. 85-1770 (May 24, 1958).

[41]Pub. L. No. 85-568, § 203(b)(5) (current version at 51 U.S.C.A. § 20113(e)).

[42]10 U.S.C.A. §§ 2301–2314.

[43]40 U.S.C.A. §§ 471–514 and 41 U.S.C.A. §§ 251–260 (recodified in 2011).

[44]49 U.S.C.A. § 1113(b)(1)(B) (providing NTSB with authority to "make agreements and other transactions necessary to carry out" the Board's obligations).

[45]Pub. L. No. 92-423, § 3, 86 Stat. 679, 680 (1972).

[46]National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 251, 103 Stat. 1352, 1403 (1989).

[47]National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 826, 105 Stat. 1290, 1442 (1991).

[48]National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845, 107 Stat. 1547, 1721 (1993).

[49]National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 804, 110 Stat. 2422, 2605 (1996).

[50]Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, § 226, 110 Stat. 3213, 3233 (1996).

[51]Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 104-50, § 308, 109 Stat. 436 (1995).

[52]Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat 2135 (2002).

[53]Pub. L. No. 107-296, § 831.

[54]Pub. L. No. 107-296, § 831.

[55]See Yeaney, "BGOV Identifies $2 Billion "Other Transaction Authority" Market," 109 Fed. Cont. Rep. (BNA) No. 198 (Feb. 21, 2018).

[56]DOD, Other Transactions Guide for Prototype Projects § C1.1.1 (Jan. 2017), available at https://www.acq.osd.mil/dpap/cpic/cp/docs/OTA_Guide%20(17%20Jan%202017)%20DPAP%20signature%20FINAL.pdf [hereinafter DOD Guide].

[57]10 U.S.C.A. § 2371(a).

[58]10 U.S.C.A. § 2371b(a).

[59]DOD Guide § C1.6 (emphasis added).

[60]10 U.S.C.A. § 2371b(d)(1)(A).

[61]10 U.S.C.A. § 2302(9); see 41 U.S.C.A. §§ 1502–1506.

[62]10 U.S.C.A. § 2371b(d)(1)(B).

[63]10 U.S.C.A. § 2371b(d)(1)(c).

[64]10 U.S.C.A. § 2371b(d)(1)(D).

[65]National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845, 107 Stat. 1547, 1721 (1993).

[66]See National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114–92, § 815, 129 Stat. 726, 893 (2015).

[67]S. Rep. No. 115-125, at 190 (2017).

[68]S. Rep. No. 115-125, at 189 (2017); see Nash, "Other Transactions: A Preferred Technique?," 32 Nash & Cibinic Rep. NL ¶ 8 (Feb. 2018) (citing S. Rep. No. 115-125 (2017)).

[69]S. Rep. No. 115-125, at 190 (2017).

[70]Nash, "Other Transactions: A Preferred Technique?," 32 Nash & Cibinic Rep. NL ¶ 8 (Feb. 2018) (citing S. Rep. No. 115-125 (2017)).

[71]National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, §§ 861–868, 131 Stat. 1283, 1493 (2017).

[72]DOD Guide.

[73]10 U.S.C.A. § 2371b(b)(2).

[74]10 U.S.C.A. § 2371b(f).

[75]42 U.S.C.A. § 16538(f).

[76]42 U.S.C.A. § 7256; see Pub. L. No. 103-160, § 845.

[77]National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 1059 (2013) (amending 42 U.S.C.A. 7256(g)(10)); see GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 8–9 (2016).

[78]Pub. L. No. 92-423, § 3 (1972).

[79]HHS, National Institutes of Health: Other Transaction Award Policy Guide for the NIH Precision Medicine Initiative Research Programs (2015).

[80]HHS, National Institutes of Health: NIH Other Transaction Award Policy Guide for the NIH Common Fund Human Biomolecular Atlas Program (HuBMAP) (2017).

[81]42 U.S.C.A. § 282(n)(1)(B).

[82]42 U.S.C.A. § 282(n)(2).

[83]42 U.S.C.A. § 282(n)(2).

[84]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 17 (2016).

