THE APPLICABILITY OF CERTAIN PROCUREMENT-RELATED STATUTES TO DOD "OTHER TRANSACTIONS"

A Project of the
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INTRODUCTION

The ABA Section of Public Contract Law formed An *ad hoc* working group to review the applicability of certain procurement related statutes to the use of "Other Transactions" ("OTs") for research and development (R&D) and for the development of weapons and weapon systems.[1] This paper presents the working group's analysis and conclusions resulting from that review.

The working group recognizes the significant benefits that the use of OT authority may bring to the funding of research and development (R&D) by the Government, especially the development of dual-use R&D technology from commercial companies and other entities unwilling to enter into standard contractual arrangements. This is notably true in regard to intellectual property provisions. In addition, the Government may benefit from the leveraging of private-sector R&D investment.

But the use of OT authority to develop prototypes of weapons systems or to procure production quantities raises a number of significant policy and legal issues. Leveraging of private-sector resources, for example, may be inappropriate when developing or acquiring military-unique end items. Further, to the extent that certain statutes and regulations do not apply to OT authority, the parties may encounter increased risks and uncertainties in areas such

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as funding limitations and dispute resolution. Inapplicability of some provisions also may raise significant questions of accountability for the public fisc and other matters of public policy.

BACKGROUND

Historical Background on the Evolution of Other Transactions Authority

The term "Other Transactions" apparently originated in 1958 with the enactment of the National Aeronautics and Space Act of 1958 ("Space Act"), Pub. L. 85-569, 72 Stat. 426, 42 U.S.C. § § 2451 *et seq.* The term was coined by the drafter of this legislation, Paul Dembling, who later served as General Counsel of NASA and then as General Counsel at the General Accounting Office. The relevant section of the Space Act authorized NASA to:

> **enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate**, with any agency or instrumentality of the United States, or with any State, Territory, or possession or with any political subdivision thereof, or any person, firm, association, corporation, or educational institution.

42 U.S.C. § 2473 (c)(5) (emphasis added).

NASA used this authority on numerous occasions to conduct "cutting edge" research, including prototyping, in the first decade of its existence. Nevertheless, with the enactment of more expansive procurement laws and regulations and with the enactment of the Chiles Act, 31 U.S.C. §§ 6301-6308, NASA used its OT authority more narrowly. Beginning in the 1970's, NASA used OTs only in situations where a procurement contract, cooperative agreement, or grant could not be used as described in the Chiles Act. As a result, NASA narrowed its use of OTs authority to situations involving "unfunded transactions," *i.e.*, where no Federal funds were provided to non-NASA organizations. Today, NASA uses OT authority for "unfunded"

collaborative research projects with industry and academia partners, instead of Cooperative Research and Development Agreements (CRADAs) used by other agencies for similar purposes. [cite].

In 1989, Congress enacted 10 U.S.C. § 2371, which authorized the Defense Advanced Research Projects Agency (DARPA) to enter into OTs on a test basis for research and development related to weapons systems. The statute provided that the nongovernment party to the OT share the cost of the research, with the Government paying no more than 50 percent of the total (to the extent determined practicable). The statute also limited the use of OTs to research projects where the use of a standard contract, grant or cooperative agreement was "not feasible or appropriate." This legislative language was proposed by the newly installed DARPA General Counsel, Richard Dunn, a former Deputy Associate General Counsel at NASA. DARPA used its OT authority to permit multiparty cost-shared research collaborations in an effort to streamline its R&D efforts and to attract more commercial companies to perform R&D for DARPA.

The reporting requirements in the statute (*see* 10 U.S.C. § 2371(h)(2)) and the legislative history [cite] indicate that the goals for the use of these cost-shared OTs were to: (a) contribute to a broadening of the technology and industrial base available for meeting Department of Defense needs, (b) foster within the technology and industrial base new relationships and practices that support the national security of the United States, and (c) encourage commercial firms to join with the Government in the advancement of dual-use technologies. Specifically, the legislation was aimed at permitting DOD to draw upon the research investments of commercial entities and non-profit research organizations that would not or could not comply with the traditional procurement rules set forth in the Armed Services Procurement Act of 1947 and the

Federal Acquisition Regulation. These agreements were unimpaired by rigid procurement regulations and permitted more flexible intellectual property clauses than those required by the Bayh-Dole Act for procurement contracts, grants, and cooperative agreements.

In 1991, the legislation was amended to expand the authority to enter into OTs to all of DOD and to make such authority permanent. Initially, this authority was limited to research projects that either related to weapons systems or were of potential interest to DOD. In 1994, the legislation was amended so that OTs could be used to carry out "basic, applied and advanced research projects."

Section 845 of the Defense Authorization Act for FY 94 expanded Section 2371 authority by authorizing DARPA to use OTs to carry out prototype projects directly relevant to weapons or weapon systems proposed to be acquired or developed by DOD. For these projects Section 845 eliminated the provision that the Government fund no more than half the costs, and eliminated the requirement limiting use of OTs to situations where a standard contract, grant or cooperative agreement was not feasible or appropriate. Section 845 also required that DARPA use competitive procedures to the maximum extent practicable before awarding an OT for a weapon system prototype.

