OTHER TRANSACTION AUTHORITY: FLEXIBILITY AT THE EXPENSE OF ACCOUNTABILITY?

HEARING

BEFORE THE

SUBCOMMITTEE ON EMERGING THREATS, CYBERSECURITY, AND SCIENCE AND TECHNOLOGY

OF THE

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CONTENTS

Page

STATEMENTS

The Honorable James R. Langevin, a Representative in Congress From the State of Rhode Island, and Chairman, Subcommittee on Emerging Threats, Cybersecurity, and Science and Technology 1
The Honorable Michael T. McCaul, a Representative in Congress From the State of Texas, and Ranking Member, Subcommittee on Emerging Threats, Cybersecurity, and Science and Technology 2

WITNESSES

Mr. Thomas W. Essig, Chief Procurement Officer, Department of Homeland Security, Accompanied by Dr. Keith B. Ward, Chief Research and Development Branch, Chemical and Biological Division, Science and Technology, Department of Homeland Security:
Oral Statement 4
Prepared Statement 6
Dr. L. Elaine Halchin, Analyst, American National Government, Congressional Research Service, Accompanied by Dr. John D. Moteff, Specialist, Science and Technology Policy, Congressional Research Service:
Oral Statement 13
Prepared Statement 15
Mr. John K. Needham, Acting Director, Acquisition and Sourcing Management, Government Accountability Office:
Oral Statement 21
Prepared Statement 23

OTHER TRANSACTION AUTHORITY: FLEXIBILITY AT THE EXPENSE OF ACCOUNTABILITY?

Thursday, February 7, 2008

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOMELAND SECURITY,
SUBCOMMITTEE ON EMERGING THREATS, CYBERSECURITY, AND SCIENCE AND TECHNOLOGY,
Washington, DC.

The subcommittee met, pursuant to call, at 2:11 p.m., in Room 311, Cannon House Office Building, Hon. James R. Langevin [Chairman of the subcommittee] presiding.

Present: Representatives Thompson, Langevin, Etheridge, Green, Pascrell, McCaul, and Broun.

Mr. LANGEVIN [presiding]. The subcommittee will come to order.

The subcommittee today is hearing testimony on other transaction authority, or OTA, answering the question, flexibility at the expense of accountability.

Good afternoon, and I want to welcome our witnesses to today's hearing on other transaction authority at the Department of Homeland Security.

I would like to begin by thanking my Ranking Member, Mr. McCaul, for working with me on this issue and the Chairman of the full committee, Mr. Thompson, for his leadership and continued oversight over procurement matters within the Department.

We are here today to consider the arguments for and against extending the Department's use of other transaction authority, which is scheduled to sunset in September 2008. Other transaction authority, abbreviated as OTA, was originally created to attract nontraditional commercial firms to do business with the Federal Government. Within that definition are those firms that either refuse or could not participate in such contractual agreements with the Federal Government.

This authority is based on the premise that it is in the Federal Government's best interest to attract nontraditional contractors who are at the cutting edge of technology, which can lead to new homeland security or defense products that companies might not otherwise have adequate resources to invest in on their own.

The Department of Homeland Security is one of several agencies, including NASA, the Department of Defense, the Department of Energy and the Department of Health and Human Services, that use OTA.

OTA applies only two types of awards at DHS. One award is known as other transactions for research, which are typically used for basic, applied or advanced research. This type of transaction

does not call for a deliverable product but rather provides a support to broaden the homeland technology knowledge base.

The other award is known as other transactions for prototypes, which are used to help the Department develop or acquire a prototype.

Companies who receive awards under OTA are granted exceptional benefits. For instance, an other transaction is not subject to the Federal acquisition regulation, or FAR, most procurement status or the Government's cost accounting standards. Companies are also usually granted greater rights to intellectual property that is produced under the agreement.

The subcommittee seeks answers to two questions today: First, is OTA premised on sound policy, and, second, given the incredible flexibility granted under OTA, are there adequate protections in place to reduce or eliminate any potential abuses?

We are not the first to examine these questions. Reports issued earlier this decade suggested other transactions do indeed expand Government's access to commercial technology and production capacity and because of the cost-sharing provisions, do result in lower overall transaction costs.

However, people closely associated with OTA, including a former Department of Defense inspector general, note that the potential for abuse exists without the traditional protections of the procurement system.

The DOD IG noted during its review of OTA that contracting officers failed, in this case, to sufficiently document justification for using other transactions, to document the review of cost proposals and to monitor the actual research costs itself. This led to the IG's testimony in 2002 where the Department concluded that based upon the DOD experience, we believe other transactions should be considered only when it is clear that the Government is unable to acquire goods, services and even technologies through existing vehicles.

In short, though the freedoms associated with OTA may attract more businesses to participate, they also carry significant risks for the Federal Government. While we all want technology faster and cheaper, we also have to be mindful that we are stewards of American tax dollars.

If we are going to allow this kind of flexibility at the Department, the Department must demonstrate to this committee that it can be trusted to handle the authority. This means showing that adequate protections are in place to reduce or eliminate any potential abuses of OTA.

Then Mr. Essig can provide us with assurances that the Department has conducted robust oversight over this process before we consider extending OTA beyond 2008. We will have several questions on this front when we get to that point.

With that, I conclude my remarks, and the Chair now recognizes the Ranking Member of the subcommittee, the gentleman from Texas, Mr. McCaul, for the purpose of an opening statement.

Mr. McCaul.

Mr. MCCAUL. I thank the Chairman. I thank you for honoring my request for this hearing. You are certainly a man of your word and, as usual, conducting yourself in a very bipartisan way, which

is a good way to conduct ourselves in this very important committee.

I believe this is an important issue. This is a tool that the Department uses to protect our country.

Part of our duty as a committee is to ensure that DHS has the best technology and training available. I see the authority to engage in the other transactions is a critical tool, which allows the Department to partner with nontraditional Government contractors to develop state-of-the-art technologies faster and more efficiently than would be possible under a traditional procurement contract.

The Department of Defense has used this authority to enter into other transactions for many years within DARPA where they have had many incredible technological breakthroughs. These agreements are not used to purchase office supplies or other commodities for which a traditional contract is perfectly acceptable.

Other transactions cover the development of technology to fill a particular unmet need, such as automated biowarfare agent detectors or a system to knock missiles out of the sky before they bring down an airliner.

The traditional requirements of Government contracting do not provide the flexibility necessary, in my judgment, to develop such projects and can be cost-prohibitive to smaller companies or those that don't regularly do business within the Government.

I understand that my colleagues may have questions regarding the accountability of these other transactions, and I, too, share their concern. Because they are not subject to the traditional Federal acquisition requirements, or the FAR, other transactions do not have the same checks and balances required by traditional procurement contracts. Considering the increased risk inherent in other transactions, they should not be entered into for inappropriate goals nor should they be entered into lightly.

It is my understanding that the Department only allows its most experienced and highly trained contracting officers to enter into other transactions and even competes such contracts despite there being no requirement that it do so. I believe that this shows that the Department approaches the negotiations of other transactions with the appropriate gravity, and I look forward to hearing how the Department has put forth this authority to use and the technologies that it has developed as a result of these agreements.

I also hope to find out more about the nontraditional Government contractors with which the Department has been able to work. At the same time, I am looking forward to the testimony from GAO and hearing their recommendations to improve the success of these types of agreements.

The Department's authority to use other transactions expires at the end of September 2008. Late last year, I introduced H.R. 4290, which would extend the authority for another 5 years. Without that authority, in my judgment, the next administration could be unnecessarily hamstrung in their pursuit of the best technology to fit their needs.

I thank the Chairman, and I yield back.

Mr. LANGEVIN. I thank the Ranking Member.

Other Members of the subcommittee are reminded that under the committee rules, opening statements may be submitted for the record.

I now want to welcome our witnesses today. Our first witness is Tom Essig, chief procurement officer of the Department of Homeland Security. Mr. Essig came to his position January 10, 2008, so he is definitely new on the job, but he has a wealth of experience behind him. Prior to this appointment, he was deputy chief procurement officer. Before coming to DHS, Mr. Essig worked in the Navy's Office of the Assistant Secretary and was the services director of the Program Analysis and Business Transformation Division.

During the questioning period, Mr. Essig will be joined by Keith Ward, chief of the Chem-Bio R&D branch within Science and Technology Directorate.

Our second witness is Dr. Elaine Halchin, analyst in American National Government at Congressional Research Service. Dr. Halchin's principal areas are research responsibility, government procurement, sports and the Senior Executive Service and the government travel policy.

During the questioning period, she will be joined by her CRS colleague, Jack Moteff.

Our third witness is John Needham, assistant director, Acquisition and Sourcing Management, Government Accountability Office. Mr. Needham leaves reviews of acquisition contracting practices at the Department of Homeland Security and Defense.

I want to welcome all of our witnesses. Without objection, the witnesses' full statements will be inserted into the record, and I now ask each witness to summarize his or her statement for 5 minutes, beginning with Mr. Essig.

Welcome.

STATEMENT OF THOMAS W. ESSIG, CHIEF PROCUREMENT OFFICER, DEPARTMENT OF HOMELAND SECURITY, ACCOMPANIED BY KEITH B. WARD, CHIEF RESEARCH AND DEVELOPMENT BRANCH, CHEMICAL AND BIOLOGICAL DIVISION, SCIENCE AND TECHNOLOGY, DEPARTMENT OF HOMELAND SECURITY

Mr. ESSIG. Mr. Chairman, Ranking Member McCaul and Members of the subcommittee, thank you for this opportunity to appear before you to discuss the Department of Homeland Security's use of its other transaction authority.

I am the Department's chief procurement officer, or CPO, and I am responsible for the management, administration and oversight of the Department's acquisition programs. With me here today is Dr. Keith Ward from the Department's Science and Technology Directorate.

Before addressing the subject of today's hearing, DHS' other transaction authority, I would like to take this opportunity to summarize my background. I am a career Federal employee with more than 30 years of public service in the acquisition career field. I began my career in 1976 as a contracting intern with the Navy Department. I was selected as a member of the Senior Executive Service in 1995 and held several senior acquisition positions with the Navy Department, including executive director of the Office of

Special Projects and director for Program Analysis and Business Transformation.

I joined DHS in May 2006 as a deputy chief procurement officer and was selected as the chief procurement officer last month. I am also certified at level three, the highest level, in both the contracting and program management career fields at both DOD and DHS.

In my written statement, I identified my top priorities as CPO. The first, to make good business deals, is intended to ensure that we accomplish our mission while also being good stewards of taxpayer dollars. Other transactions, or OTs, are a very useful took in helping us achieve that goal.

OTs differ from traditional contracts in a number of ways. Contracts are governed by the Federal acquisition regulation, or the FAR, and as a result include a number of terms and conditions not seen in commercial transactions. OTs, however, are not subject to the FAR, so we are able to tailor terms and conditions in order to, No. 1, attract business entities that do not normally do business with the Government and, No. 2, enhance our ability to share the cost of maturing certain dual-use technologies with industry, thereby lowering the overall cost to the taxpayer.

OTs have only been used by two of DHS contracting activities, the Transportation Security Administration, TSA, and the Office of Procurement Operations in support of DHS Science and Technology Directorate. Their respective OT authority comes from different sources.

TSA's OT authority is derived from the Aviation and Transportation Security Act, and its primary use has been for the explosive baggage screening and closed-circuit TV programs at the Nation's airports. Because airport operators are public entities, TSA's ability to enter into traditional contracts for these programs is limited. TSA's OT authority provides the necessary flexibilities to meet their mission requirements.

The focus of my testimony today, however, is on the Department's OT authority in support of the S&T Directorate. That authority stems from the Homeland Security Act of 2002, which allows DHS to enter into other transactions for basic, applied and advanced research and development and prototype projects. The Department appreciates that the recently passed DHS Appropriations Act includes a provision extending our OT authority through September 30 of this year, and we are grateful for, and fully support, Ranking Member McCaul's efforts to further extend that authority through September 2012.

In my written statement, I identified four S&T projects that were made possible with this OT authority. One of these is the lightweight autonomous chemical identification system, or LACIS project, which is developing handheld chemical agent detectors for our first responders, including fire departments and HAZMAT teams. The project resulted from a broad agency announcement designed to reach a broad segment of the market and attract traditional and nontraditional firms, both individually and as teams.

In a December 2004 report, the Government Accountability Office, GAO, reported on DHS' used of its OT authority under the Homeland Security Act and recommended that DHS provide guid-

ance on including audit provisions in OTs, develop a training program on the use of OTs and capture knowledge gained during the acquisition process. I am pleased to report that we have implemented all three recommendations.

In summary, OT authority provides a tool that is especially useful when bringing nontraditional contractors to the Federal research and development environment, gives the Department access to more commercially available technologies than would otherwise be the case, promotes the development of dual-use technologies at a reduced overall cost to the taxpayer and allows the Department to obtain proposals from teams that cut across organizational boundaries to achieve optimal mixes of talent and innovation.

We also recognize that OTs are not right for every situation and have implemented guidance, training, knowledge sharing and oversight procedures to ensure that OTs are used appropriately.

Thank you, Mr. Chairman, for your interest in and continued support of the DHS acquisition program and for the opportunity to testify before the subcommittee about the Department's OT authority.

I would be glad to answer any questions you or other Members of the subcommittee may have for me.