[85]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 17 (2016).

[86]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 17 (2016).

[87]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 17 (2016).

[88]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 17 (2016).

[89]Statement of Chief Procurement Officer Thomas W. Essig Before the House Subcommittee on Emerging Threats, Cybersecurity, and Science and Technology of the Committee on Homeland Security, 2008 WL 345436.

[90]See DHS, Management Directive No. 0771.1, Other Transaction Authority (July 8, 2005) ("DHS may use two major types of OTs: OTs for Research and OTs for Prototype Projects.").

[91]DHS Office of Inspector General, OIG-18-24, Department of Homeland Security's Use of Other Transaction Authority 2 (Nov. 30, 2017).

[92]DHS, Management Directive No. 0771.1, Other Transaction Authority 4 (July 8, 2005).

[93]DHS, Management Directive No. 0771.1, Other Transaction Authority 4(July 8, 2005).

[94]DHS Office of Inspector General, OIG-18-24, Department of Homeland Security's Use of Other Transaction Authority 1 (Nov. 30, 2017).

[95]Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101, 115 Stat. 597 (2001) (adding 49 U.S.C.A. § 114) ("In carrying out the functions of the Administration, the Under Secretary [head of TSA] shall have the same authority as is provided to the Administrator of the Federal Aviation Administration under subsections (l) and (m) of" 49 U.S.C.A. § 106). See generally MorphoTrust USA, LLC, Comp. Gen. Dec. B-412711, May 16, 2016, 2016 CPD ¶ 133;

[96]49 U.S.C.A. § 114(m)(1).

[97]See 49 U.S.C.A. § 106(l)(6).

[98]GAO, GAO-18-172, Transportation Security Administration: After Oversight Lapses, Compliance with

Policy Governing Special Authority Has Been Strengthened 5 (2017).

[99]49 U.S.C.A. § 106(l)(6).

[100]GAO, GAO-18-172, Transportation Security Administration: After Oversight Lapses, Compliance with Policy Governing Special Authority Has Been Strengthened (2017).

[101]GAO, GAO-18-172, Transportation Security Administration: After Oversight Lapses, Compliance with Policy Governing Special Authority Has Been Strengthened 11 (2017).

[102]GAO, GAO-18-172, Transportation Security Administration: After Oversight Lapses, Compliance with Policy Governing Special Authority Has Been Strengthened 8 (2017).

[103]GAO, GAO-18-172, Transportation Security Administration: After Oversight Lapses, Compliance with Policy Governing Special Authority Has Been Strengthened 1 (2017).

[104]GAO, GAO-18-172, Transportation Security Administration: After Oversight Lapses, Compliance with Policy Governing Special Authority Has Been Strengthened 3 (2017).

[105]GAO, GAO-18-172, Transportation Security Administration: After Oversight Lapses, Compliance with Policy Governing Special Authority Has Been Strengthened 5 (2017).

[106]51 U.S.C.A. § 20113(e) (formerly 42 U.S.C.A. § 2473(c)(5)).

[107]NASA Advisory Implementing Instruction (NAII 1050-1D), at B-1 (Sept. 29, 2019), available at https://nodis3.gsfc.nasa.gov/NPD_attachments/N_AII_1050_001D.pdf.

[108]NASA Advisory Implementing Instruction (NAII 1050-1D), at B-1 (Sept. 29, 2019), available at https://nodis3.gsfc.nasa.gov/NPD_attachments/N_AII_1050_001D.pdf.

[109]Expl. Partners, LLC, Comp. Gen. Dec. B-298804, Dec. 19, 2006, 2006 CPD ¶ 201 (citing NASA Policy Directive, NPD 1050.1G, Nov. 13, 1998, at 1–2); see 31 U.S.C.A. § 6305.

[110]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 15 (2016).

[111]Szeliga, "Alternative Agreements for Research and Development With NASA," 18-4 Briefing Papers 1 (Mar. 2018).

[112]Szeliga, "Alternative Agreements for Research and Development With NASA," 18-4 Briefing Papers 1 (Mar. 2018).