Section 804 of the Defense Authorization Act of FY 97 extended the authority under Section 845 through September 1999, and also extended to the Military Departments (and other DOD elements to be designated by the secretary) the authority use OTs to carry out prototype projects relevant to weapons or weapon systems. The limited legislative history in the conference report accompanying Section 804 noted that the authority to use OTs for prototypes was being reauthorized "to allow additional flexibility in the acquisition of prototype technologies and systems." [cite] [*See* attachment 1.] [Proposed two year extension].

Two Types of OTs

In summary, there are two principal types of OTs authorized by Section 2371. These categories of transactions are different in purpose and authorized use and arise under separate statutory authority. The first principal type of OT, created in 1989 to enable DARPA and later DOD to access commercial technology for use in R&D efforts, has been called "OTs used for assistance," "Section 2371 OTs," or the term we shall use for purposes of this analysis, "S&T [science and technology] OTs." S&T OTs may by used when the following conditions are satisfied: (1) the private party contributes a cost share of at least 50% (to the extent practicable)[2] and (2) "when the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate." 10 U.S.C. § 2371(e)(2).[3] They are used primarily to develop "dual use" technologies that may have potential civilian as well as military applications [cite] (this explains the cost-sharing requirement).

The second principal type of OT, which was initially authorized by Pub. L. 103-160, § 845, has been called "Prototype OTs," "Section 845 OTs" or "Section 845/804 OTs." Section 845/804 OTs are authorized "to carry out prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense;" Section 845/804 OTs need not meet the cost share and appropriateness/feasibility tests that are required for S&T OTs. Pub. L. 103-160, § 845(b), *as amended by* Pub. L. 104-201, § 804 *(see* 10 U.S.C. § 2371 note). Nevertheless, competitive procedures are to be used (to the maximum

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[2] The requirement that the Government's cost share not exceed 50% may be waived under February 8, 1994, DOD guidance issued by the Deputy Director, Research and Engineering (DDR&E), and March 24, 1998 guidance issued by the acting DDR&E. Such waivers appear to be infrequent.

[3] 10 U.S.C. § 2371 refers to "standard" contracts. Although it is not entirely clear, Congress apparently intended that term to mean procurement contracts subject to the uniform procurement system, because that is the term used in 31 U.S.C. § 6303, as distinguished from grants and cooperative agreements.

extent practicable) when entering into section 845/804 OTs.[4] The legislative history of Section 845 states that Section 845 OTs are to be issued to conduct "purely military research" to develop new weapons.[5] Thus Section 845 provides independent authority to enter into transactions that are not "standard" procurement contracts to develop prototypes.

Implementation of OT Authority

DARPA's Draft Guidance

In draft guidance on the use of OTs issued in February 1995, DARPA stated that OTs are not traditional procurement contracts because they are not used to acquire goods or services for the direct benefit of the federal Government. [cite] Therefore, DARPA concluded that it was not required to include FAR or DFARS clauses and was free to negotiate provisions that make sense for a particular project and that were mutually agreeable to the parties. The guidance document also said that the authority can apply to transactions where the principal purpose is to stimulate or support research and development and that the transactions should be characterized by a strong mutuality of benefit.

DDR&E Guidance

DoD has issued guidance on a new type of assistance agreement called a "technology investment agreement" (TIA), combining OTs and Cooperative Agreements. When the agreement, as negotiated, includes a non-standard patent rights clause (i.e., that does not meet

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[4] Although 10 U.S.C. § 2371 does not require that competitive procedures be used for S&T OTs, nearly all of DARPA's S&T OTs entered into to date have been awarded using competitive procedures. DOD has recently issued guidance on Technology Investment Agreements (TIAs) stating that TIAs, including S&T Other Transactions, "are to be awarded using competitive procedures, to the maximum extent practicable." DDR&E Memorandum, "Subject: Instruments for Stimulation or Support of Research," dated December 2, 1997, Attachment: "Guidance on 'Technology Investment Agreements' for Military Departments and Defense Advanced Research Projects Agency," at 4.

[5] *See infra*, Appendix A, at A-48.

Bayh-Dole Act requirements) it is issued under the authority of 10 U.S.C. § 2371. Acting DDR&E Memorandum, "Revision 1 to Guidance on Instruments for Stimulation or Support of Research."

1996 GAO Report

In March 1996, the GAO issued a report to the congressional committees on armed services and national security, indicating that OTs (and cooperative agreements) have provided DOD a way to obtain technological know-how and financial investment from firms that normally would not perform research for DOD. The GAO analysis did not specifically address the additional authority to use OTs for prototype projects as set forth in Sections 845 and 804.