[The statement of Mr. Essig follows:]

PREPARED STATEMENT OF THOMAS W. ESSIG

FEBRUARY 7, 2008

Chairman Langevin, Ranking Member McCaul and Members of the subcommittee, thank you for this opportunity to appear before you to discuss the Department of Homeland Security's (DHS) acquisition program and in particular, DHS' use of its Other Transaction Authority (OTA). I am the Chief Procurement Officer (CPO) for the Department. With me here today is Dr. Keith Ward from DHS' Science & Technology (S&T) Directorate.

As DHS' CPO, I am the lead executive responsible for the management, administration and oversight of the Department's acquisition programs. In that capacity, I oversee and support eight procurement offices within DHS—Customs and Border Protection (CBP), Federal Emergency Management Agency (FEMA), Immigration and Customs Enforcement (ICE), Transportation Security Administration (TSA), United States Coast Guard (USCG), United States Secret Service (USSS), Federal Law Enforcement Training Center (FLETC), and the Office of Procurement Operations (OPO). My office provides the acquisition policies, procedures, training and workforce initiatives that will that enable our acquisition professionals to support mission accomplishment while also being good stewards of taxpayer dollars.

Before addressing the subject of today's hearing, DHS' Other Transaction Authority, I would like to take this opportunity to summarize my background and convey my top priorities as the CPO. I am a career Federal employee, with more than 30 years of public service in the acquisition career field. I began my Federal career in 1976 when I entered the Navy's Contracting Intern Development Program. My initial assignment was with the Naval Sea Systems Command (NAVSEA), where I served as a contract specialist supporting various Naval weapon systems and shipbuilding programs. I was selected as a member of the Senior Executive Service in 1995 and served as the Director of the Surface Systems Contracts Division of NAVSEA. I have also held Senior Executive Service positions with the Navy Department as the Executive Director of the Office of Special Projects, Director of the Navy Engineering Logistics Office, and Director for Program Analysis and Business Transformation in the Office of the Assistant Secretary of the Navy for Research, Development, and Acquisition. I joined DHS in May 2006 as the Deputy Chief Procurement Officer and was selected as the Chief Procurement Officer in January 2008. While most of my career has been in the area of contracting, my assignments have also given me responsibility for leadership of other critical acquisition functions. As a result, I am certified at Level III (the highest level) in both the contracting and program management career fields at both the Department of Defense (DoD) and DHS.

Earlier this year, I identified my top priorities for fiscal year 2008. The first three priorities were initially established by my predecessor, Ms. Elaine Duke. While we have made significant progress on all three priorities, more remains to be done and I have, therefore, retained them for fiscal year 2008.

Priority No. 1: To Make Good Business Deals

We need to make business decisions that enable us to accomplish our mission, while also being good stewards of taxpayer dollars. Within the Office of the CPO (OCPO), we are developing and implementing a policy and oversight framework that will facilitate the Department's ability to achieve this objective. We have, for example, recently issued policy and guidance on topics that include: goals for contract awards to small business and other socio-economic concerns; judicious use of the Alaska Native Corporation 8(a) program, including requirements to ensure the award is in the best interest of the Government; increasing the use of competition; and guidance documents on Source Selection, the use of Other Than Full and Open Competition, and acquisition planning.

Priority No. 2: To Build and Sustain the DHS Acquisition Workforce

A key enabler of our ability to make good business deals is a highly skilled and motivated acquisition workforce. In fiscal year 2008, we are focusing on four acquisition workforce initiatives: establishment of an acquisition intern program; identification of certification and training requirements for all acquisition functional areas; a centralized acquisition training fund; and centralized recruitment and hiring of acquisition personnel. I greatly appreciate the funding we received in fiscal year 2008 in support of these initiatives.

Priority No. 3: To Perform Effective Contract Administration

In addition to making sure that our contract awards represent good business deals, we must perform effective contract administration in order to ensure that we get what we bargained for. In this area, we are leveraging support from the Defense Contract Management Agency to support a number of contract administration areas, including the performance of Earned Value Management (EVM) on DHS contracts. We are also conducting comprehensive reviews and improving communications with our contracting activities to identify and remedy issues that may occur over the life cycle of our contracts. Recently, these reviews led to a change in our Acquisition Manual to address specific Contracting Officer's Technical Representative oversight responsibilities associated with the review of contractor invoices (also referred to as vouchers) for reasonableness and accuracy, and to ensure that deliverables have been provided in accordance with the terms of our contracts.

These first three priorities are largely focused on the contracting function. Recognizing, however, that successful acquisition programs require more than just good contracting, I have added a fourth priority this year:

Priority No. 4: To Improve the Quality of Program Management Throughout DHS

In order to deliver the capabilities to meet DHS' mission on schedule and within budget, we are working to strengthen program management, including related functions such as cost analysis, logistics, systems engineering, and test and evaluation. During the past year, we established a core group within OCPO and partnered with the Defense Acquisition University and the Homeland Security Institute to ensure we have the skills and experience necessary to assess the status of DHS' acquisition programs and put policies and procedures in place to improve the management of our acquisition programs. We are also working to ensure that our program management teams are appropriately staffed and trained. Our goal is to make certain we have the policies, processes, and skilled people in place to effectively manage our programs and ensure the successful achievement of our mission objectives.

OTHER TRANSACTION AUTHORITY (OTA)

There are many differences between a FAR-based contract and an Other Transaction or "OT ". Contracts are procurement instruments and, as such, are governed by the FAR. Contracts are to be used when the principal purpose of the project is the acquisition of goods and services for the direct benefit of the Federal Government. In contrast, DHS OTs used by the DHS Science & Technology Directorate for prototype projects are used to acquire technologies that provide counter-terrorism tools and resources for our agents and first responders in the field to combat against those threatening our Homeland. Unlike traditional contracts, these OTs attract business entities that do not normally do business with the Federal Government, exploit the cost-reduction potential of accessing innovative or commercially developed technologies, and tend to increase competition for follow-on efforts. The Con-

tract Disputes Act and GAO protest rules do not apply to OTs for prototype projects; procedures for resolving disputes and filing protests are addressed in the actual OT.

OTs have only been issued by two of DHS' contracting activities: the Transportation Security Administration (TSA) and the Office of Procurement Operations (OPO) in support of DHS' Science & Technology Directorate. Their respective OT Authority comes from different sources.

The focus of much of my testimony today is on the Department's OT Authority stemming from the Homeland Security Act of 2002 as well as the subject of the Government Accountability Office's (GAO) 2004 audit. However, I would first like to address the TSA's OT Authority which is derived from the Aviation and Transportation Security Act (Pub. L. 107–71).

TSA's OT Authority

TSA's primary use of its OT Authority has been for its Explosive Baggage Screening Program (EBSP) and its Closed Circuit TV (CCTV) Program at the Nation's airports. TSA's use of OTs is primarily as a mechanism for providing reimbursement funding and outlining the roles and responsibilities associated with these shared airport projects.

1. Explosive Baggage Screening Program (EBSP)

TSA's EBSP projects involve the modification and/or construction of a checked baggage inspection system in the Airport/Air Carrier baggage handling system through the installation of Explosive Detection Systems (EDS). The scope of each project includes, but is not limited to, design, construction of installation of new or renovation of existing baggage conveyor systems, modification and upgrade of existing mechanical, electrical, telecommunications infrastructure and plumbing equipment, and baggage handling screening matrix able to support EDS machines, and the installation of hardware and software for use with in in-line baggage screening applications.

Each airport uses established contracting processes and contractors to design and perform necessary airport site preparation to support the project. The variety of local factors and conditions that affect airport funding and design decisions requires a partnership between TSA and each airport. Teaming with each airport ensures a mutually acceptable baggage screening solution to TSA and each airport and its associated air carriers. By providing funding to each airport via an OT that allows for the reimbursement of the baggage screening project costs, TSA benefits as the burden of the airport design work and the responsibility of the construction management, logistics, and work performance is shared with each airport. The OT outlines the responsibilities of the airport and the TSA as well as provides the funding for each airport project.

TSA uses an integrated and participatory approach to the project planning and design process with each airport to appropriately size the system for EDS equipment, providing the most cost-effective solution and ensuring optimal baggage screening performance standards are met. Using industry standards, TSA validates the cost estimate of the project based on information provided by each airport. Once the design effort is completed, the TSA Technical Representative monitors the airport construction effort.

TSA retains a percentage of the OT funds until the airport has successfully passed the TSA administered integrated baggage screening test. Reimbursement of costs by TSA is made to the airport on a documented cost basis. The use of an OT provides for airport performance of site preparation work, but allows TSA to retain oversight of the project and control over the reimbursement of costs. Additionally, TSA submits an annual spend-plan to congressional appropriators detailing planned locations and funding for its in-line systems. To date, for the EBSP, TSA has executed 53 OTs valued at approximately $320 million. All of these OTs have been with airport operators which are public entities.

2. Closed Circuit Television (CCTV) Other Transaction Agreements

Expanding the views of an airport's CCTV camera system to include views of the passenger checkpoints and baggage screening areas allows TSA to enhance security situation awareness, deter theft, aid in the resolution of claims, and assist in the resolution of law enforcement issues. Each airport uses established contracting processes to perform installation work (electrical, network connectivity, camera mounting, media storage capability) necessary to support the TSA camera views of passenger screening and baggage screening areas. Given the variety of local factors and conditions that affect airport funding and design decisions, developing a partnership between TSA and each airport ensures a mutually acceptable CCTV screening solution.

TSA benefits from the business relationships each airport establishes with their CCTV vendors as each CCTV system is unique to a particular airport. By providing funds to each airport via an OT that allows for the reimbursement of the costs of the installation of CCTV cameras and media storage capability, TSA benefits by sharing the burden of the installation management, logistics, and work performance. The OTA outlines the responsibilities of the airport and the TSA as well as provides the funding for the project.

Each airport provides TSA a statement of work with a cost estimate for the camera views to be installed. The cost estimate is validated and an OT is executed with the airport for the project and monitored during the project's performance. Installed CCTV products supplement each airport's current CCTV system and are not owned by the TSA. Each airport is responsible for maintenance and repairs to ensure the uninterrupted operation of the CCTV system. To date, TSA has executed 32 OTs valued at approximately $32 million for CCTV projects. All of these OTs have been with airport operators which are public entities.

S&T's OT Authority

DHS' OT Authority exercised by OPO in support of S&T is very different from that used by TSA. The OPO Authority is derived from the Homeland Security Act of 2002 and the subject of GAO's 2004 audit. Section 831 of Public Law 10–296, the Homeland Security Act of 2002, granted DHS its authority to enter into transactions (other than contracts, cooperative agreements, and grants) for basic, applied, and advanced research and development (R&D) projects as well as for prototype projects. This authority has since been codified in Title 6 of the United States Code (Subchapter VIII Part D Section 391, as amended. DHS' R&D OT Authority is based on DoD's authority (Section 2371 of Title 10, United States Code and Section 845 of Public Law 103–160). DHS appreciates that the recently passed DHS Appropriations Act (Public Law 110–161) includes a provision extending our OT R&D Authority through September 30, 2008, and we very much appreciate and fully support Ranking Member McCaul's efforts through H.R. 4290 *Homeland Security Technology Advancement Act* to further extend our R&D OT Authority through September 30, 2012.

This DHS R&D OT Authority provides a useful tool that enhances the Department's ability to carry out basic, applied and advanced research and development; advance the development, test and evaluation, and deployment of critical homeland security technologies; and accelerate the prototyping and deployment of technologies to address homeland security vulnerabilities. This type of R&D OT Authority is especially useful in bringing non-traditional Government contractors to the Federal Research & Development environment, because the resultant OTs permit flexibilities in key areas to include application of cost accounting standards, submission of cost and pricing data, specific Federal Acquisition Regulation (FAR) provisions, and intellectual property rights. They are also useful for dual-use (Government/commercial) technologies in cases where the estimated cost of advancing those technologies is too great for industry to invest on its own or the risk is too immense for companies to commit to traditional contract terms and conditions. In these cases, OT Authority gives the Department access to more companies and commercially available technologies than would otherwise be the case and, in certain situations, is the only way to affordably advance the maturity level of technologies that will help us counter homeland security vulnerabilities.

I previously mentioned that my first priority as CPO is to "make good business deals." R&D OT Authority supports that goal by enhancing our ability to share the costs of maturing certain dual-use technologies with industry, thereby lowering the overall cost to the taxpayer. In a traditional contract, the Government usually pays the full cost of maturing that technology. Our OT Authority also gives us the ability to reach agreements with a consortium of providers, where such arrangements are more advantageous to the Government than traditional contracts (through prime and subcontractor agreements or establishment of joint ventures).

I would like to take this opportunity to elaborate on several examples of DHS' use of its OT Authority in support of the Under Secretary for Science & Technology:

1. Lightweight Autonomous Chemical Identification System (LACIS) Project

Under the LACIS Project, hand-held chemical agent detectors for first responders, e.g., fire departments, military HAZMAT teams, and industrial HAZMAT teams, are being developed by Sensor Research and Development, Corp., Smiths Detection—Edgewood, Inc., and Purdue University in collaboration with ICx Griffin Analytical Technologies. The current detectors, normally spectrometers, for chemical warfare agents and toxic industrial chemicals, tend to have a limited range, are expensive and are subject to false alarm from interference. The LACIS Project has been on

time and is overcoming limitations of the current technology at a relatively affordable cost. The use of an OT for this requirement has promoted flexibility in forming teaming arrangements involving both traditional and non-traditional participants.