[113]Szeliga, "Alternative Agreements for Research and Development With NASA," 18-4 Briefing Papers 1 (Mar. 2018).

[114]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 27 (2016).

[115]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 27 (2016).

[116]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 27 (2016).

[117]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities 9 (2016); 49 U.S.C.A. § 5312.

[118]49 U.S.C.A. § 106(l)(6).

[119]DOT Office of Inspector General, ZA2017098, DOT and FAA Lack Adequate Controls Over Their Use and Management of Other Transaction Agreements (Sept. 11, 2017).

[120]49 U.S.C.A. § 60117(k).

[121]DOT Office of Inspector General, ZA2017098, DOT and FAA Lack Adequate Controls Over Their Use and Management of Other Transaction Agreements 3 (Sept. 11, 2017).

[122]H. R. Rep. No. 114-270, at 703 (2015).

[123]H. R. Rep. No. 114-270, at 703 (2015).

[124]See, e.g., United States v. Northrop Grumman Sys. Corp., 2015 WL 5916871 (N.D. Ill. Oct. 8, 2015) (discussing OTA awarded by DHS to Northrop Grumman Systems Corp.).

[125]Orbital ATK, Inc. v. Walker, 2017 WL 2982010, at *3 (E.D. Va. July 12, 2017).

[126]CIO Council, "IT Acquisition and Contracts Management," 2016 State of Federal IT Report, at F-16, available at https://www.cio.gov/assets/files/sofit/02.06.acquisition.pdf.

[127]DOD Guide § C1.3.2.

[128]DOD Guide § C2.1.1.4.

[129]See, e.g., Department of Defense Ordnance Technology Consortium (DOTC), http://www.nac-dotc.org/about_dotc.html; Energy Conversion Devices, Inc., Comp. Gen. Dec. B-260514, June 16, 1995, 95-2 CPD ¶ 121 (discussing award of OTA to consortium).

[130]See, e.g., National Armaments Consortium Member Agreement, available at http://www.nac-dotc.org/docs/Revised_NAC_CMA_Final_Jan_2015.pdf.

[131]See FAR subpt. 16.5.

[132]See CAE USE, Inc. v. Dep't of Homeland Sec., CBCA 4776, 16-1 BCA ¶ 36,377 ("under an IDIQ contract, after the government purchases the minimum quantity stated in the contract, its legal obligation under the contract is satisfied" (citing Travel Centre v. Barram, 236 F.3d 1316, 1319 (Fed. Cir. 2001)).

[133]See FAR 16.102(b) ("Contract types not described in this regulation shall not be used, except as a deviation under subpart 1.4.").

[134]FAR 16.301-2, -3.

[135]FAR 16.601(c) ("A time-and-materials contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of

the work or to anticipate costs with any reasonable degree of confidence."); see also FAR 16.601(d) (providing limitations on the use of time-and-materials type contracts).

[136]See FAR 16.602.

[137]FAR 12.207(a).

[138]FAR 12.207(b)(1).

[139]41 U.S.C.A. § 1901.

[140]FAR 13.500; H.R. Rep. No. 104-222, pt. 1, at 48 (1995) (noting the Federal Acquisition Reform Act (FARA) of 1996, Pub. L. No. 104-106, 110 Stat. 642, built on previous reform "by establishing simplified procedures for the purchase of commercial items and exempting commercial item purchases from burdensome government-unique requirements such as the Truth in Negotiations Act and Cost Accounting Standards").

[141]DOD Guide § C2.1.3.1.7.

[142]35 U.S.C.A. §§ 202–204.

[143]DOD Guide § C2.3.1.1.

[144]FAR 27.402(b).

[145]FAR 27.402(b).

[146]FAR 27.404-1, 52.227-14(b).

[147]FAR 27.401.

[148]GAO, GAO-16-209, Federal Acquisitions: Use of "Other Transaction" Agreements Limited and Mostly for Research and Development Activities (2016)

[149]DOD Guide § C2.3.1.3.

[150]GAO, GAO-05-136, Homeland Security: Further Action Needed To Promote Successful Use of Special DHS Acquisition Authority 5 (2004).