1996 DOD IPT Report

A DOD Integrated Product Team ("IPT") reported in June 1996 that DARPA had used the Section 845/804 OT authority to enter into a few commercial-type agreements for prototypes of weapon systems. These transactions reportedly employed commercial practices and did not involve traditional Government contracts requirements for audits, socio-economic clauses, or standard termination or disputes clauses. The report indicated that DARPA awarded a total of 40 OTs in FY 1995 with a value of more than $400 million. Within this total, six projects valued at more than $130 million were awarded for Section 845/804 OTs in FY 1995. More recently, projects authorized or contemplated under Section 845/804 include two Unmanned Aerial Vehicle Programs, the Arsenal Ship Program, the DD21 Destroyer, and the Affordable Multi-missile Manufacturing Program. The IPT report encouraged the expanded use of Section 845/804 OT authority as an alternative to the traditional FAR-based system for prototype development by military departments.

Some of the advantages of Section 845 OTs covered in the IPT report included (1) significant flexibility in negotiating terms and conditions because of the nonapplicability of procurement statutes, (2) the ability of commercial companies to participate as prime contractors or subcontractors because commercial practices can be utilized, (3) lack of DCAA involvement, (4) minimum socio-economic clauses (e.g., no subcontracting plans are required, and the Buy American Act is inapplicable), and (5) better Government and contractor teamwork (Government termination and disputes clauses are replaced by cooperative decisions).

The Kaminski Memorandum

In December 1996, the Undersecretary of Defense for Acquisition and Technology, Paul G. Kaminski, issued to the Secretaries of the military departments and directors of the defense agencies a guidance memorandum regarding Section 845/804 OTs. [cite] The memorandum noted that Sections 845 and 804 authorized the use of alternatives to procurement contracts for the covered prototype projects. The memorandum further stated that to the extent a particular statute or regulation is limited to the use of a procurement contract, it would generally not apply to an OT. Attached to the memorandum was a list of twenty-one statutes that the memorandum stated "apply to procurement contracts, but that are not necessarily applicable to 'other transactions'." [Kaminski Memorandum at 1.] The list included, among others, the Competition in Contracting Act, the Contract Disputes Act, Public Law 85-804, the authorization to indemnify contractors against unusually hazardous risks for R&D contracts, the prohibition against doing business with those who engage in criminal conduct, the Anti-Kickback Act, the Procurement Integrity Act, the Drug Free Workplace Act and the Buy American Act. [*See* Kaminski Memorandum, Attachment 1.] The Kaminski memorandum specifically noted that the list was provided for guidance only, was not intended to be definitive, and advised:

> To the extent that a particular requirement is a funding or program requirement or is not tied to the type of instrument used, it would generally apply to an "other transaction." Each statute must be looked at to assure that it does or does not apply to a particular funding arrangement using an "other transaction." Use of section 845 authority does not eliminate the applicability of all laws and regulations. Thus, it is essential that counsel be consulted when an "other transaction" will be used.

Kaminski Memorandum at 1.

The Kaminski memorandum specifically authorized the secretaries of the military departments and the directors of the Defense agencies to issue any further guidance they deemed necessary. [*Id.* at 2.]

Possible Extension of Prototype Authority to Production

In testimony before a subcommittee of the House Committee on National Security in February 1997, the deputy director of DARPA suggested that the authority in Section 845/804 might appropriately be expanded as the prototype projects transitioned into the production phrase. In March 1997, DOD developed a legislative proposal that would have provided authority to enter into OTs for follow-on production programs on a pilot basis. [Attachment 4]. DOD forwarded this revised legislative proposal to Congress, but it was not part of the final DOD legislation. DoD again forwarded such a proposal to OMB in March 1998, but it was not part of the legislation presented to Congress.

1997 DOD IG Report

In March 1997, the DOD Office of Inspector General issued a report on DARPA's administration of contracts, grants, and S&T OTs. The DOD IG was critical of some failures by contracting officers (a) to sufficiently document the justification for using S&T OTs, (b) to document the review of cost proposals, and (c) to monitor actual research costs.

The report identified four OTs issued pursuant to Section 845, but did not appear to address those OTs in any substantial way.

1998 DOD IG Report

Issues in Using OTs

The use of OTs – both S&T and 845/804 – offers the potential for significant benefits to both the Government and the private sector. For example, using either S&T or 845/84 OTs can, in many instances, accomplish the following objectives.

1. Obtain dual-use technology in return for shared investment. The Government can leverage private sector technological "know how" and financial investment.

2. Tap into the commercial marketplace to obtain affordable high technology. Achievement of this objective can be facilitated by waiving standard clauses concerning audits, socioeconomic goals, and required systems; flexibility on intellectual property rights; and minimizing the flow-down of requirements to lower tiers.

3. Compress the time required for all phases of development of a weapon system by moving more quickly from early planning stages through development to production of prototypes.

4. Utilize short, flexible statements of work and specifications.

In the case of 845/804 OTs, however, there are issues not generally applicable to S&T OTs that should be considered. Specifically, the potential for leveraging private sector resources would be diminished in the development of a weapon system or other military-unique end item. In addition, cost sharing, which is not required, is likely to be appropriate only to the extent there is a potential commercial benefit. Finally, the right of either party to terminate the agreement

should be assured, particularly if the agreement were to contain a fixed or not-to-exceed price for production quantities (if authorized by future legislation).