2. Autonomous Rapid Facility Chemical Agent Monitor (ARFCAM)

Under the ARFCAM Project, autonomous chemical detectors for monitoring facilities, e.g., airports and train stations as well as other high-asset venues, are being developed by Hamilton Sundstrand Space Systems, Inc., Smiths Detection—Watford Inc., and Bruker Daltonics. The current commercial detectors, normally spectrometers, for chemical warfare agents and toxic industrial chemicals, tend to have a limited range, are expensive and are subject to false alarm from interference. The ARFCAM Project has been on time and is overcoming limitations of the current technology at a relatively affordable cost. The use of an OT for this requirement has promoted flexibility in forming teaming arrangements involving both traditional and non-traditional participants.

3. BioWatch Generation 3 (BioAgent Autonomous Network Detector (BAND)) Program

The purpose of the BAND Program is to develop a detect-to-treat biological detection sensor system that provides more rapid indications of the presence of biological agents compared to current state-of-the-art technology. This program is developing the next generation of BioWatch detectors and is critical to the BioWatch program. Currently, the BioWatch system consists of distributed collectors that sample on filters that are collected and centrally processed at local laboratories. This process has not provided information in as timely a response as the Department would have liked.

With the use of our OT Authority, DHS has been able to prototype and test three BAND systems from three firms, IQuum, Inc., Microfluidic Systems, Inc., and U.S. Genomics, Inc. While each system is different, the systems have performed up to the rigorous objectives set by DHS. DHS objectives include having: a very high sensitivity in a cluttered background; an extended coverage area, i.e., with a networked system as opposed to a manual collection system; a very low false alarm rate, range of 1 per 10 to 100 years; and a low cost of ownership. Due to the projected reduced costs of these systems, a larger portion of the Nation's population will be protected without incurring additional costs and with equivalent or better performance.

Both the LACIS and BAND Programs resulted from Broad Agency Announcements (BAAs) designed to obtain proposals from teams that cut across organizational boundaries to achieve optimal mixes of talent and innovation. The BAAs specified that DHS would use its OT Authority to attract traditional and non-traditional firms individually and as teams.

4. Countermeasures for the Man-Portable Air Defense System (Counter MANPADS) Program

Under the DHS Counter-MANPADS Program, we have adapted military Directed InfraRed Counter Measure (DIRCM) technology to protect commercial transports from shoulder-launched surface-to-air missiles, called Man-Portable Air Defense Systems (MANPADS). The systems use existing military missile warning systems to detect MANPADS and cue an infrared laser to jam the missile guidance system. At the completion of the program, DHS expects to have two counter-MANPADS systems capable of being deployed on commercial transports.

DHS realized savings in time by the use of OT agreements. After a full and open competition, three 6-month OTs were awarded for Phase I, which was less than 8 weeks following program initiation. This rapid schedule was several months shorter than what would have been experienced for comparable programs of similar size and complexity using a FAR-based solicitation and contract award. The use of OT Authority for prototype projects will allow DHS to complete a three-phase system development, test, and operational evaluation program in 5 to 6 years compared to similar DoD programs that have been programmed since the mid-1990's. The use of OT Authority also allowed us to select teams that included non-traditional mixtures of military and commercial contractors that would not have been possible under FAR-based contracts.

In the second phase of the program, accomplished through a modification to an existing OT, design solutions were completed through prototype development and Federal Aviation Administration (FAA) certification for airworthiness. For this phase, the contractors fabricated, installed, and tested their prototypes on commercial aircraft. In the latest phase, the OT holders delivered and installed several complete countermeasure prototypes on commercial cargo and passenger aircraft and have continued demonstrating system performance. DHS is now evaluating the operational suitability and anticipated costs by collecting data during commercial

airline operations for each of the systems. Performance results achieved to date would not have been possible without the OTs because the non-traditional contractors (commercial airlines and associated operation and maintenance companies) would not have participated under a FAR-based contract.

The following are Counter-MANPADS Program Highlights and Key Points:

- Program on schedule—to be completed early 2009;
- Systems can protect commercial transports;
- Live fire test demonstrations Fall 2007 (October–December);
- Four different FAA-certified installations;
- Phase III reduced risk and cost of ownership;
- DHS results are also improving DoD systems' reliability and performance;
- No deployment decision yet made.

OTs, however, are not right for every situation, as the rights provided to the Government under an OT differ significantly from those provided under a traditional contract. While OTs are an extremely useful tool, they should only be used in appropriate situations by personnel that are knowledgeable of the advantages and disadvantages of OTs versus contracts and who are able to make informed decisions regarding which method is anticipated to provide better value to the Government.

In that regard, on July 8, 2005, DHS issued Management Directive (MD) 0771.1, "Other Transaction Authority," to align OT Authority and accountability and provide policy and guidance on the Department's use of OT Authority for research as well as for prototype projects. In accordance with this MD, I, as the Chief Procurement Officer, am responsible for setting policy, conducting oversight, and approving the use of OT Authority pursuant to the Homeland Security Act of 2002. I have further designated the DHS Director, Strategic Initiatives within OCPO as the authority to make Department-level decisions on R&D OTs. As indicated earlier, the only Heads of Contracting Activity within the Department with approval to use OT Authority are the Head of the Contracting Activity (HCA) for the Office of Procurement Operations (OPO), who reports directly to me, and the HCA for TSA under the authority of the Aviation and Transportation Security Act.

While Other Transactions are not covered by the Competition in Contracting Act, OPO uses competitive procedures to the maximum extent practicable for its R&D OTs including soliciting through FedBizOpps and utilizing Broad Agency Announcements to reach a broad segment of the marketplace. For OTs where competition is determined not to be available or not appropriate (e.g., unsolicited proposals), the OT file is fully documented and, for OTs exceeding $550,000, documentation supporting the use of non-competitive procedures must be approved by the OPO Competition Advocate or higher (depending on OT total dollar value). Furthermore, OPO utilizes the audit services of the Defense Contract Audit Agency (DCAA) during its pre- and post-award phases for its R&D OTs, as it normally would for traditional contracts.

GAO REVIEW OF DHS' USE OF ITS RESEARCH & DEVELOPMENT OTHER TRANSACTION AUTHORITY

In December 2004, the Government Accountability Office (GAO) released its report, *HOMELAND SECURITY: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority* in accordance with The Homeland Security Act of 2002 requirement for GAO to report annually to Congress on DHS' use of its OT Authority. To fulfill this obligation, GAO: (1) Evaluated whether DHS has developed polices and established a workforce to manage other transactions effectively; and, (2) evaluated how effectively DHS has used its other transactions authority to attract non-traditional Government contractors. In its report, GAO made the following recommendations:

(1) Provide guidance on including audit provisions in other transactions agreements;

(2) Develop a training program in the use of other transactions; and

(3) Capture knowledge obtained during the acquisition process for use in planning and implementing future other transactions projects.

I am pleased to report that DHS has implemented all three GAO recommendations, as follows:

Recommendation No. 1: Provide guidance on including audit provision in other transactions agreements.

The Director of the Office of Procurement Operations (OPO), the primary HCA holding the Department's Other Transaction Authority, has established procedures for conducting internal reviews and audits of all procurement documentation to ensure compliance with applicable Federal and departmental regulatory guidelines. The review and approval process for OTs has been integrated into OPO standard

business processes. In accordance with established procedures, all OTs valued at $550,000 or greater are reviewed by the Office of General Counsel and OPO Division Directors. OTs with an estimated value greater than $10 million are subject to additional review by the OPO Policy, Oversight and Customer Support Division, and OTs with an estimated value of $25 million or greater are reviewed by the OPO Acquisition Review Board, chaired by the OPO HCA and comprised of OPO Division Directors and representatives from S&T General Counsel. As the CPO, I approve all OPO OTs with a value over $50 million. OPO Contracting Officers assigned to support S&T are required to complete OT training. This training includes guidance on the appropriate audit provisions that should be included in OTs and securing audit services where appropriate. Currently, OPO Contracting Officers utilize the services of DCAA whenever possible for pre- and post-award support in evaluating proposals and auditing of OTs.

Recommendation No. 2: Develop a training program in the use of other transactions.

Recognizing the specialized nature and inherent complexities required to establish and effectively administer OTs for research and development and prototype requirements, the DHS OPO established specialized, recurring OTA Training for the OPO Contracting Workforce supporting S&T and their customers. During fiscal year 2006, two 3-day OTA training sessions were conducted, and an additional two 3-day sessions were conducted in fiscal year 2007. OPO plans to continue this training in fiscal year 2008. This comprehensive OTA training provides specific guidance on OTAs for Prototype Projects, Assistance OTs, the acquisition of property, and foreign access to technology. Very importantly, the class also includes the necessary foundation in FAR-based research and development contracting, with a particular emphasis on the contract types suitable for S&T contracts. This foundational knowledge provides the Contracting Officer and members of the program office with the understanding of R&D contracting to ensure that the appropriate method of acquisition is selected.

Recommendation No. 3: Capture knowledge obtained during the acquisition process for use in planning and implementing future other transactions projects.

In July 2005, DHS OPO solicited support services from leading industry experts on the appropriate use and implementation of OTs. This expertise was utilized by DHS to develop policies and procedures for implementing the OT Authority within the Department, and to maximize lessons-learned from the application of OT Authority by defense agencies, military services and other Federal agencies. OPO continues to enlist the services of these industry experts to provide specialized OT training for the DHS acquisition workforce. OPO personnel refer to the OTA lessons-learned and training material when formulating OTs and conducting OTA policy reviews.

In summary, OTs provide an essential tool to assist DHS with accomplishment of its mission. The tool is: especially useful in bringing non-traditional contractors to the Federal Research & Development environment; gives the Department access to more commercially available technologies than would otherwise be the case; promotes the development of dual-use technologies at a reduced overall cost to the taxpayer; and allows the Department to obtain proposals from teams that cut across organizational boundaries to achieve optimal mixes of talent and innovation. The tool, however, is not appropriate for all actions and requires an appropriate level of knowledge and experience to determine whether an OT or traditional contract provides the better value to the Government. As Chief Procurement Officer, I am responsible for setting policy, conducting oversight, and approving the use of OT Authority within DHS. We concur with the recommendations of the GAO and have implemented guidance, training, and knowledge sharing to ensure that our OTs are used appropriately. I have also directed that a statistical sample of TSA and OPO OTs be reviewed during regular Procurement Reviews and will update Departmental guidance, training and lessons-learned as appropriate. Additionally, I have directed a review of Management Directive (MD) 0771.1, "Other Transaction Authority," and am assessing whether both OT Authorities should be covered by a single MD.

Thank you, Mr. Chairman for your interest in and continued support of the DHS Acquisition Program and for the opportunity to testify before the subcommittee about the Department's Other Transaction Authority. I would be glad to answer any questions you or other Members of the subcommittee may have for me.

Mr. LANGEVIN. Thank you, Mr. Essig, and I thank you for your testimony.

I now recognize Ms. Halchin to summarize your statement for 5 minutes.

STATEMENT OF L. ELAINE HALCHIN, ANALYST, AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE, ACCOMPANIED BY JOHN D. MOTEFF, SPECIALIST, SCIENCE AND TECHNOLOGY POLICY, CONGRESSIONAL RESEARCH SERVICE

Ms. HALCHIN. Mr. Chairman and Members of the subcommittee, thank you for inviting me here today to offer testimony regarding the subject matter of this hearing, other transaction authority.

I am Elaine Halchin, an analyst in American National Government with the Congressional Research Service of the Library of Congress.

Other transaction authority originated 50 years ago. The Space Act of 1958, as amended, authorized the National Aeronautics and Space Administration to enter into and perform such contracts, leases, cooperative agreements or other transactions as may be necessary in the context of its work. However, other transaction authority, as it exists today, began in 1989.

The Department of Defense received statutory authority to engage in other transactions through the Defense Advanced Research Projects Agency for research projects. Other executive departments that have been authorized by statute to engage in other transactions are the Department of Transportation, the Department of Energy and of course the Department of Homeland Security.

Other Federal agencies that engage in research also may use OT authority for projects designed to facilitate defending against or recovering from acts of terrorism or nuclear, biological, chemical or radiological attacks. Other transaction authority may be used for research and for prototypes.

Providing OT authority to DARPA and later expanding the authority for use within DOD was part of an effort by the Defense Department and Congress to seek ways to better leverage the commercial technology and industrial base. This effort was based on the argument that the technical capabilities of the commercial technology industrial base exceeded those of the traditional defense sector in some areas and that such transactions would cost the Government less money due to greater economies of scale and preexisting investments.

However, the regulations and statutes governing traditional procurement methods were a barrier to some businesses. Companies that were unable or unwilling to comply with the Federal acquisition regulation did not enter into contracts with the Federal Government OT authority is a wholesale way of waiving these and other procurement requirements.

In addition, it was anticipated that other transactions would encourage cost sharing, which would result in savings for the Government.