[151]See Rocketplane Kistler, Comp. Gen. Dec. B–310741, Jan. 28, 2008, 2008 CPD ¶ 22 (discussing NASA OTA for commercial space exploration).

[152]See Rocketplane Kistler, Comp. Gen. Dec. B-310741, Jan. 28, 2008, 2008 CPD ¶ 22, at *3 n.4 ("The announcement states that NASA will not obtain rights to a participant's background intellectual property and 'that title to all property acquired for the. . .demonstrations will remain with the Participant(s).' ").

[153]GAO, GAO-05-136, Homeland Security: Further Action Needed To Promote Successful Use of Special DHS Acquisition Authority 1 ("Other transactions are exempt from. . .the government's Cost Accounting Standards").

[154]OMB Memorandum M-10-11, at 9.

[155]DOD Guide § C1.2.4.

[156]Alvin Ltd. v. U.S. Postal Serv., 816 F.2d 1562, 1566 (Fed. Cir. 1987) (citing Rock Island, Ark.& La. R.R. Co. v. United States, 254 U.S. 141, 143 (1920)).

[157]Maxima Corp. v. United States, 847 F.2d 1549, 1556 (Fed. Cir. 1988) ("The need for mutual fair dealing is no less required in contracts to which the government is a party, than in any other commercial arrangement. 'It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.' " (citing St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

[158]41 U.S.C.A. § 7101 et seq.

[159]41 U.S.C.A. § 7102(a).

[160]Red River Waste Sols., Inc., Comp. Gen. Dec. B-414367, Mar. 21, 2017, 2017 CPD ¶ 97 (citing Rocketplane Kistler, Comp. Gen. Dec. B-310741, Jan. 28, 2008, 2008 CPD ¶ 22, at 3).

[161]See PDR, Inc. v. United States, 78 Fed. Cl. 201, 206 n.4 (2007) (noting cooperative research and development agreements not subject to CDA).

[162]See, e.g., Statement of Chief Procurement Officer Thomas W. Essig Before the House Subcommittee on Emerging Threats, Cybersecurity, and Science and Technology of the Committee on Homeland Security, 2008 WL 345436 (Feb. 7, 2008)

[163]Tektel, Inc. v. United States, 116 Fed. Cl. 612, 626 (2013) (citing Maine Yankee Atomic Power Co. v. United States, 225 F.3d 1336, 1339 (Fed. Cir. 2000)).

[164]See Maine Yankee Atomic Power Co. v. United States, 225 F.3d 1336, 1340 (Fed. Cir. 2000) (citing McKart v. United States, 395 U.S. 185, 193 (1969)).

[165]28 U.S.C.A. § 2401(a).

[166]See 28 U.S.C.A. § 1442(a) (providing for agencies of the U.S. government to remove civil actions commenced in state courts "to the district court of the United States for the district and division embracing the place wherein it is pending").

[167]28 U.S.C.A. § 1491(a) (providing jurisdiction over "any claim against the United States founded. . .upon any express or implied contract with the United States"); see also DOD Guide § C2.20.1 (noting "an OT dispute potentially can be the subject of a claim in the Court of Federal Claims").

[168]Erickson Air Crane Co. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984) ("The government consents to be sued only by those with whom it has privity of contract, which it does not have with subcontractors." (citing United States v. Johnson Controls, Inc., 713 F.2d 1541, 1550–52 (Fed. Cir. 1983)).

[169]See Sealift Bulkers, Inc. v. Republic of Armenia, No. 95-1293(PLF), 1996 WL 901091, at *3 (D.D.C. Nov. 22, 1996) ("[P]laintiff concedes that it has no contract with the United States and that it is not in privity of contract with it. The United States therefore is immune from suit by [plaintiff].").

[170]See, e.g., FAR 52.243–1 ("Changes—Fixed–Price"). See generally Nash & Feldman, Government Contract Changes (3d ed. & June 2017 Update Thomson Reuters).

[171]DOD Guide § C2.19.1.

[172]DOD Guide § C2.19.1.