Because many of the statutes and regulations that apply to traditional procurement contracts may not apply to a Section 845/804 OT, the parties should ensure that the agreement contains alternative provisions dealing with such matters as funding, data rights, dispute resolution and audits.

DISCUSSION

The Applicability of the Statutes Identified in the Kaminski Memorandum

This section analyzes whether OT instruments are indeed exempt from the statutes identified in the Kaminski memorandum, as well as certain additional statutes identified by the Working Group studying these issues.

Overview

By statute OTs are not procurement contracts. They may, however, contain the elements of a "common law" contract, such as offer, acceptance, and mutual manifestation of intent to be bound, elements that have been held sufficient to constitute a contract. *See Trauma Serv. Group v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997); *Thermalon Indus. v. United States*, 34 Fed. Cl. 411, 414 (1995); *Total Med. Management, Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997).

Historical Background on the Federal Grants and Cooperative Agreement Act

The following legislative background of the Chiles Act and the analysis of the Act's requirements is useful in understanding the context in which OTs evolved and provides a framework for analyzing the applicability of laws to different types of funding agreements.

Before Congress enacted the Chiles Act, the Government expended appropriated funds in furtherance of federal programs using different types of legal instruments, depending on the relationship between the Government and the recipient of the funds. Federal agencies always have had inherent authority to enter into contracts related to their administrative purposes, including contracts for the acquisition of goods or services for their own use, unless legislatively prohibited. *See* General Accounting Office (GAO), Principles of Federal Appropriations Law (2d ed. 1992), Chapter 10, Federal Assistance: Grants and Cooperative Agreements, at 10-11. Thus, although Congress could place and has placed restrictions on their inherent procurement authority, agencies did not need special legislation to enter into legally binding contracts in which they committed to pay appropriated funds for goods or services.

By contrast, agencies have no inherent authority to give away public money or property or release vested rights to benefit parties other than the Government. Such assistance must be specifically authorized by Congress, either in the agency's enabling legislation or legislation authorizing a specific program. Consequently, the purpose underlying the expenditure and the relationship between the agency and the recipient of the funds is the critical distinction between funding agreements and is therefore central to any analysis of laws applicable to some or all types of funding agreements.

The Chiles Act was enacted to distinguish between assistance and procurement relationships and clarify which type of instrument an agency should use to accomplish its objectives, assuming it had the requisite authority to choose. S. Rep. 95-449, 95th Cong., 2nd Sess. (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News, 11, 16. As the Senate Committee on Governmental Affairs observed when amending the statute in 1982, the Chiles Act did not create independent statutory authority to enter into legal relationships, but was "intended to force agencies to use a legal instrument that, according to the criteria established by the Act, matches the intended and authorized relationship -- regardless of the terminology used in existing legislation to characterize the instrument to be used in the transaction." S. Rep. No. 97-180, 97th Cong., 1st Sess. 4 (1981), *reprinted in* 1982 U.S. Code Cong. & Admin. News 3, 6.

According to the legislative history of the Chiles Act, congressional action was necessary because failure to distinguish between procurement and assistance relationships had led to the inappropriate use of grants "to avoid the requirements of the procurement system," and conversely to the imposition of unnecessary red tape and administrative requirements on assistance recipients. S. Rep. No. 95-449, 1978 U.S. Code Cong. & Admin. News at 16; S. Rep. No. 97-180, 1982 U.S. Code Cong. & Admin. News at 3. In order to create congressionally mandated standards, the Chiles Act defined and established selection criteria for three types of legal instruments that could be used to fund agency objectives: "procurement contracts," "grants," and "cooperative agreements."[6] S. Rep. No. 97-180, 1982 U.S. Code Cong. & Admin. News at 3-4. The Chiles Act is not exhaustive: It does not cover any other funding transactions,

[6] Another type of instrument, the "Cooperative Research and Development Agreement" (CRADA), involves no federal funds and thus is not governed by the Chiles Act. 15 U.S.C. § 3710a.

such as real estate transactions or loans; nor does it recognize activities for which a procurement contract, grant or cooperative agreement, as defined, would be unavailable.

The latter two types of agreements are defined as "assistance" agreements, the principal purpose of which is to transfer something of value to the recipient in order to carry out the public purpose of support or stimulation authorized by a law of the United States, instead of acquiring property or services for the direct benefit or use of the United States Government. 31 §§ U.S.C. 6304-6305. Cooperative agreements and grants differ in the degree of involvement between the funding agency and the recipient when carrying out the contemplated activity. Cooperative agreements are to be used when the expected involvement of the agency in the funded assistance activity is substantial, whereas grants are to be used when the agency's involvement is essentially administrative. Id.

The Chiles Act is silent on whether the promises by the United States embodied in these three instruments would qualify as "contracts" under the common law and does not distinguish among the instruments on this basis. Indeed, the legislation used the term "contract" simply to distinguish assistance relationships as a class from transactions that are part of the procurement system. S. Rep. 95-449, 1978 U.S. Code Cong. & Admin. News, at 13, 16. In establishing standards for use of different types of instruments, the statute directs agencies to use "procurement contracts" when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the United States Government. 31 U.S.C. § 6303.