Since an other transaction is not a contract, the FAR, a number of procurement statutes and the Government's cost accounting standards do not apply to such transactions. In 2000, an ad hoc working group affiliated with the public contract law section of the American Bar Association published a monograph on the applica-

bility of relevant statutes to DOD's OT authority. Although the monograph includes some statutes and provisions that apply only to DOD, the analysis of other statutes is applicable to non-DOD agencies.

Upon analyzing 30 statutes or statutory provisions, the working group determined that 20 of them do not apply to other transactions. Two others that do not apply to research OTs may apply to prototype OTs. The list of statutes, which may be found in table one of my testimony, includes, for example, the Competition and Contracting Act, the Procurement Protest System and the Procurement Integrity Act.

Freedom from Federal procurement requirements is an overarching advantage of the use of OT authority, but, at the same time, problems associated with other transactions may follow from this exemption. Agencies and companies that engage in OTs might face uncertainties and increased risk regarding, for example, funding limitations, dispute resolution and data rights.

Also, the protection and tools that contracting officers have to negotiate fair and reasonable prices and to ensure that costs are allowable and consistent with Federal procurement policies do not apply to other transactions.

Additionally, the DOD inspector general has reported that some contracting officers fail to sufficiently document the justification for using research OTs, to document the review of cost proposals and to monitor actual research costs. Thus, the flexibility inherent in OT authority, which is a significant advantage of using this method, might also result in fewer protections and decreased transparency and accountability when compared to conventional procurement methods.

A DOD IG summary of several audits that it had conducted found that other transactions had not attracted a significant number of nontraditional defense contractors. Data for the period, fiscal year 1994 through fiscal year 2001, showed that traditional defense contractors received nearly 95 percent of the $5.7 billion in funds for 209 prototype other transactions.

In 2002, the RAND Corporation evaluated the effectiveness of using OT authority for prototypes within DOD. The study examined 21 of the 72 prototype projects that at the time of the study had been awarded using other transaction authority. Due to a number of challenges that involved devising metrics for determining whether OT projects achieved policy objectives and comparing other transactions with traditional procurements, the study relied largely on the judgments and opinions provided by DOD and private sector program managers.

The RAND study concluded that, first, DOD had gained access to important, new industrial resources; second, the flexibility permitted by other transaction authority meant that more of the project cost was spent on the product, then on the acquisition process; and, third, the Government did incur some risks but RAND considered the risks to be low.

On the one hand, it is not possible to determine conclusively whether the use of OT authority accomplishes what is intended, including higher performance and less expensive Government end products; however, the RAND study and the judgments of many

people involved in OTs suggests that the use of this authority does expand Government access to commercial technology and production capacity and involves lower transaction costs and reduced risks for the projects.

Evaluating how DHS has used other transaction authority and whether the use has been successful would be a complex undertaking for several reasons, including some of the challenges encountered by RAND in the course of conducting its study.

Adding to the complexity of such an undertaking would be the need to do field research to obtain information that is sufficiently detailed and comprehensive.

This concludes my statement. Thank you for your attention. I am accompanied by a colleague, Dr. Jack Moteff, who is a specialist in science and technology policy with CRS. We welcome your questions.

[The statement of Dr. Halchin follows:]

PREPARED STATEMENT OF L. ELAINE HALCHIN

FEBRUARY 7, 2008

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

ORIGIN AND EXPANSION OF OTHER TRANSACTION (OT) AUTHORITY

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

Other executive departments that have been authorized, by statute, to engage in "other transactions" are the Department of Transportation (DOT), the Department of Energy (DOE), and the Department of Homeland Security (DHS).[5] Additionally, executive agencies that engage in research as well as research and development projects that have the potential to facilitate defense against, or recovery from, acts of terrorism or nuclear, biological, chemical, or radiological attacks are authorized to engage in "other transactions."[6]

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[1] American Bar Association, Section of Public Contract Law, Ad Hoc Working Group on Other Transactions, *Department of Defense "Other Transactions": An Analysis of Applicable Laws*, American Bar Association (Chicago: 2000), p. 3. The statutory authority for NASA to engage in "other transactions" may be found at 42 U.S.C. § 2473 (Pub. L. 85–569; 72 Stat. 426, at 430).

[2] Nancy O. Dix, Fernand A. Lavallee, and Kimberly C. Welch, "Fear and Loathing of Federal Contracting: Are Commercial Companies Really Afraid to Do Business with the Federal Government? Should They Be?" *Public Contract Law Journal*, vol. 33, fall 2003, p. 25. The statutory authority for DOD to engage in "other transactions" may be found at 10 U.S.C. § 2371 (Pub. L. 101–189, as amended; 103 Stat. 1352, at 1403).

[3] Sec. 251(a) of Pub. L. 101–189.

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

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

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

RATIONALE FOR OTHER TRANSACTION AUTHORITY

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

However, the regulations and statutes governing traditional procurement methods were a barrier to some businesses. Companies that were unable, or unwilling, to comply with the Federal Acquisition Regulation (FAR) and procurement statutes did not enter into contracts with the Federal Government. For example, prior to the enactment of OT authority, DARPA missed "numerous opportunities to contract with companies that were developing some of the most promising new technologies" reportedly because they had "neither the capability nor the desire to do business with the Government through the procurement process."[9] Two particular areas of concern for some companies were data rights and the Federal Government's cost accounting standards. As the value of intellectual property, or data, has grown, companies are said to be less willing "to accept the standard clauses [on data rights] required by . . . Federal procurement laws and regulations."[10] As for cost accounting standards, the often-heard complaint was that commercially oriented firms would have to establish separate divisions or contracting functions to accommodate the relatively unique Federal cost accounting standards.[11] Other transaction authority was a wholesale way of waiving these and other procurement requirements that served as barriers to some companies. In addition, it was anticipated that "other transactions" would encourage cost sharing, which would result in savings. Commercial firms agree to cost sharing because the technology under development benefits the company commercially, and, typically, commercial markets are much larger than the Government market.

APPLICABILITY OF THE FEDERAL ACQUISITION REGULATION AND PROCUREMENT STATUTES TO OTHER TRANSACTIONS

Since an "other transaction" is not a contract, the Federal Acquisition Regulation, a number of procurement statutes, and the Government's Cost Accounting Standards do not apply to such transactions.[12] Determining which procurement statutes do not apply to "other transactions" is a lengthy, involved process. In 2000, an ad hoc working group affiliated with the Public Contract Law Section of the American

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

[8] Nancy O. Dix, Fernand A. Lavallee, and Kimberly C. Welch, "Fear and Loathing of Federal Contracting: Are Commercial Companies Really Afraid to Do Business with the Federal Government? Should They Be?" p. 26.

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

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

[11] See Center for Strategic and International Studies, *Integrating Commercial and Military Technologies for National Strength: An Agenda for Change*. Another barrier was the use of military specifications (MilSpecs).

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

Bar Association (ABA) published a monograph on the applicability of relevant statutes to DOD's other transaction authority. Although the monograph includes some statutes and provisions that apply only to DOD procurement, the analysis of other statutes is applicable to non-DOD agencies.

Upon analyzing 30 statutes or statutory provisions, the working group determined that 20 of them do not apply to "other transactions," and two others that do not apply to research OTs may apply to prototype OTs.[13] The list of statutes, shown in Table 1, includes, for example, the Competition in Contracting Act, the Procurement Protest System, and the Procurement Integrity Act.

Finally, it should be noted that, in describing the challenges of analyzing each statute, the Ad Hoc Working Group pointed out that its analysis of statutes may not be conclusive in some cases.[14]

TABLE 1.—STATUTES AND STATUTORY PROVISIONS THAT DO NOT APPLY TO OTHER TRANSACTIONS

Statute or Statutory Provision *	Purpose of Statute or Statutory Provision **
Competition in Contracting Act (CICA) .. 10 U.S.C. §§ 2301 et seq.; 41 U.S.C. §§ 253 et seq.	"To promote the use of competitive procedures and prescribe uniform Government-wide policies and procedures regarding contract formation, award, publication, and submission of cost or pricing data."
Contract Disputes Act ..... 41 U.S.C. §§ 601 et seq.	"To create a comprehensive, fair, and balanced statutory scheme of administrative and legal remedies for claims under Government contracts."
Procurement Protest System (Subtitle D of CICA).	"To provide a statutory basis for procurement protests by interested parties to the Comptroller General."
Kinds of Contracts ..... 10 U.S.C. § 2306	"To establish various restrictions on the terms and conditions of contracts."
Examination of records of contractor ..... 10 U.S.C. § 2313	"To provide authority to the contracting agency to access a contractor's records or plants in order to perform audits of the contractor."
Contracts: acquisition, construction, or furnishing of test facilities and equipment [to R&D contractors]. 10 U.S.C. § 2353	"To provide authority for acquisition, construction, or furnishing of test facilities or equipment in connection with R&D contracts."
Contracts: indemnification provision ..... 10 U.S.C. § 2354	"To authorize the Military Departments to include provisions in DOD R&D contracts indemnifying the contractor for certain claims and losses."
Prohibition against doing business with certain offerors. 10 U.S.C. § 2393	"To prohibit the award by the Department of Defense of contracts, or in some cases subcontracts, to firms that have been debarred or suspended by another agency."
Major weapon systems: contractor guarantees. 10 U.S.C. § 2403	"To provide warranty protection to the Government for major weapons systems it acquires."
Prohibition on persons convicted of defense contract related felonies and related criminal penalties as defense contractors. 10 U.S.C. § 2408	"To prevent persons convicted of fraud or any other felony arising out of a defense contract from further participating in contracts with the Department of Defense for a specified statutory period."

[13] American Bar Association, Section of Public Contract Law, Ad Hoc Working Group on Other Transactions, *Department of Defense "Other Transactions": An Analysis of Applicable Laws*, pp. 27–31.

[14] Ibid., p. 26.

TABLE 1.—STATUTES AND STATUTORY PROVISIONS THAT DO NOT APPLY TO OTHER TRANSACTIONS—Continued

Statute or Statutory Provision *	Purpose of Statute or Statutory Provision **
Contractor employees: protection from reprisal for disclosure of certain information. 10 U.S.C. § 2409	"To prohibit contractors from discharging, demoting, or discriminating against employees who disclose substantial violations of law related to contracts."
Limitation on the use of appropriated funds to influence certain Federal contracting and financial transactions. 31 U.S.C. § 1352	"To prohibit recipients and requesters of Federal contracts, grants, or cooperative agreements from using appropriated funds to pay any person to influence or to attempt to influence executive or legislative decisionmaking in connection with the awarding of any Federal contract or grant, the making of any Federal loan, or the entering into of any cooperative agreement."
Anti-Kickback Act ..... 41 U.S.C. §§ 51–58c	"To eliminate the practice of subcontractors paying kickbacks in the form of fees, gifts, gratuities, or credits to higher tier subcontractors or prime contractors for the purpose of securing the award of subcontracts or orders."
Procurement Integrity Act ..... 41 U.S.C. § 423	"To ensure the ethical conduct of Federal agency procurements by prohibiting certain Government officials from accepting compensation from or discussing future employment with bidders or offerors, and prohibiting the unauthorized receipt or disclosure of contractor bid and proposal information or source selection information before the award of a Federal agency procurement contract."
Walsh-Healey Act ..... 41 U.S.C. §§ 35–45***	"To require all covered contracts to contain stipulations regarding minimum wages, maximum hours, safe and sanitary working conditions, child labor, and convict labor requirements."
Drug-Free Workplace Act ..... 41 U.S.C. §§ 701–707	"To eliminate any connection between drug use or distribution and Federal contracts, cooperative agreements, or grants."
Buy American Act ..... 41 U.S.C. § 10a–10d	"To provide a preference for domestic products in Government acquisition for public use."
Bayh-Dole Act ..... 35 U.S.C. §§ 200–212	"To set forth Government's policy regarding allocation of patent rights to inventions conceived or first actually reduced to practice under contracts, grants, and cooperative agreements with small business firms and educational and other nonprofit organizations."****
Technical data provisions applicable to DOD. 10 U.S.C. §§ 2320 and 2321	"To provide for regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process."
Truth in Negotiations Act ..... 10 U.S.C. § 2306a	"To require the submission of cost or pricing data on negotiated contracts in excess of $500,000, as well as for certain subcontracts and contract modifications."

TABLE 1.—STATUTES AND STATUTORY PROVISIONS THAT DO NOT APPLY TO OTHER TRANSACTIONS—Continued

Statute or Statutory Provision *	Purpose of Statute or Statutory Provision **
Cost Accounting Standards ..... 41 U.S.C. § 422	"To provide for the promulgation of uniform standards for allocating costs to Government contracts."
Cost Principles ..... 10 U.S.C. § 2324	"To provide for the disallowance of certain costs under flexibly priced contracts and prescribe penalties for the submission of claims for unallowable costs."

Source: American Bar Association, Section of Public Contract Law, Ad Hoc Working Group on Other Transactions, *Department of Defense "Other Transactions": An Analysis of Applicable Laws*, American Bar Association, (Chicago: 2000), pp. 27–31.

* The source of the name or descriptive information in this column is American Bar Association, Section of Public Contract Law, Ad Hoc Working Group on Other Transactions, *Department of Defense "Other Transactions": An Analysis of Applicable Laws*, pp. 27–29.

** Ibid., pp. A–1—A–57.

*** This provision or statute does not apply to "other transactions" involving research and development, but it may apply to "other transactions" involving prototypes. (Ibid., pp. 30–31.)