[173]31 U.S.C.A. § 3729 et seq.

[174]Univ'l Health Servs., Inc. v. United States, 136 S. Ct. 1989, 1995 (2016).

[175]136 S. Ct. at 1996 (citing 31 U.S.C.A. § 3729(a)).

[176]31 U.S.C.A. § 3729(b)(2)(A); see also United States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 907 (9th Cir. 2017) ("submitting direct requests for payment from government agencies, as well as submitting requests for reimbursement" can result in liability under the FCA) (citing United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1177 (9th Cir. 2006)).

[177]As amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321–73 (1996).

[178]31 U.S.C.A. § 3729(a). The currently adjusted penalty range is $5,500 to $11,000. 28 C.F.R. § 85.3(a)(9).

[179]United States ex rel. Davis v. D.C., 679 F.3d 832, 839 (D.C. Cir. 2012) (citation omitted).

[180]See United States ex rel. Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390, 407 (4th Cir. 2013) ("each invoice constitutes a claim under the False Claims Act") (citation and alteration omitted); Cantrell v. N.Y. Univ., 326 F. Supp. 2d 468, 470 (S.D.N.Y. 2004) ("One invoice constitutes one false claim. . .and a false claim is made when the invoice is presented for payment.").

[181]10 U.S.C.A. § 2306a; 41 U.S.C.A. §§ 3501–3509.

[182]41 U.S.C.A. § 7103(c)(2).

[183]See, e.g., 41 U.S.C.A. § 8701(4) (defining "prime contract" under the Anti-Kickback Act).

[184]United States ex rel. Rostholder v. Omnicare, Inc., 745 F.3d 694, 700 (4th Cir. 2014) ("The FCA is designed to prevent fraud and reflects Congress' broad goal 'to protect the funds and property of the government.' " (citing United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d 724, 728 (4th Cir. 2010)); see United States v. Rachel, 289 F. Supp. 2d 688, 696 (D. Md. 2003) ("Under the FCA, a direct contractual relationship with the Government is not required for liability.").

[185]United States ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 304 (4th Cir. 2009) ("a subcontractor could be liable for submitting a false claim to a prime contractor of the United States").

[186]Long Island Sav. Bank, FSB v. United States, 503 F.3d 1234 (Fed. Cir. 2007).

[187]503 F.3d at 1251.

[188]See Pachter & Garland, "Kickbacks Result in Forfeiture of Claim," 106 Fed. Cont. Rep. (BNA) No. 13, at 377 (Oct. 11, 2016).

[189]Nash, "Government Defenses To Avoid Payment: They're Working," 29 Nash & Cibinic Rep. NL ¶ 7 (Feb. 2015.)

[190]See Pachter, "The Strange Case of Long Island Savings Bank—Or How a Contract Self-Destructed Into Voidness," 44-FALL Procurement Law. 1 (Fall 2008).

[191]10 U.S.C.A. § 2304(a)(1)(A); 41 U.S.C.A. § 3301(a)(1).

[192]10 U.S.C.A. § 2304 et seq.; 41 U.S.C.A. § 3301.

[193]Latvian Connection, LLC, Comp. Gen. Dec. B-409543, June 2, 2014, 2015 CPD ¶ 87 (citing 10 U.S.C.A. § 2304(a)(1)(A)).

[194]Kendall Healthcare Prods. Co., Comp. Gen. Dec. B-289381, Feb. 19, 2002, 2002 CPD ¶ 42.

[195]Kendall Healthcare Prods. Co., Comp. Gen. Dec. B-289381, Feb. 19, 2002, 2002 CPD ¶ 42.

[196]DOD Guide § C1.2.3.

[197]Payment Under Settlement Agreement Between the Army & Storage Tech. Corp., Comp. Gen. Dec. B-233417, Mar. 31, 1992, 92-1 CPD ¶ 337 (citing Heyer Prods. Co., Inc. v. United States, 135 Ct. Cl. 63 (1956)).

[198]See DOD Guide §§ C1.2.3, C2.1.3.1.6.