Subsequent to the enactment of the Chiles Act, GAO determined whether a procurement contract rather than an assistance agreement was the proper instrument for funding a project -- and therefore subject to procurement laws and regulations. *See, e.g.*, 65 Comp. Gen. 605 (1986), (agency prohibited from using a cooperative agreement to fund a study); 61 Comp. Gen. 428

(1982) (cooperative agreement authorized and procurement contract not required because primary purpose of funding activity was to encourage development of a prototype and early market entry rather than acquiring the particular item for Government's own use even though it would eventually have governmental applications). In addition to examining the nature of the relationship memorialized in a funding instrument, GAO has considered whether special legislation has exempted a transaction from the requirements of the Chiles Act. In B-222665, July 2, 1986, the Comptroller General determined that contracts the Department of Interior awarded to Indian tribes were statutorily exempt from the Chiles Act.

The courts also have had occasion to apply the Chiles Act in determining whether the relationship between an agency and a funding recipient is subject to laws applicable to procurement contracts rather than assistance agreements. *See, e.g., Hammond v. Donvan*, 538 F. Supp. 1106 (W.D. Mo. 1982) (statute requiring affirmative action for veterans not applicable to relationship more in the nature of a grant than a contract as defined by the Chiles Act because its purpose was to benefit general public not particular agency). In all of these cases, the focus was on the purpose of the agreement, not on its form or label.

By creating separate authority for funding activities of specific agencies through use of OTs, Congress effectively exempted those activities from the requirements of the Chiles Act, regardless of the terms of the OT. In short, agencies were given independent authority to enter into binding agreements that might include significant funding for the procurement of goods or services, but were not subject to the formalities and cumbersome rules applicable by statute to procurement contracts. Likewise, agreements embodied in OT instruments might include substantial assistance, but would not be subject to rules applicable specifically to grants and cooperative agreements.

OT statutory authority creates a blanket exception or "safe harbor" for OTs against the applicability of statutes that apply only to procurement contracts, regardless of the terms of the OT. Therefore, there is no requirement in the OT legislation (§ 2371 and § 845/804) that these transactions be distinguishable in nature or purpose from procurement contracts or assistance agreements in order to be exempt from those statutes that apply soly to procurement contracts or assistance agreements. Only the statutory conditions for entering into an OT need by satisfied. Thus, even if the agreement embodied in an OT instrument would also meet the criteria for using one of the recognized traditional instruments, it would not be considered as such and would only be subject to laws applicable to funding agreements or contracts generally, not laws specifically aimed at procurement contracts or assistance agreements.

Analytical Approach

In reviewing the statutes below, the Working Group developed a framework to assist the analysis. First, we considered the issue of what specifically Section 2371 and Sections 845 and 804 authorized. Second, we reviewed the statutory language and legislative history of each statute to determine whether Congress intended OTs to be "other than" all contracts entered into by the United States, or just other than "procurement contracts." In our effort to determine Congressional intent, we also considered the title in which a particular statute is codified, *i.e.*, whether the particular statute under review is codified in a title that was specifically concerned with "procurement" contracts, or was located in a title that suggested more general applicability.

Various statutes authorizing the Government to conduct business transactions are codified in Title 10, "Armed Forces," and the Federal Property and Administrative Service Act of 1949 (the "Property Act"), title 10 of Title 41 of the United States Code. The U.S. Code distinguishes procurement, research and development, and other topics by placing them in different chapters.

The statutory authority for OTs, 10 U.S.C. § 2371, is contained in Chapter 139 "Research and Development," which includes Sections 2351-2374.[7] Title 10 also includes a separate Chapter 137 "Procurement Generally" in Sections 2302a-2331.[8] Similarly, Title 41 includes, among

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Chapter 139 includes the following sections:

- § 2351 Availability of Appropriations;
- § 2358 Research and Development Projects;
- § 2361 Award of Grants and Contracts to Colleges and Universities: Requirement of Competition;
- § 2364 Coordination and Communication of Defense Research Activities;
- § 2366 Major Systems and Munitions Programs: Survivability Testing and Lethality Testing Required Before Full-Scale Production;
- § 2367 Use of Federally Funded Research and Development Centers
- § 2370a Medical Countermeasures Against Bio-Warfare Threats: Allocation of Funding Between Near-Term and Other Threats;
- § 2371 Research Projects: Transactions Other Than Contracts and Grants;
- § 2371a Cooperative Research and Development Agreements ("CRADAs") under Stevenson-Wydler Technology Innovation Act of 1980;
- § 2372 Independent Research and Development and Bid and Proposal Costs: Payments to Contractors;
- § 2373 Procurement for Experimental Purposes; and
- § 2374 Merit-based Award of Grant for Research and Development

Chapter 137 contains the following sections:

- § 2302a Simplified Acquisition Threshold;
- § 2302b Implementation of Simplified Acquisition Procedures;
- § 2302c Implementation of FACNET Capability;
- § 2302d Major System: Definitional Threshold Amounts;
- § 2304 Contracts: Competition Requirements;
- § 2304a Task and Delivery Order Contracts: General Authority;
- § 2304b Task Order Contracts: Advisory and Assistance Services;
- § 2304c Task and Delivery Order Contracts: Orders;
- § 2304d Task and Delivery Order Contracts: Definitions;
- § 2304e Contracts: Prohibition on Competition Between Department of Defense and Small Business and Certain Other Entities;
- § 2305 Contracts: Planning, Solicitation, Evaluation, and Award Procedures;
- § 2305a Design-Build Selection Procedures;
- § 2306 Kinds of Contracts;
- § 2306a Cost or Pricing Data: Truth in Negotiations;
- § 2306b Multiyear Contracts;
- § 2307 Contract Financing;

others, the Property Act in Title III "Procurement Provisions," found in Sections 251-266.[9] The Office of Federal Procurement Policy Act, 41 U.S.C. §§ 401-435, also contains procurement-related provisions of general applicability.

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§ 2311 Assignment and Delegation of Procurement Functions and Responsibilities;
§ 2313 Examination of Records of Contractor;
§ 2318 Advocates for Competition;
§ 2319 Encouragement of New Competitors;
§ 2320 Rights in Technical Data;
§ 2321 Validation of Proprietary Data Restrictions;
§ 2323 Contract Goal for Small Disadvantaged Businesses and Certain Institutions of Higher Education;
§ 2323a Credit for Indian Contracting in Meeting Certain Subcontracting Goals for Small Disadvantaged Businesses and Certain Institutions of Higher Education;
§ 2324 Allowable Costs Under Defense Contracts;
§ 2326 Undefinitized Contractual Actions: Restrictions;
§ 2327 Contracts: Consideration of National Security Objectives;
§ 2328 Release of Technical Data Under Freedom of Information Act: Recovery of Costs; and
§ 2331 Contracts for Professional and Technical Services.

[9] Title III of the Property Act consists of::

§ 251 Declaration of Purpose;
§ 252 Purchases and Contracts for Property;
§ 252a Simplified Acquisition Threshold;
§ 252b Implementation of Simplified Acquisition Procedures;
§ 252c Implementation of FACNET Capability;
§ 253 Competition Requirements;
§ 253a Planning and Solicitation Requirements;
§ 253b Evaluation and Award;
§ 253g Prohibition of Contractors Limiting Subcontractor Sales Directly to United States;
§ 253h Task and Delivery Order Contracts: General Authority;
§ 253i Task Order Contracts: Advisory and Assistance Services;
§ 253j Task and Delivery Order Contracts: Orders;
§ 253k Task and Delivery Order Contracts: Definitions;
§ 2531 Severable Services Contracts for Periods Crossing Fiscal Years;
§ 254 Contract Requirements;
§ 254b Cost or Pricing Data: Truth in Negotiations;
§ 254c Multiyear Contracts;
§ 254d Examination of Records of Contractor;
§ 255 Contract Financing;

In authorizing the use of OTs, Congress distinguished them from "standard contract(s)." 10 U.S.C. § 2371(e)(2) (Supp. 1997). As previously noted, DARPA, the first DOD agency authorized to use OTs, has interpreted this distinction to mean that even though they may be contracts, OTs are not "procurement" contracts, and are not covered by the FAR and related procurement laws and regulations. DARPA's view also is consistent with the Chiles Act requirement to use procurement contracts to acquire goods and services for the benefit of the Government. OT authority effectively exempts DOD from this requirement. Congress has arguably ratified this interpretation by renewing and expanding DARPA's OT authority four times (in 1991, 1993, 1994 and 1996) making only relatively minor changes.[10] *See, e.g.*, Pub. L. 103-160, § 845(b), *as amended by* Pub. L. 104-201, § 804.

DARPA's contemporaneous interpretation of its OT authority is supported by a careful reading of the statute and its structure. 10 U.S.C. § 2371(a) states:

> The Secretary of Defense and the Secretary of each military department may enter into transactions (other than contracts, cooperative agreements, and grants) under the authority of this subsection in carrying out basic, applied, and advanced research projects. The authority under this subsection is ***in addition to the authority provided in [10 U.S.C. § 2358] to use contracts, cooperative agreements, and grants*** in carrying out such projects.

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§ 256 Allowable Costs;
§ 261 Assignment and Delegation of Procurement Functions and Responsibilities;
§ 262 Determinations and Decisions;
§ 263 Performance Based Management: Acquisition Programs;
§ 264 Relationship of Commercial Item Provisions to Other Provisions of Law;
§ 264a Definitions;
§ 264b Preference for Acquisition of Commercial Items;
§ 265 Contractor Employees: Protection From Reprisal for Disclosure of Certain Information; and
§ 266 Merit-Based Award of Grants for Research and Development.

[10] Since 1989 (the year DARPA was given OT authority), Congress has appropriated millions of dollars for DARPA's use in connection with OTs, without objection to DARPA's interpretation.