**** The phrase "first actually reduced to practice" refers to a working model of the idea or invention.

CONCERNS REGARDING THE USE OF OTHER TRANSACTION AUTHORITY

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

HOW WELL DOES OT AUTHORITY WORK?

A DOD IG summary of several audits that it had conducted found that "other transactions" had not attracted a significant number of nontraditional defense contractors.[19] Data for the period fiscal year 1994 through fiscal year 2001 showed that

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

[16] Ibid., p. 11.

[17] Ibid.

[18] Ibid., p. 12.

[19] A "nontraditional defense contractor" is "an entity that has not, for a period of at least 1 year prior to the date that a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section [Sec. 845 of Pub. L. 103–160] is entered into, entered into or performed with respect to—(1) Any contract that is subject to full coverage under the cost accounting standards prescribed pursuant to section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 422) and the regulations implementing such section; or (2) any other contract in excess of $500,00 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency, that is subject to the Federal

Continued

traditional defense contractors received nearly 95 percent of the $5.7 billion in funds for 209 prototype "other transactions."[20]

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

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

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

On the one hand, it is not possible to determine conclusively whether the use of other transaction authority accomplishes what is intended, including higher performance and less expensive Government end-products. However, the RAND study and the judgments of many people involved in OTs suggest that the use of OT au-

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Acquisition Regulation." (10 U.S.C. § 2371 note.) Apparently, this definition also applies to "other transactions" that involve research.

[20] U.S. Department of Defense, Office of the Inspector General, "Statement for the Record, Robert J. Lieberman, Deputy Inspector General, Department of Defense, to the Subcommittee on Technology and Procurement Policy, House Committee on Government Reform, on The Services Acquisition Reform Act (SARA) of 2002," Mar. 12, 2002, Report No. D–2002–064, pp. 11–12.

[21] Ibid., p. 12.

[22] Ibid.

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

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

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

[26] Ibid., pp. 27–28.

thority does expand Government access to commercial technology and production capacity and involves lower transaction costs and reduced risks for the projects.

DHS'S EXPERIENCE WITH OTHER TRANSACTION AUTHORITY

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

- What companies are involved in OT projects?
- What does each company bring to the project in terms of technology, manufacturing capability, or engineering resources?
- To what extent do each company's resources reside in, or take advantage of, the commercial market?
- How much cost sharing, if any, has occurred?
- Has the Department experienced any unintended consequences as a result of using OT authority?
- How have DHS and its partners addressed certain elements of their transactions, such as data rights and cost accounting standards?
- For OTs that have been completed, did the terms and results of the transactions match the rationale for and expected benefits of the transactions?
- How many nontraditional Government contractors and traditional contractors have participated in DHS transactions?[27]
- Finally, based on these questions and possibly others, has OT authority enabled DHS to acquire research, technologies, and prototypes that it would not have been able to acquire otherwise?

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

Mr. LANGEVIN. Thank you, Ms. Halchin. Thank you for your testimony.

I now recognize Mr. Needham to summarize your statement for 5 minutes.

Welcome.

STATEMENT OF JOHN K. NEEDHAM, ACTING DIRECTOR, ACQUISITION AND SOURCING MANAGEMENT, GOVERNMENT ACCOUNTABILITY OFFICE

Mr. NEEDHAM. Thank you, Mr. Chairman, Ranking Member McCaul and other Members of the subcommittee. I appreciate the opportunity to discuss the Department of Homeland Security's use of other transaction authorities under the Homeland Security Act.

I am John Needham, acting director of the Acquisition and Sourcing Management Team of the Government Accountability Office.

In my statement, I am going to cover three points. First is the extent of DHS' use of OT authority under the Homeland Security Act, the status of DHS' implementation of GAO's previous recommendations and accountability challenges associated with the use of these agreements based on GAO's previous work at the Department of Homeland Security and the Department of Defense.

While OTs provide great flexibility in attracting contractors that have not typically pursued Government contracts, they also carry the risk of reduced accountability and transparency, and fewer safeguards have been found FAR-based procurements. Accordingly,

[27] The term "nontraditional Government contractor" has the same meaning as "nontraditional defense contractor," which is defined in Sec. 845(e) of Pub. L. 103–160 and 10 U.S.C. § 2371 note. The definition also is included above, in another footnote.

GAO will be continuing to review DHS' use of OT agreements this year.

In discussing the extent to which DHS has used its authority, I would point out that the $153 million that DHS spent on OTAs in the Science and Technology Directorate in 2006 is approximately 1 percent of DHS' total procurement obligations. Based on data that we recently reviewed, DHS entered into 37 OT agreements between fiscal years 2004 and 2007, most of which were initiated in 2004 and 2005.

Though it is using its authority less frequently, it continues to obligate funds for its earliest agreements. The agreements from the first 2 years account for 88 percent of OT spending by DHS in its Science and Technology Directorate. Furthermore, about 77 percent of dollars spent on these agreements have been obligated under seven of DHS' 37 agreements. According to DHS, all the agreements to date were for prototype projects and that each included at least one nontraditional contractor.

Regarding the recommendations that we made in our 2004 and 2005 reports, DHS has taken several steps to address these recommendations. It has created guidance on when to include audit provisions in OT agreements, established a training program on using these agreements and improved controls over potential conflicts of interest.

However, it has not implemented all of them. For example, we also recommended that DHS capture knowledge gained from OTs it has awarded, while DHS has compiled lessons that relate to DOD rather than DHS' experience, as opposed to that of DOD.

Challenges that I would like to talk about are the four, and they are inherent in the flexibilities provided by OT authority. The first is attracting and ensuring the use of nontraditional contractors. DHS has said that it had the nontraditional contractor involved in each of its 37 OT agreements in the Science and Technology Directorate.

It should be noted that DHS' management directive identifies conditions under which it can enter into OTs without using nontraditional contractors. While we have not assessed the extent of the involvement of nontraditional contractors or what portion of the funding they receive; however, our review of OT agreements at DOD found that DOD departed from the original rationale of using these agreements, as most were entered into with traditional DOD contractors and nonprofit institutions.

Second, intellectual property rights. A large appeal of using an OT is to provide greater protection to a firm's intellectual property rights. Alternatively, and just as important, insufficient intellectual property rights on the part of the Government could hinder the Government's ability to adapt developed technology for use outside the initial scope of the project. Therefore, while an OT agreement may help reduce the development costs early on, there is no assurance that the total cost to the Government will be reasonable when the cost of producing the final product is considered as well.

Third, financial controls and cost accounting. OTs are exempt from cost accounting standards and audit requirements. While OT recipients have flexibility in tracking costs, they still need to provide cost information and demonstrate that Government funds are

being used responsibly. This is particularly true for traditional contractors that are performing work under both FAR-based contracts as well as OT agreements.

Furthermore, DHS also needs a way to assess the reasonableness of the contractor's reported value of in-kind contributions.

Now, finally, maintaining a skilled acquisition force is also a key challenge. As prior GAO work has noted, maintaining institutional knowledge sufficient to maintain Government control and contractual-type relationships is critical. The unique nature of OT agreements means that the Federal Government acquisition staff working with these agreements need to be experienced in doing R&D acquisitions, have strong business acumen and sound judgment to operate effectively in a relatively unstructured business environment.

Retaining a skilled acquisition workforce has been a continual challenge at DHS overall, and we have ongoing work in this area for this committee.

Mr. Chairman, this concludes my oral statement. I would be pleased to take questions from the subcommittee Members. Thank you.

[The statement of Mr. Needham follows:]

PREPARED STATEMENT OF JOHN K. NEEDHAM

FEBRUARY 7, 2008

DEPARTMENT OF HOMELAND SECURITY: STATUS AND ACCOUNTABILITY CHALLENGES ASSOCIATED WITH THE USE OF SPECIAL DHS ACQUISITION AUTHORITY

GAO HIGHLIGHTS: HIGHLIGHTS OF GAO–08–471T, A REPORT TO THE SUBCOMMITTEE ON EMERGING THREATS, CYBERSECURITY, AND SCIENCE AND TECHNOLOGY, COMMITTEE ON HOMELAND SECURITY COMMITTEE, HOUSE OF REPRESENTATIVES

Why GAO Did This Study

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

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

What GAO Recommends

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

DEPARTMENT OF HOMELAND SECURITY: STATUS AND ACCOUNTABILITY CHALLENGES ASSOCIATED WITH THE USE OF SPECIAL DHS ACQUISITION AUTHORITY

What GAO Found

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

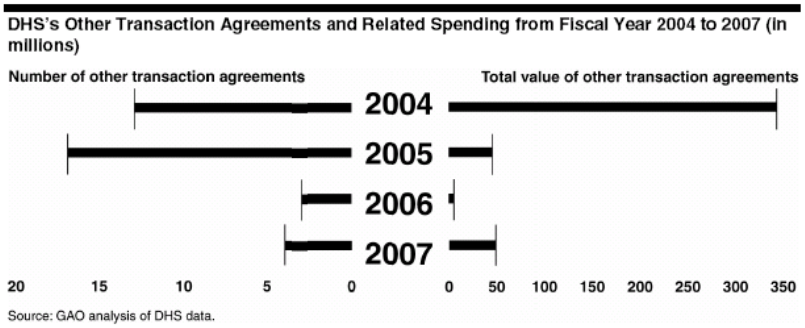
use of other transaction agreements as required by the Homeland Security Act of 2002.

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

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

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

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



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

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

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

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

SUMMARY

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

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

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

BACKGROUND

Other transaction authority was created to enhance the Federal Government's ability to acquire cutting-edge science and technology by attracting nontraditional contractors that have not typically pursued Government contracts. Other transactions are agreements other than Government contracts, grants, or cooperative agreements and may take a number of forms. These agreements are generally not subject to the FAR. This authority originated in 1958 when Congress gave the National Aeronautics and Space Administration (NASA) the authority to enter into contracts, leases, cooperative agreements, or "other transactions." In 1989, Congress granted the Defense Advanced Research Projects Agency (DARPA) temporary authority to use other transactions for advanced research projects. In 1991, Congress made this authority permanent and extended it to the military services. In 1993, Congress temporarily expanded DARPA's other transaction authority, allowing the agency to use the agreements for prototype projects. The Homeland Security Act of 2002 created DHS and granted the agency the authority to enter into other transactions for research and development and prototype projects for a period of 5 years. Congress granted DHS this authority to attract nontraditional[2] firms that have not worked with the Federal Government, such as high-tech commercial firms that have resisted doing business with the Government because of the requirements mandated by the laws and regulations that apply to traditional FAR contracts. The Consolidated Appropriations Act for 2008 extended this authority until September 30, 2008.[3]

DHS began operations in March 2003 incorporating 22 Federal agencies to coordinate and centralize the leadership of many homeland security activities under a single department.[4] Since then, DHS has become the third largest agency for procurement spending in the U.S. Government. DHS's acquisition needs range from basic services to complex investments, such as sophisticated screening equipment for air passenger security and upgrading the Coast Guard's offshore fleet of surface and air assets. In fiscal year 2006, according to agency data, the Department obligated $15.9 billion for goods and services to support its broad and complex acquisition portfolio. DHS's S&T Directorate supports the Department's mission by serving as its primary research and development arm. In fiscal year 2006, according to S&T

[2] DHS's Management Directive No. 0771.1, July 8, 2005, defines a nontraditional Government contractor as a business unit that has not, for at least a period of 1 year prior to the date of entering into or performing an other transaction agreement, entered into or performed: any contract subject to full coverage under Federal Cost Accounting Standards (CAS); or any contract in excess of $500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency that is subject to compliance with the Federal Acquisition Regulation (FAR).

[3] Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, Dec. 26, 2007.

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

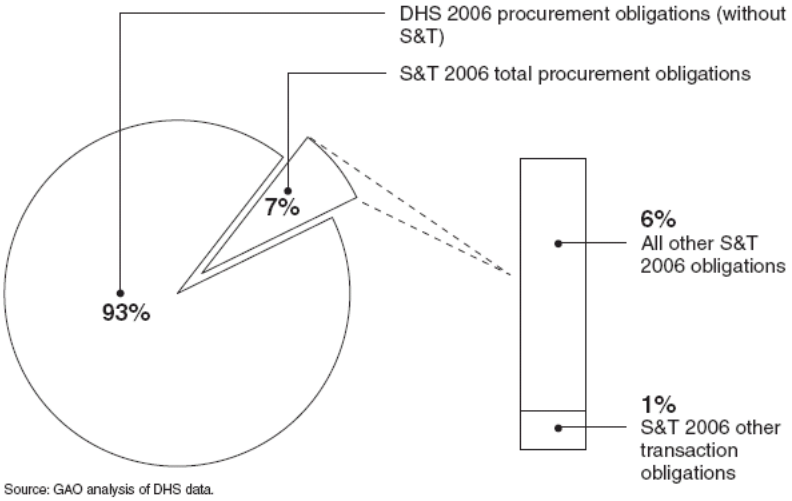
data, S&T obligated over $1.16 billion dollars to fund and develop technology in support of homeland security missions. The directorate has funded technology research and development in part through the use of other transaction authority. According to agency officials, S&T is the only component within DHS that uses this authority. Because of their flexibility, other transactions give DHS considerable latitude in negotiating with contractors on issues such as intellectual property, reporting on cost, and data rights. In addition, it may relieve the parties from certain contract administration requirements that nontraditional contractors find burdensome.