[199]Energy Conversion Devices, Inc., Comp. Gen. Dec. B-260514, June 16, 1995, 95-2 CPD ¶ 121.

[200]MorphoTrust USA, LLC, Comp. Gen. Dec. B-412711, May 16, 2016, 2016 CPD ¶ 133 (citing Rocketplane Kistler, B–310741, Jan. 28, 2008, 2008 CPD ¶ 22, at 3).

[201]Expl. Partners, LLC, Comp. Gen. Dec. B-298804, Dec. 19, 2006, 2006 CPD ¶ 201.

[202]See 31 U.S.C.A. § 6301 et seq.

[203]Expl. Partners, LLC, Comp. Gen. Dec. B-298804, Dec. 19, 2006, 2006 CPD § 201.

[204]MorphoTrust USA, LLC, Comp. Gen. Dec. B-412711, May 16, 2016, 2016 CPD ¶ 133.

[205]Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir. 1983).

[206]705 F.2d at 1053.

[207]United States v. Alliant Techsys. Inc., 1994 WL 362247 (C.D. Ill. May 13, 1994); see also Press Release, U.S. Dep't of Justice, Ultra Electronics Abandons Its Proposed Acquisition of Sparton Corp. After Department of Justice Expresses Concerns (Mar. 5, 2018) (noting Department of Justice raised concerns that merger that "threatened to permanently combine the only two qualified suppliers of sonobuoys to the U.S. Navy").

[208]31 U.S.C.A. § 3901 et seq.

[209]31 U.S.C.A. § 3902(a).

[210]41 U.S.C.A. § 6305.

[211]31 U.S.C.A. § 3727.

[212]See, e.g., Vermont Yankee Nuclear Power Corp. v. United States, 73 Fed. Cl. 236, 240 (2006).

[213]See H.R. Rep. No. 82-376 (1951) ("Under this statute, banks were able to finance defense contractors on the security of such assignments of claims where other forms of security were not available.").

[214]31 U.S.C.A. § 3727(c); 41 U.S.C.A. § 6305(b).

[215]31 U.S.C.A. § 3727(c); 41 U.S.C.A. § 6305(b).

[216]To the Admin., Small Bus. Admin., Comp. Gen. Dec. B-152012, 43 Comp. Gen. 138 (1983) (citations omitted).

[217]See, e.g., Galloway Corp. v. S.B. Ballard Constr. Co., 464 S.E.2d 349 (Va. 1995) (discussing clauses under Vir-

ginia law); Thos. J. Dyer Co. v. Bishop Int'l Eng'g Co., 303 F.2d 655 (6th Cir. 1962).

[218]See Vickery & Paalborg, "Assignment of Claims Act," 87-3 Briefing Papers 1 (Feb. 1987).

[219]See Vickery & Paalborg, "Assignment of Claims Act," 87-3 Briefing Papers 1 (Feb. 1987).

[220]OMB Memorandum M-10-11, Guidance on the Use of Challenges and Prizes To Promote Open Government 1 (Mar. 8, 2010). See generally Gottlieb & Rawicz, "Federal Inducement Prizes," 15-9 Briefing Papers 1 (Aug. 2015)

[221]OMB Memorandum M-10-11, Guidance on the Use of Challenges and Prizes To Promote Open Government 9 (Mar. 8, 2010).

[222]See https://www.challenge.gov/about/.

[223]National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

[224]Pub. L. No. 115-91, § 867.

[225]S. Rep. No. 115-125, at 189 (2017).

[226]S. Rep. No. 115-125, at 189 (2017).

[227]S. Rep. No. 115-125, at 189 (2017).

[228]S. Rep. No. 115-125, at 189 (2017).

[229]S. Rep. No. 115-125, at 190 (2017).

[230]Pub. L. No. 115-91, § 864 (amending 10 U.S.C.A. § 2371b)).

[231]Pub. L. No. 115-91, § 863 (10 U.S.C.A. § 2371); see also 10 U.S.C.A. § 2371(g).

[232]Pub. L. No. 115-91, § 862 (amending 10 U.S.C.A. § 2358).

NOTES:

BRIEFING PAPERS