10 U.S.C. § 2371(a) (emphasis added).

Thus, OTs are not just "other than" contracts in general, but more narrowly, they are other than the type of contracts authorized in 10 U.S.C. § 2358. Section 2358, in turn, refers to chapter 63 of title 31 to define the scope of its contractual authority:

> (b) Authorized means -- The Secretary of Defense or the Secretary of a military department may perform research and development projects – (1) *by contract, cooperative agreement, or grant, in accordance with chapter 63 of title 31.*

10 U.S.C. § 2358(b) (emphasis added).

An OT is therefore "other than" a contract entered into in accordance with Chapter 63 of Title 31, which is the Chiles Act. A "contract . . . in accordance with" this Act is a *procurement contract* used when "(1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; or (2) the agency decides in a specific instance that the use of a procurement contract is appropriate." 31 U.S.C. § 6303. On the basis of these three statutory provisions, OTs are "other than" and "in addition to" procurement contracts issued to acquire property or services for the direct benefit of the United States Government. The term "contract" in Section 2371 is synonymous with the term "procurement contract" as used in 31 U.S.C. §§ 6301 *et seq.*,-- a contract to acquire goods or services for the direct benefit of the Government.

Under this analysis, Section 2371 does not state that OTs are not "contracts" in the common law sense of mutual intent to contract based on offer, acceptance, and consideration. *See Total Med. Management, Inc. v. United States,* 104 F.3d 1314, 1317 (Fed. Cir. 1997) (holding that a "memorandum of understanding" between the Army and plaintiff was a valid contract). Thus it is incorrect to assume that all statutes and regulations governing "contracts"

generally do not also govern OTs; OTs can be contracts in the legal sense, but by statute are not procurement contracts.

For these reasons, the statutes contained in Title 10, Chapter 137, and Title III of the Property Act, which all specifically apply to procurement contracts only, would not apply to OTs unless the language of the particular statute or its legislative history indicates otherwise. Similarly, those statutes that by their own terms apply only to procurement contracts do not apply to OTs. Arguably, to make a procurement statute applicable to Section 845/804 OTs because they acquire property or services for the direct use or benefit of the Government would defeat the purpose of Sections 2371 and 845/804. But where the statute to be analyzed lies outside these portions of the U.S. Code, or when the statute cannot be fairly read to apply only to procurement contracts, further analysis is required to determine whether that statute applies to OTs.

Results of Analyses:

The Working Group analyzed the following statutes. The detailed analysis is set forth at Appendix A:

Table I

Item No.	Statute	Applicability of Statute to OTs
1.	Competition in Contracting Act, Pub. L. No. 98-369 (1984), as amended (Kaminski Memorandum, Item 1).	CICA does not apply to Section 845/804 OTs.
2.	41 U.S.C. §§ 601 *et seq.*, the Contract Disputes Act, Pub. L. No. 95-563 (1987), as amended (Kaminski Memorandum, Item 2).	CDA does not apply to either S&T OTs or Section 845 OTs.

Item No.	Statute	Applicability of Statute to OTs
3.	31 U.S.C. §§ 3551 *et seq.*, Procurement Protest System, Subtitle D of the Competition in Contracting Act, Pub. L. No. 98-369 (1984) (Kaminski Memorandum, Item 3).	The protest system at GAO does not apply to protests over the award of either S&T OTs or Section 845/804 OTs. However, the GAO will likely review the agency's use of OTs to determine whether the statutory requirements of 10 U.S.C. § 2371 and §§ 845/804 are met
4.	50 U.S.C. §§ 1431-1435, Extraordinary Contractual Authority and Relief, Public Law 85-804 (Kaminski Memorandum, Item 4).	Public Law 85-804 applies to both S&T and Section 845 804 OTs.
5.	10 U.S.C. § 2207, Expenditure of Appropriations: Limitation (Kaminski Memorandum, Item 5).	Section 2207 applies to both S&T and Section 845 804 OTs.
6.	10 U.S.C. § 2306, Kinds of Contracts (Kaminski Memorandum, Item 6).	This statute applies only to procurement contracts and thus does not apply to either S&T or Section 845/804 OTs.
7.	10 U.S.C. § 2313, Examination of records of contractor (Kaminski Memorandum, Item 7).	Section 2313 does not apply to either S&T or Section 845 804 OTs.
8.	10 U.S.C. § 2353, Contracts: acquisition, construction, or furnishing of test facilities and equipment [to R&D contractors] (Kaminski Memorandum, Item 8).	This statute does not apply to Section 845/804 OTs.
9.	10 U.S.C. § 2354, Contracts: indemnification provisions (Kaminski Memorandum, Item 9).	This statute does not apply to either S&T or Section 845 804 OTs.
10.	10 U.S.C. § 2393, Prohibition against doing business with certain offerors (Kaminski Memorandum, Item 10).	This statute does not apply to either S&T or Section 845 804 OTs.
11.	10 U.S.C. § 2403, Major Weapon Systems: Contractor Guarantees (Warranties) (Kaminski Memorandum Item 11).	This statute does not apply to either S&T or Section 845/804 OTs.
12.	10 U.S.C. § 2408, Prohibition on persons convicted of defense contract related felonies and related criminal penalty as defense contractors (Kaminski Memorandum, Item 12).	Section 2408 arguably does not apply to either S&T or Section 845/804 OTs.
13.	10 U.S.C. § 2409, Contractor employees: protection from reprisal for disclosure of certain information (Kaminski Memorandum, Item 13).	The statute does not apply to either S&T or Section 845 804 OTs.