DHS'S USE OF OTHER TRANSACTION AUTHORITY HAS DECLINED SINCE FISCAL YEAR 2005

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

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

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

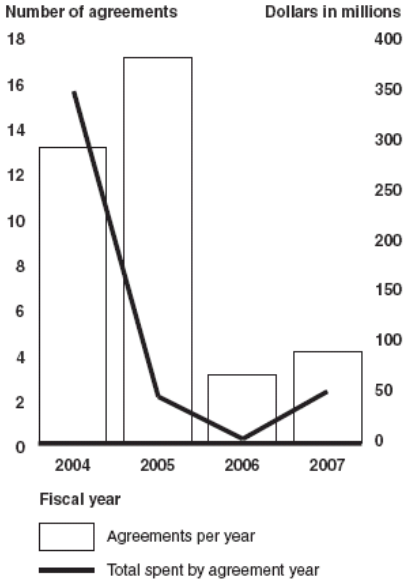


Source: GAO analysis of DHS data.

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

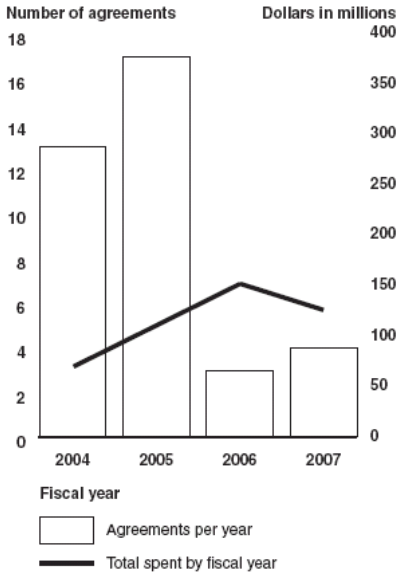
[5] According to S&T, total spending through other transaction agreements includes four that are managed by DHS's Domestic Nuclear Detection Office (DNDO). S&T contracting representatives told us that these agreements were entered into by the S&T Directorate before DNDO was created.

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



Source: GAO analysis of DHS data.

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



Source: GAO analysis of DHS data.

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

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

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

Soon after DHS established the S&T Directorate, S&T issued other transaction solicitations using some commonly accepted acquisition practices and knowledge-based acquisition principles. For example, DHS used integrated product teams and contractor payable milestone evaluations to manage other transaction agreements.[6] To quickly implement its early projects, S&T relied on experienced staff from DARPA, other Government agencies, and industry to help train S&T program and contracting staff in using other transactions and help DHS create and manage the acquisition process. S&T also brought in program managers, scientists, and experts from other Government agencies on a temporary basis to provide assistance in other areas. Beyond these efforts, GAO found some areas for improvement and recommended that: DHS provide guidance on when to include audit provisions in agreements; provide more training on creating and managing agreements; capture knowledge gained from current agreements for future use; and take measures to

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

help rotational staff avoid conflicts of interest. DHS has implemented some measures to address many of these recommendations; however, it has not addressed all of them.

- *Provide guidance*.—We recommended that DHS develop guidance on when it is appropriate to include audit provisions in other transaction agreements. Subsequently, DHS modified its management directive to add guidance on including GAO audit provisions in agreements.[7] However, the guidance only addresses prototype agreements over $5 million. While S&T contracting officials recently told us that they have only issued other transaction agreements for prototypes, they noted that the Department intends to issue agreements for research projects in the future. In addition, it is unclear how the $5 million threshold is to be applied. In at least one agreement, the audit provision did not apply to subcontractors unless their work also exceeded the $5 million threshold.
- *Provide additional training*.—We recommended that DHS develop a training program for staff on the use of other transactions. DHS has developed a training program on other transactions, and S&T contracting representatives said they have plans to conduct additional sessions in 2008. The training includes topics such as intellectual property rights, acquisition of property in other transactions, and foreign access to technology created under other transaction authority. An S&T contracting representative told us the Directorate currently has three staff with other transaction warrants and has additional in-house expertise to draw on as needed, and they said S&T no longer needs to rely on other agencies for contracting assistance.
- *Capture lessons learned*.—We recommended that DHS capture knowledge obtained during the acquisition process for use in planning and implementing future other transaction projects. In 2005, DHS hired a consultant to develop a "lessons learned" document based on DOD's experience using other transactions. This is included in DHS's other transaction training. However, it was not evident based on our follow-up work that DHS has developed a system for capturing knowledge from its own experience regarding other transaction agreements the directorate has executed since it was created.
- *Ethics*.—We made a number of recommendations regarding conflicts of interest and ethics within S&T. When the S&T Directorate was established in 2003, it hired scientists, engineers, and experts from Federal laboratories, universities, and elsewhere in the Federal Government for a limited time under the Intergovernmental Personnel Act (IPA) with the understanding that these staff would eventually return to their "home" institution.[8] This created potential conflicts of interest for those staff responsible for managing S&T portfolios as these staff could be put in a position to make decisions on their "home" institutions. We recommended that DHS help the portfolio managers assigned through IPA comply with conflict of interest laws by improving the S&T Directorate's management controls related to ethics. DHS has complied with these recommendations to define and standardize the role of these portfolio managers in the research and development process; provide regular ethics training for these portfolio managers; and determine whether conflict of interest waivers are necessary. The only outstanding recommendation concerns establishing a monitoring and oversight program of ethics-related management controls. Furthermore, an S&T official told us the use of rotational portfolio managers has largely been eliminated with the exception of one portfolio manager who is currently serving a 2-year term.

Inherent to Other Transactions' Flexibility Are Certain Accountability Challenges

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

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

[8] The Intergovernmental Personnel Act (IPA) of 1970, U.S.C. §§ 3371–76, allows employees to be temporarily assigned to a Federal agency.

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

Intellectual Property Rights.—One reason companies have reportedly declined to contract with the Government is to protect their intellectual property rights. Alternatively, insufficient intellectual property rights could hinder the Government's ability to adapt developed technology for use outside of the initial scope of the project. Limiting the Government's intellectual property rights may require a trade-off. On the one hand, this may encourage companies towork with the Government and apply their own resources to efforts that advance the Government's interests. However, it also could limit the Government's production options for items that incorporate technology created under an other transaction agreement. For example, we previously reported that DARPA received an unsolicited proposal from a small commercial firm to develop and demonstrate an unmanned aerial vehicle capable of vertical take-off and landing based on the company's existing proprietary technology. DARPA agreed not to accept any technical data in the $16.7 million agreement. To obtain Government purpose rights,[10] DOD would have to purchase 300 vehicles or pay an additional $20 million to $45 million.[11] Therefore, using an other transaction agreement could potentially limit competition and lead to additional costs for follow-on work.

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

Maintaining a Skilled Acquisition Workforce.—Other transactions do not have a standard structure based on regulatory guidelines and therefore can be challenging to create and administer. Prior GAO work has noted the importance of maintaining institutional knowledge sufficient to maintain Government control. The unique nature of other transaction agreements means that Federal Government acquisition staff working with these agreements should have experience in planning and conducting research and development acquisitions, strong business acumen, and sound judgment to enable them to operate in a relatively unstructured business environment. Retaining a skilled acquisition workforce has been a continual challenge at DHS, and we have ongoing work in this area for this committee.

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

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

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

[11] GAO–01–980T.

APPENDIX I: SELECTED DHS OTHER TRANSACTION AGREEMENTS

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

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

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

Mr. LANGEVIN. Thank you, Mr. Needham.

I want to thank the witnesses for their testimony, and I will remind each Member that he or she will have 5 minutes to question the panel.

I will now recognize myself for questions.

Mr. Essig, let me begin with you. Basically, three areas I want to get into. Just briefly, first, is the Department still planning on asking this committee for an extension of the other transaction authority beyond the 2008 sunset?

Next, I want to point out and ask this question: On section 831 of the Homeland Security Act, it requires that a report be submitted to Congress each year for awards made in the preceding fiscal year, pursuant to OT authority. This includes all initial awards and options exercised. My question here is, where are these reports?

Then, finally, I would like you to address Mr. Needham's point with respect to those recommendations that have not been implemented that GAO had recommended. Why haven't you addressed those areas?

If you would start with the sunset question first.

Mr. ESSIG. Thank you, Mr. Chairman. As I mentioned in my opening comments, we are very appreciative and fully support Ranking Member McCaul's proposal to extend our authority to 2012. We believe that other transaction authority is an absolutely critical tool for us to close some critical homeland security vulnerabilities.

Regarding the second question, regarding section 831 and the requirement for an annual report to Congress, I have been the chief procurement officer just since last month, and I am now aware that the Department has not submitted the reports as required by section 831. As the chief procurement officer, I am responsible for ensuring that those reports are submitted, and I will commit and go on the record as indicating that I will have that report submitted this year. I will also put procedures in place to ensure that those reports are submitted on a timely basis in the future.

Regarding the specific GAO recommendations, regarding full implementation of the knowledge capturing system, what I would like to identify for the group, the book I have in front of me—it is about a 2-inch binder—is a training manual we use for all of our OT contracting officers. Now, my background is primarily in the area of DOD, but one thing that DHS does over and above what I have seen before is we only warrant our contracting officers to do other transactions after they have successfully completed this training course.

Now, the manual you see here is the guide book they are given in the class. It includes the lessons learned from the Department of Defense. It includes some recommendations from the Logistics Management Institute on actions taken at the Department of Homeland Security. All of this information is available to our OT contracting officers when they evaluate whether or not to do OTs in the future.

This is a living document. This is a document which will be updated for every successive class. Our intention is as we identify additional lessons learned, we incorporate this into the manual so that as people go through training they have the latest available lessons learned, both from other agencies as well as DHS. So if we find cases where the Department has not yet fully implemented a GAO recommendation, I can tell you, I fully concur with the recommendations of GAO, and we will fully implement those recommendations.

Mr. LANGEVIN. Thank you. Well, that certainly is reassuring, and I appreciate that answer.

Let me ask this: The DOD audit found departures from the original rationale for using OT agreements, which was to attract nontraditional defense contractors. Data collected from fiscal year 1990 to 1997 revealed that 85 percent of the funds for other transactions went to traditional DOD contractors, which isn't quite how Congress envisioned the authority. According to the 2004 GAO report, DHS relied on self-certification by contractors of their status as a nontraditional Government contractor. Is this still the practice today?

Mr. ESSIG. Actually, at the time DOD received its authority for other transactions on prototypes, I was the director for surface systems contracts with the Naval Sea Systems Command, so I was

with DOD at that time. I recall very specifically when DOD received this authority there was heavy interest in demonstrating that we are able to implement the authority received. The unfortunate consequence, in my perception, the unfortunate consequence of that is that it was used in cases where it did not provide the greatest value to the Government. It was used in cases with traditional Government contractors. It did not provide the benefits, it did not give us access to those nontraditional contractors, it did not provide the cost-sharing arrangements we have seen.

That is one of the lessons learned, okay, I think that we have now. We understand how it was incorrectly used in the past. It was a lesson learned for the future. At DHS, every one of our OTs is reviewed, not only by the contracting officer but by a review panel that includes both the Office of General Counsel and some senior personnel within the contracting office, and the goal is to ensure that the justification and the documentation for an other transaction at DHS meets the appropriate measures.

Mr. LANGEVIN. So the answer is that this issue of these contractors of self-certifying is no longer the case?

Mr. ESSIG. As I said, I have been at this for a month. I do not have the information in front of me. I can take that question for the record and get back to you as to whether or not we are using any self-certification within the Department.

Mr. LANGEVIN. Okay. Thank you. I would hope that the answer comes back, "No," but I will wait to hear from you.

Mr. ESSIG. Yes, sir. I would like to confirm that.

Mr. LANGEVIN. Thank you.

With that, I will stop now and recognize the Ranking Member, Mr. McCaul, the gentleman from Texas, for 5 minutes.

Mr. MCCAUL. I thank the Chairman, and I thank the witnesses.

Mr. Essig, congratulations on your new position. I must say, we both met with you prior to this, and I was impressed by your professionalism, your sincerity and your experience in terms of procurement. I think you are going to be a great asset to the Department.

There are some concerns and reservations that have been raised, but I believe that, in my view, the benefits of these other transactions far outweigh the risk.

Now, we talked about innovation, flexibility, bringing barriers down to businesses, some small businesses, the cost savings, cost-sharing arrangements, the fact that we, through this other transaction authority, developed handheld chemical agent detection systems, which have been used in larger cities, the fact that the DOD has been doing this for quite some time, and the RAND study seemed to be somewhat favorable that this has worked quite well in areas where we really need it. NASA has used it, the Department of Energy.

My question to Mr. Essig is, this is getting ready to expire in September 2008, it will sunset: If Congress allows this to expire, what will be the impact at the Department of Homeland Security and your ability to protect this Nation from potential terrorist threats?

Mr. ESSIG. Thank you for that question. I believe that the loss of the other transaction authority would have at least two serious

and possibly devastating consequences from the ability of the Department to meet its mission requirements.

First, given the nature of the homeland security mission, it is essential that we have access to all available commercial technologies, including those that are from companies that do not currently or traditionally do business with the Government. Technologies such as the four S&T systems I identified in my written statement, including the LACIS project, which you just mentioned, sir, on the chemical agent detectors, would not have been achievable without this authority.

