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DOD

'Other Transactions' Authority Extended Through FY 2001; Spector Issues Guidance

Although Congress recently agreed to extend the use of ''other transactions'' agreements for weapon systems prototypes through Sept. 30, 2001, it has made it clear that it does not favor an expansive interpretation of this authority.

The House-Senate conference report accompanying the fiscal year 1999 defense authorization act states:

> The conferees continue to believe that the section 845 authority should only be used in exceptional cases where it can be clearly demonstrated that a normal contract or grant will not allow sufficient access to affordable technologies.

Further, any extension of the authority will be based on a conclusion by the congressional defense committees that it has been used in ''a limited and responsible manner,'' the report says.

Congress Concerned About Management Controls. Section 241 of the FY 1999 defense authorization act extends through FY 2001 the other transactions authority for prototype projects contained in Section 845 of the FY 1994 defense authorization act.

Despite the conference report language regarding ''exceptional cases,'' Section 845 does not specify that other transactions should be used only where a traditional contract would not be feasible or appropriate. (That restriction is imposed by 10 U.S.C. § 2371, which authorizes the use of other transactions for research—rather than prototype—projects. That authority was made permanent by the FY 1992 defense authorization act.)

However, the conference report expresses particular concern that Section 845 authority ''not be used to circumvent the appropriate management controls in the standard acquisition and budgeting process.''

It also directs the secretary of defense to report to Congress by March 1, 1999, on the use of this authority.

DARPA Doesn't Intend to Change Practice. The Defense Advanced Research Projects Agency believes the conference report language is not only inconsistent with the language of Section 845, but also with its legislative history, a DARPA official told FCR Nov. 16.

''DARPA does not intend to change its practice as to the use of other transactions for prototypes,'' the official said.

According to the official, staff of the Senate conferees accepted the language inserted by the staff of the House conferees not because they were persuaded that any problems exist, but in order to ensure the extension of the authority.

DARPA believes that the conference report language does not represent a consensus view among the conferees, and has not been able to pinpoint the concerns underlying the House language, the official said.

OTs Amount to $3.4 Billion. OTs are noncontractual vehicles that are not subject to most of the statutory and regulatory requirements that apply to government contracts. Congress authorized limited use of OTs by DOD in 1989 to reduce barriers to participation by commercial firms in DOD research, thereby broadening the technology and industrial base available to the department.

OTs were later extended to prototype projects. DARPA is seeking legislative authority to use OTs to transition from prototyping to production.

For FY 1990 to 1997, DOD issued 210 other transactions research and prototype agreements valued at about $3.4 billion, according to the DOD inspector general.

Spector Guidance to Protect Government's Interests. Meanwhile, Director of Defense Procurement Eleanor R. Spector Oct. 23 issued internal guidance that calls for withholding payments under OT agreements if reporting requirements are not met.

The guidance comes in response to an August report by the DOD IG which recommended that DOD issue policy guidance to improve reporting on OTs, specify requirements for maintenance of DOD funds, and establish quantifiable performance measures for OTs (70 FCR 221).

According to the IG, ''DOD officials did not have the information necessary to adequately monitor 'other transaction' efforts, did not adjust milestone payments when necessary, forfeited interest on milestone payments, and did not receive information necessary to preclude duplicating research.''

In her memorandum to the military services and defense agencies on ''Financial and Cost Aspects of Other Transactions for Prototypes,'' Spector emphasizes that each ''agreements officer'' must ensure that agreement terms and conditions ''are clear and protect the government's interests.''

Use of Payable Milestones for Financing. Other transactions allow the negotiation of financing terms appropriate for the particular project. Many OTs use ''payable milestones'' as a means of financing, Spector observes.

In agreements that have cost-reimbursement features, the intention is for payable milestones reasonably to track actual expenditures, Spector explains.

> When this is the case, the agreement must address the procedures for readjusting the payable milestones based on actual expenditures. Payable milestones should be adjusted as soon as it is evident that payable milestones are no longer reasonably representative of actual or expected expenditures.

Agreements with firm fixed price characteristics may contain payable milestone provisions that do not require adjustment for actual expenditures.

''In these cases, this fact should be clear in the agreement and the negotiated payable milestone values should be commensurate with the estimated value of the milestone events,'' Spector says.

Milestones Should Include Reporting Requirements. The IG found cases when agreements required submission to the government of technical, business, or annual reports, but no corrective action was taken when the reports were not delivered.

Agreements officers must consider whether reports are important enough to warrant establishment of separate payable milestones, or if report requirements should be incorporated as part of larger payable milestones, Spector says.

''In either case, an appropriate amount must be withheld if a report is not delivered,'' the guidance states.

Agreements must require that a technical report be delivered to the Defense Technology Information Center when research and engineering projects are completed. They must also require the OT awardee to provide evidence of this submission to the agreement administrator.

''If the OT awardee has failed to comply with any term of the agreement, the administrative agreements officer must take timely, appropriate action to remedy the situation,'' the guidance says.

Some Industry Concerns With Authority. But while Congress, the IG, and DOD focus on protecting the government's interests, there are some in industry who believe that the increasing use of OTs goes beyond their intended purpose and is not in industry's interest.

In light of recent acquisition reforms—and increased use of simplified acquisition procedures, commercial items, indefinite delivery/indefinite quantity contracts, and governmentwide acquisition contracts—weapon systems are now virtually the only acquisitions covered by the Federal Acquisition Regulation and government cost accounting requirements, they maintain.

Since weapon systems contractors likely already do business with the government under the FAR, a key rationale for the use of OTs is arguably inapplicable, they assert. The use of OTs for weapon systems contracts will mean that defense contractors must maintain two separate systems—one subject to the FAR and the Cost Accounting Standards, and the other appropriate to the OT context.

One industry observer asserts that OTs generally include the traditional clauses protecting the government's interests, while omitting those that protect the contractor. For example, OTs provide no disputes clause and no indemnification for extraordinary risks, but they can require cost sharing by the contractor.

This cost sharing raises questions as to rights in technical data, the industry member suggests. When the government shares in development costs, it acquires limited purpose rights in the resulting data. When a contractor brings its background technology to the development effort, the government's obligation to treat that data as protected ends, and a contractor could see its proprietary data published by the government for purposes of a subsequent competition.

Although defense contractors theoretically can negotiate the terms of OT agreements to address these problems, most are a ''captive audience'' for the increasing use of OTs, unless they have the option to move into another line of business, according to the industry representative.