The second consequence of the loss of this authority would be that it would significantly reduce the ability of the Department to share the cost of developing dual-use technologies with industry. Now, these are technologies that may have application both commercially and for homeland security where the cost of developing that technology is too great for industry to develop it on its own.

So in the absence of the OT authority where we can share the cost of developing that with industry, the Department would be forced either to forego the development of technology and be unable to close those areas of identified risk or bear the full cost of its development, increasing the cost to the taxpayer.

If I could ask, I guess, Keith, if he had anything to add to that?

Mr. WARD. Yes, I would be happy to.

Mr. Essig has asked me to give a few examples of particular products that have come out of some of our currently funded R&D efforts in the Department of Homeland Security S&T Directorate.

The first I want to show you—and I apologize for the committee Members not being able to see this, but I am not going to apologize for how small it is, because, in fact, one of the goals of this particular project—it is part of the Autonomous Rapid Facility Chemical Agent Monitoring System, which is specifically being developed to protect the facilities, rail and transport security systems and infrastructure protection—is small affordable systems.

This particular gadget name is actually longer and bigger than the gadget itself. This is a differential mobility spectrometer combined with a convention ion mobility spectrometer. How about that?

It was developed by a company called Sionex out of New Bedford, Massachusetts. They were the nontraditional contractor that the prime, Hamilton Sundstrand, teamed with in response to our initial broad agency announcement, which encouraged people to team with unconventional contractors.

This is an extremely innovative technical solution to the general problem of building affordable, lightweight, highly effective chemical monitoring systems, and I think it is an excellent example of the power of OTAs. This particular company, in my opinion, would not have been able to provide this sort of technology to homeland security without our having other transaction authority.

One final example, if I may mention it briefly, is in the biological defense arena. As many of you know, one of our projects, called the Bioagent Autonomous Network Detector, BAND, aims to develop the third generation biowatch system. One of the major performers of the three that are left in the program is a company called

Microfluidics, Incorporated. They chose to team with a small company called Cycle Smart, Incorporated in Sunnyvale, California.

This particular gadget that I hold in my hand is a highly innovative and clever Microfluidic Systems made with this nontraditional contractor. It is this particular part of the overall third generation biowatch system. It is the actual part that—both the whole organisms and spores from biological agents so that the system can get to the DNA to allow it to identify exactly what the agent is.

Another great example of a nontraditional contractor coming to the fore. Again, it is my professional opinion that we would have never been able to capture this sort of innovative technology had we not had other transaction authority for prototype development.

Mr. MCCAUL. Thank you, Dr. Ward.

I submit, then, Mr. Chairman, that we work with the GAO to better improve the other transaction authority but that we not throw out the baby with the bath water. I think that it provides innovation, flexibility, cost savings, it is good for the American taxpayer, and, ultimately, it is the kind of flexibility that, in my view, the Department needs to protect this Nation. So I hope that this committee and this Congress will reauthorize this provision and give DHS the tools that it needs.

Thank you.

Mr. LANGEVIN. I thank the gentleman for his questions and his comments.

Mr. Ward, just as a followup, on that third generation biodetector you were holding up, that is something that requires little to no human interaction, and that is something that is real time?

Mr. WARD. Yes, sir, Mr. Chairman. We have currently three performers all competing to see who can build the best system, and all of those systems will be completely autonomous, work in real time and conduct all of the analysis of the biological agent in place, on the box. That is quite different from what our current biowatch system does, as you probably know.

Mr. LANGEVIN. Well, I agree. I am not at all satisfied with our current biodetection system we have in place, and I am anxious to get to that third generation technology as quickly as possible.

Do you have, as a side note, a best guess as to when that technology will be ready to be fielded?

Mr. WARD. Yes, sir, Mr. Chairman. Currently, there will be the final stages of the developmental testing and evaluation, which will allow us to hand this off to the Office of Health Affairs, the DHS customer who is actually running biowatch, and that will occur in the latter part of 2009, with early deployment in 2010.

Mr. LANGEVIN. Thank you. The sooner the better, as far as I am concerned. We are all concerned about our preparedness in that area, which is sorely lacking, and I am anxious to get that new equipment fielded.

So thank you for the brief on that and the update.

With that, the Chair now recognizes the gentleman from North Carolina, Mr. Etheridge, for 5 minutes.

Mr. ETHERIDGE. Thank you, Mr. Chairman, and let me thank our witnesses for being here.

If OT is designed to allow nontraditional commercial firms to do business with the Federal Government and inject entrepreneurial

energy into the Federal research enterprise, one would expect that small business would be the prime benefactors. However, there are still a lot of large businesses making agreements under OT.

Mr. Needham and Dr. Halchin, can you describe some of the impediments to using OT for small businesses?

Mr. NEEDHAM. Congressman, when we did our work back in 2004, one of the things that we did was spend time with the procurement effort in terms of the outreach that DHS did. One of the things we were impressed with was they did an extensive outreach. They used what they called industry days where they would basically go out and discuss what some of the technology they were looking for. They tried to do a fairly wide announcement as to bring as many small businesses as possible.

They then followed that up with technical conferences where businesses could come in and kind of get a closer——

Mr. ETHERIDGE. No, I understand the process, but what are the impediments?

Mr. NEEDHAM. Well, the impediments are that they have a good knowledge of what small businesses are out there, what kind of knowledge base they have and where they are located and are they reaching them. One of the things that they would have to do is evaluate how well their outreach has been.

Mr. ETHERIDGE. Okay.

Dr. Halchin, do you have anything to add to that?

Ms. HALCHIN. I would agree with Mr. Needham. One other item I could add, I know that DHS and DOD do post at least some if not all of their—I guess usually they use something called a broad agency announcement when they are about to embark on some sort of other transaction, and they may post it on their Web site. I am not sure if it always gets posted on the Federal Business Opportunities Web site. It is possible but that could be an impediment if these types of opportunities are not publicized as widely as traditional procurements are.

Mr. ETHERIDGE. Thank you, because that is one of the issues that this was all about initially, trying to reach out to small folks.

Mr. Essig, do you know what percentage of OT agreements go to large versus small businesses?

Mr. ESSIG. There are a couple of different things there. In 2006, approximately 34 percent of our S&T other transaction dollars went to small businesses as small business prime contractors. I do not have the visibility into how——

Mr. ETHERIDGE. What is your definition of small versus large?

Mr. ESSIG. It depends upon the particular category. That is defined by the Small Business Administration.

Mr. ETHERIDGE. So you use the Small Business Administration as your cut line.

Mr. ESSIG. Yes, sir.

Mr. ETHERIDGE. You are saying 34 percent?

Mr. ESSIG. Thirty-four percent in 2006, and the good news here, two things: One, in 2007, 54 percent of our S&T OT dollars went to small businesses, and one of the things we do with our use of broad agency announcements and the use of OTs is we are looking for participation from as broad a sector of the marketplace as pos-

sible, be it small businesses, large businesses or mid-size businesses.

We are also looking at promoting unusual teaming arrangements. We are not constrained by traditional prime subcontractor relations. We could get consortiums to apply. It gives us opportunities to reach teams of companies, which may involve, again, a mixture of large, small and mid-size. The data we capture on awards, as it reflects the awards to prime contractors, and, again—so small businesses can get a portion of the total work without necessarily being prime contractors. Notwithstanding that, the results for small businesses looks fairly good at this point.

Mr. ETHERIDGE. Well, since we are on that topic, let me ask you another one. OT, as you know, was originally created to attract nontraditional commercial firms to do business with the Federal Government, small business, et cetera, but there is some flexibility in DHS' management directive for implementing OT that allows traditional firms to enter agreements in exceptional circumstances. Can you offer examples of these exceptional circumstances that would allow DHS to issue an OT for a prototype project without the participation of a nontraditional Government contract, and how often does this exceptional circumstance clause apply?

Mr. ESSIG. First off, again, and having only been the chief procurement officer for a month, I am not personally aware of any exceptions approved. In accordance with the management directive that you are speaking to, any of those agreements would have to be approved as the senior procurement executive.

I have not seen any since I have been at DHS, but I can take the question and get back to you as to whether or not there have been any——

Mr. ETHERIDGE. Would you? And submit that to the committee for the record.

Mr. ESSIG. Now, I could speculate as to some reasons for that, but I have no concrete examples of where that authority has been used. What it does is recognize the opportunity that if we find an arrangement which is basically advantageous and helps us basically close a critical vulnerability in homeland security, if it doesn't meet one of those two conditions, it gives us a way to implement it, nonetheless.

Mr. ETHERIDGE. So you will submit that in writing for the committee.

Mr. ESSIG. Yes, sir.

Mr. ETHERIDGE. Thank you.

I yield back.

Mr. LANGEVIN. I thank the gentleman.

The Chair now recognizes the gentleman from Georgia, Mr. Broun, for 5 minutes.

Mr. BROUN. Thank you, Mr. Chairman.

Mr. Essig, what are the most important protections that the Federal acquisition regulation-based contracts contained in other transactions do not? Also, how does DHS plan to monitor the benefits, dollars, time saved from using its other transaction agreements?

Mr. ESSIG. The other transactions, as you indicate, they are exempt from the Federal acquisition regulations. They are also ex-

empt from a number of statutory requirements that apply to procurement transactions, which include cost and pricing data, which include standard provisions for disputes and protests.

As a result of that, the level of expertise that is required from our other transaction contracting officers is higher than it is for contracting officers in general. The reason for that is, is when we are using standard, what I call, boiler-plate provisions that are identified in the Federal acquisition regulations, mandatory provisions, we know what they do, we know why they are included, and it really doesn't require a significant level of expertise.

When you start to eliminate those, you really need to—or you modify a clause, you really need to understand why it was there in the first place and what the implications are for changing it.

Some of the keys areas, as I said, and probably one of the key areas I ran into in my work while still within the Department of the Navy had to do with the issue of cost and pricing data. In the absence of cost and pricing data, how do you assure that the price you are getting is fair and reasonable for the Government? That is less of a problem in areas where we are having cost-sharing arrangements, in which case we are really concerned with before we pay, for example, 50 cents on the dollar, did the company reasonably and accurately incur the dollar?

But there are other techniques which are used. Many of those are identified. There are some other pricing techniques that can be used. But it becomes critical that basically our contracting personnel understand appropriate measures for analyzing costs in the absence of certified cost and pricing data.

Now, within the Office of the Chief Procurement Officer, we have recently hired somebody—we have basically hired from the Department of Defense who is an expert, both in the cost accounting standards and an expert in cost analysis of contracts. He is setting up some training opportunities for the contracting personnel within DHS, and the goal is to improve the capability of our OT contracting officers, all of our contracting personnel in being able to analyze proposed costs.

So we understand there are some risks. We are putting together some basic things to assure that the proper reviews are in place.

Previously, I mentioned that we have reviews over and above the level of the contracting officer. For OTs valued at greater than $25 million, those are approved by an acquisition review board. For those over $50 million, they have to come to me for approval. So I think we have proper protections in place on a pre- and post-award side. It requires a more detailed review of the business deal than your normal contract does.

Mr. BROUN. When those contracts come to you, what kind of thought process do you go through to approve or disapprove those contracts?

Mr. ESSIG. One of the things we are trying to get all of our contracting personnel to understand—and the training manual, by the way, is not a training manual in other transactions. Critical to really understanding this is, this is a training manual that is Federal acquisition regulation-based, research and development contracting and other transactions.

The assurance is we need to be sure that our contracting personnel and our program personnel understand the implications and the benefit and disadvantages of each approach, and they both have pros and they both have cons. So we are looking at basically ensuring that they are properly trained, we have proper checks and balances in place to understand under the situations where an other transaction is the greatest benefit.

One of the things we are starting to use in our broad agency announcement is we are not specifying that this will result in an other transaction. We are saying it may result in an other transaction, it may result in a contract, it may result in a grant.

What that gives is the ability for us to weigh the actual proposals, not speculate as to which of these will likely provide the greatest benefit but to have real data to look at, where you can take a look at what the company has proposed in terms of price, terms and conditions on a contractual basis and what they have proposed if we are willing to change some of the intellectual property rights or we are willing to waive cost and pricing data. Based on real data we can then make an informed decision as to which of those two approaches provides the greater value for the Government.

Mr. BROUN. All right. I thank you very much.

Dr. Ward, I want to associate myself with the Chairman's comments about getting that biological piece of equipment that you had. I am a physician, and certainly I would like to see it on the ground as quickly as we possibly can.

I have some other questions that I would like to submit to you all for you all to answer and put in the record.

Mr. Chairman, I ask permission to do so.

Mr. LANGEVIN. Without objection.

Mr. BROUN. I thank you all for coming today and appreciate you all participating in this panel.

Thank you, Mr. Chairman. I will yield back.

Mr. LANGEVIN. I thank the gentleman for his questions.

The Chair now recognizes the gentleman from New Jersey, Mr. Pascrell, for 5 minutes.

Mr. PASCRELL. Thank you, Mr. Chairman.

Mr. Needham, are you convinced that our homeland security, before it considered nontraditional contracting or whatever, were they unable to, let's say, acquire goods or services or the needed technologies through existing vehicles and more traditional? Are you convinced that that is the case or are you not convinced?

Mr. NEEDHAM. At the time we did our review, we didn't have any data related to that particular question, but this authority was put into the act when the Department was created, so they had it from the get-go.

Mr. PASCRELL. But how you use the authority should be determined by some oversight——

Mr. NEEDHAM. Right.

Mr. PASCRELL [continuing]. Other than the Department. I am asking you whether or not all other means were exhausted? That is a very direct and simple question. You had reviews in the Department of Defense to that effect, did you not?

Mr. NEEDHAM. Yes.

Mr. PASCRELL. What did you conclude?

Mr. NEEDHAM. There was mixed use. I mean, that they were able to get—about 13 percent of the companies they were able to get were nontraditionals when we looked at them, and that was in 2000.

We also have found at the time they didn't have a condition specified as to when to use nontraditional contractor or to use an OT. One of the things that the Department of Defense changed was they put these things into policy as well as symmetrics for measuring what they were doing with OTs. In fact, when the Department of Homeland Security was created and the OT authority was given to them, they basically modeled their directives and their processes on what was done at DARPA and brought in DARPA personnel. Much of what we recommended to DARPA was embedded into the management directive at DHS.

But we only looked at—at that time, there were only two projects that were underway. They have now completed 37, or have 37 underway, so we are going back in this year to look at——

Mr. PASCRELL. So you already had a review of two, so they have 35 really to review.

Mr. NEEDHAM. Right.

Mr. PASCRELL. So the information you are providing to us is not complete, by any stretch.

Mr. NEEDHAM. No.

Mr. PASCRELL. Let me ask you this question: So you only looked at two of them. Would you say any percentage of the dollar, each dollar that was extended, was in these other transactions that we have talked, other traditional contracts, is every cent of the dollar accounted for in those two projects?

Mr. NEEDHAM. We can't answer that question. We didn't get in—in fact, as I mentioned in my statement, we didn't look at that, but we will be looking at the financial aspects of this when we go back in next month.

Mr. PASCRELL. Now, why would I be asking that question, Mr. Needham?

Mr. NEEDHAM. Because it is about dollars. It is tax dollars going into these agreements, and what is the accountability there?

Mr. PASCRELL. Well, what did the Department of Homeland Security in its own oversight, what did it find in the accountability of those dollars wherever procurement was necessary, be it traditional or nontraditional?

Very simple question, Mr. Chairman, very simple question.

Mr. NEEDHAM. What I can speak to is what I saw in terms of the inspector general's reviews that they did in the chem-bio program, and it was dealing with the fact that there were needs for more controls to make sure that improvements were actually happening. I have seen a limited number of reviews based on what I looked at in the last year.

Mr. PASCRELL. So I can conclude—correct me if I am wrong—that we are nowhere near coming to a conclusion of the review of such contracts so that we can make decisions in this committee and in the Congress of the United States. We are now in 2008, and there have been many contracts, both traditional and nontraditional, that have been accepted, and we don't really have a firm

conception—I don't, let me speak for myself—I don't have a firm conception as to whether this works or doesn't work since there has only been a review of two contracts. I mean, have I——

Mr. NEEDHAM. That was early on, sir.

Mr. PASCRELL. Yes. And who is reviewed? Is there any mechanism within the Department that reviews since those first two contracts to the present time?

Mr. NEEDHAM. There is an internal review process between the Program Office and the Chief Procurement Office.

Mr. PASCRELL. Who is in charge of that?

Mr. NEEDHAM. The chief procurement——

Mr. PASCRELL. If I may ask Mr. Essig, who is in charge of that?

Mr. ESSIG. I am sorry, sir. Who is in charge of oversight of OTs?

Mr. PASCRELL. Yes.

Mr. ESSIG. I am, sir. I am responsible for oversight of acquisition within the Department.

Mr. PASCRELL. Now, you are just in the job.

Mr. ESSIG. Yes, sir.

Mr. PASCRELL. Did you review the reports made by your predecessor about what occurred from these two contracts to the present time? Have you reviewed that?

Mr. ESSIG. Well, I have reviewed the GAO recommendations. I have reviewed the——

Mr. PASCRELL. But the GAO recommendations are based upon only two contracts. What happened between the two contracts and the other 35, you don't have any idea yet.

Mr. ESSIG. I have not reviewed them. I have reviewed the processes that have been put in place to ensure that they are properly reviewed and that proper oversight procedures are in place. As a result of that review, I have recently directed that a review of other transactions that are contracting activities be included as a portion of our periodic procurement management reviews, okay? That is a change that I have implemented within the last week. So I have reviewed the processes, I have not reviewed individual other transactions.

Mr. PASCRELL. Thank you.

Mr. Chairman, I would hope that this committee would be able to obtain within the next 2 or 3 weeks the reports about those other 35 contracts. This is unacceptable. Can't blame this young man, he just got the job, but it is unacceptable that the Department does not have a review. There is no oversight, there is no oversight in any part of these departments. You know it, and I know it, and anything I have heard today is simply in the future, what we are going to do in the future.

Mr. Chairman, you go back over the meetings over the past 3 years, we always hear about the future, we never hear or have any accountability. The citizens do not have any idea how their money is being spent, none, zero.

Thank you.

Mr. LANGEVIN. Certainly, this is part of that effort to exercise the oversight that needs to be exercised in this area, and we will continue to give both the contracts and this process and the OT contract awards great scrutiny.

Just as a follow-up, Mr. Essig, so that I am clear, and it is for the record, the reports that we required under the contracts, have they in fact been done or is this something that had not been done but will be as we go forward? Could you clarify that point? I was not clear.

Mr. ESSIG. Yes, sir. It is my understanding the reports have not been done. I have directed that those reports be completed, and they are now in the process of being completed. I have ensured that among the changes, we incorporate that requirement, not only into our overall schedules to make sure we don't miss them, but that the requirement is included in our training manuals so it is one of the things we don't miss then.

Mr. LANGEVIN. I appreciate that answer, for the record. We will want to follow up on those reports, and as the gentleman from New Jersey points out, you can't be—the blame can't be put on your shoulders for what happened prior to your arrival, which is just recent, but certainly we will want to hear about the outcome of those reports and then give greater scrutiny to this as we go forward.

To Mr. Needham, for the record, will you be following up on these reviews? Also, I am interested in knowing, will you be looking further at the percentage of these contracts that does in fact go to nontraditional contractors?

Mr. NEEDHAM. Mr. Chairman, we have a review scheduled. The team has been selected, and they are going to start work next month, and we will do a full scope initially to look at all aspects of the program, and we will be meeting with your office to arrange, in terms of the questions and the work, how we will be approaching it.

Mr. LANGEVIN. Thank you.

I thank the gentleman from New Jersey for that robust line of questioning.

The gentleman from Texas, Mr. Green, is now recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman. After hearing my colleague from New Jersey, I am tempted to say, "Amen," but I will simply say, "A-woman."

Let us start with thanking you for appearing today and giving us your testimony.

Ms. Halchin, you have indicated that 95 percent of the proceeds from $5.7 million—proceeds of $5.7 million went to traditional defense contractors; is that correct?

Ms. HALCHIN. Yes, sir; that is correct. The data relates to DOD, but that is correct.

Mr. GREEN. Mr. Essig, how do you explain how that could occur, 95 percent? It is a pretty large number. How does that happen?

Mr. ESSIG. Sir, here again, I don't have data to be able to answer for DOD. I can only tell you based on my personal involvement while working for the Navy Department was we were looking for ways, basically, to implement other transaction authority. We had no group of lessons learned back then such as we have today. When you try things with no experience, with no background, you have some successes and you have some failures. I think what I am looking at in my position, as the chief procurement officer, is where

is the Department today, how did we get here, and where do we need to go?

Mr. GREEN. Do we know what an OTA looks like today?

Mr. ESSIG. In our training manual, we include several examples of OTAs that have been used. Again, each OTA is negotiated individually. What we are trying to do is put together some samples, some models of prior OTAs, of prior provisions that have been used successfully without taking authority away from the OT contracting officer to tailor that to the unique needs.

Mr. GREEN. Do we have a definition of an OTA?

Mr. ESSIG. We have a specific definition of an OT in our management directive and——

Mr. GREEN. An OT, excuse me. Continue, an OT.

Mr. ESSIG [continuing]. And I believe that comes from the Homeland Security Act. It is modeled on DOD's authority. The language, though, about other transactions comes specifically from the Homeland Appropriation Act, and it talks to the use of transactions other than contracts, grants or a cooperative agreement.

Mr. GREEN. Is a small business, by virtue of being a small business, considered an OT?

Mr. ESSIG. No, sir. However, small businesses have an opportunity under OTs because of the way the definition of a nontraditional contractor is worded. The way it is worded is a nontraditional contractor is a company that has not in the past year performed on a contract that is subject to full coverage under the cost accounting standards, which is $15 million worth of contracts or a contract in excess of $500,000 to carry out prototype projects or perform basic, applied, or advanced research projects for a Federal agency subject to compliance with the FAR.

Now, what that means, if you have a business that hasn't had $15 million of work in the past year, is not subject to cost accounting standards, and has not had $500,000 of R&D contracts with a FAR-covered Federal agency, it qualifies as a nontraditional source. Many small businesses would meet those requirements even if they had contracts with the Federal Government. Those could be support contracts, they could be supply contracts, or research and development contracts that don't reach that threshold.

Mr. GREEN. So do you have any other examples of nontraditional businesses that you can call to our attention, small businesses? What other categories do you have?

Mr. ESSIG. We do. I think Keith has some examples.

Mr. GREEN. Okay. Thank you.

Mr. WARD. Yes, sir.

Mr. GREEN. Would a business owned by a female be considered a traditional or nontraditional business?

Mr. WARD. Actually, the definition of a nontraditional contractor, which would be necessary in order for a team to qualify for an other transaction agreement, actually is the definition that Mr. Essig just gave you, and that has to do not with their ownership but how much previous work they have done under FAR contracts or other sorts of contracts.

However, I might point out, because it may be of interest, that this third generation biowatch system that seeing developed now started out with eight to 10 major performers. The only ones that

are left are three. They have done the best work, and the other ones have all dropped off. Every one of those happens to be small businesses, just by accident and the good work that they happen to have been done.

We also have some examples of nontraditional contractors who have qualified and allowed their teams to qualify for OTAs that do happen to be women-owned small businesses. The particular one there is——

Mr. GREEN. What percentage have been women-owned?

Mr. WARD. I am sorry, I don't have that in front of me. I will be happy to take that for the record. Maybe Mr. Essig knows.

Mr. ESSIG. Our contract database and our other transaction database captures information on the prime contractors. It will identify them as small businesses. I will verify but I do not believe we have visibility into which specific small or socioeconomic category they may fall into.

Now women-owned small business is one of the socioeconomic categories that we identify goals for contract awards within the Department. Within the Department, we support all of our small business and socioeconomic preference programs. So, again, we look at them every year.

Basically, we establish goals for contracting within each of those groups, and each of those goals is identified and provided to the heads of the contracting activities at the beginning of each year.

But I will verify, I can take it for the record and get back to you. I don't believe we have visibility into the award data by socioeconomic category.

Mr. GREEN. If I can ask one more question, Mr. Chairman?

Mr. LANGEVIN. Briefly.

Mr. GREEN. Okay. Is there a reason why you don't have that kind of visibility? Is there some rule that prohibits that kind of visibility?

Mr. ESSIG. Two things. The Federal Procurement Data System, FPDS, currently data on procurement contracts. Other transactions are not procurement vehicles, and, as a result, they are not currently captured in FPDS. Because that data is important to us at the Department of Homeland Security, all of the other transactions issued by the Office of Procurement Operations is included in our contract database, our prism contract database. So we are gathering that data for Department of Homeland Security.

One of the other things I have done is I have had discussions with the director of our Office of Small and Disadvantaged Business Utilization looking at establishing goals for the Department that go beyond just contracting goals, that include other transactions in the base. So what we would identify is we are looking at goals for awards for small and other socioeconomic organizations, firms, okay, regardless of whether or not it is an other transaction or a contract. We are looking at total awards from the Department, how much is going to these organizations.

Mr. GREEN. Thank you very much.

Thank you, Mr. Chairman.

Mr. LANGEVIN. I thank the gentleman.

Before the hearing concludes, the Ranking Member and I just wanted something clarified, Mr. Needham, that you had brought up.

With respect to the teams you are putting in place, the reviews you are conducting, when do you expect that those would be concluded?

Mr. NEEDHAM. Mr. Chairman, what we typically do is go in and do a period of work where we survey what is being done in the Department and then come back and then meet with the various committee staffs to lay out what would be an approach that we would take. At that point, we would lay out when we would conclude the work. We would expect, though, after several months we would be able to kind of define what that period would be. But I would expect that we are going to be able to brief you prior to September 2008 on what we are getting at that point. Whether we will hope to conclude the work at that point is another question, depending on the scope of what we cover.

Mr. LANGEVIN. We will look forward to the reports when they are done.

Mr. NEEDHAM. Okay.

Mr. LANGEVIN. With that, I want to thank the witnesses for their valuable testimony and the Members for their questions.

Members of the subcommittee may have additional questions for the witnesses, and I would ask that you respond expeditiously in writing to those questions.

Hearing no further business, the subcommittee stands adjourned.

[Whereupon, at 3:25 p.m., the subcommittee was adjourned.]

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