Item No.	Statute	Applicability of Statute to OTs
14.	31 U.S.C. § 1352, Limitation on the use of appropriated funds to influence certain Federal contracting and financial transactions (Kaminski Memorandum, Item 14).	Probably does not apply to either S&T or Section 845/804 OTs.
15.	41 U.S.C. §§ 51-58, Anti-Kickback Act of 1986 (Kaminski Memorandum, Item 15).	The Anti-kickback Act may apply to Section 845/804 OTs. The Act does not apply to S&T OTs.
16.	41 U.S.C. § 423, Procurement Integrity Act, Section 27 of the Office of Procurement Policy Act (Kaminski Memorandum, Item 16).	The provisions of the Procurement Integrity Act do not apply to either S&T or Section 845/804 OTs.
17.	a. 41 U.S.C. §§ 351 *et seq.*, Service Contract Act. b. 41 U.S.C. §§ 35-45, Walsh-Healey Act. c. 29 U.S.C. §§ 201-219, Fair Labor Standards Act.	a. The Service Contract Act generally applies to both S&T and prototype OTs. b. The Walsh-Healey Act could theoretically apply. As a practical matter, however, it is more likely that the Service Contract Act would apply to Other Transactions. c. Subject to the exemptions under section 13 of the Act (29 U.S.C. § 213), generally it applies to employers engaging in S&T and Section 845/804 OTs.
18.	41 U.S.C. §§ 701-707, Drug-Free Workplace Act of 1988 (Kaminski Memorandum, Item 18).	The Drug-Free Workplace Act does not apply to either S&T or Section 845/804 OTs.
19.	41 U.S.C. §§ 10a - 10d, Buy American Act (Kaminski Memorandum, Item 19).	The statute does not appear applicable to S&T or Section 845/804 OTs.
20.	28 U.S.C. § 1491, Tucker Act (Added by Working Group.)	OTs would be subject to the Tucker Act, and the Court of Federal Claims would have jurisdiction over such instruments.
21.	35 U.S.C. §§ 200-212 (1980) (Bayh-Dole Act) (Added by Working Group.)	The requirements of the Bayh-Dole Act are not, by law, mandatorily applicable to either S&T or Section 845/804 OTs.
22.	10 U.S.C. § 2320 and § 2321, Technical data provisions applicable to DOD (Added by Working Group.)	10 U.S.C § 2320 and 10 U.S.C. § 2321 and their implementing regulations are not applicable to either S&T or Section 845/804 OTs.

Item No.	Statute	Applicability of Statute to OTs
23.	18 U.S.C. § 1905, Trade Secrets Act (Added by Working Group.)	The Trade Secrets Act applies to information obtained by the Government in connection with both S&T and Section 845 804 OTs.
24.	5 U.S.C. § 552, Freedom Of Information Act, (FOIA), as amended by FARA (Added by Working Group.)	The act applies to OT documents to the same extent as procurement contract documents, In addition, the National Defense Authorization Act of 1998, P.L. 105-85, § 832, 111 Stat. 1629 (1997), to be codified at 10 U.S.C. § 2371(i), expressly exempts OT proposals, business plans, supporting documents and confidential technical information from disclosure under FOIA for 5 years .
25.	31 U.S.C. § 1304, Judgments, awards, and compromise settlements (Added by Working Group.)	Payment from the Judgment Fund would be permitted for an S&T or Section 845/804 OT entered into under Section 2371, provided one of the circumstances described in Section 1304 exists.
26.	31 U.S.C. § 1341, Limitations on expending and obligating amounts (Added by Working Group.)	The statute applies to any S&T or Section 845/804 OT that would commit the Government to expend funds.
27.	31 U.S.C. § 3801 *et seq.*, Administrative Remedies for False Claims and Statements (Added by Working Group.)	The statute applies to both S&T and Section 845/804 OTs.
28.	10 U.S.C. § 2306a (Truth in Negotiations Act) (added by the working group).	Does not apply to either S&T OTs or section 845/804 OTs.
29.	41 U.S.C. § 422 (Cost Accounting Standards) (added by working group).	Does not apply to either S&T OTs or section 845/804 OTs.

Table II

Item No.	Statute	Applies to OTs	Does Not Apply to OTs
1.	Competition in Contracting Act		X
2.	The Contract Disputes Act.		X
3.	Procurement Protest System, Subtitle D of the Competition in Contracting Act.		X.
4.	Extraordinary Contractual Authority and Relief, Public Law 85-804.	X	
5.	10 U.S.C. § 2207, Expenditure of Appropriations: Limitation	X	
6.	10 U.S.C. § 2306, Kinds of Contracts		X
7.	10 U.S.C. § 2313, Examination of records of contractor.		X
8.	10 U.S.C. § 2353, Contracts: acquisition, construction, or furnishing of test facilities and equipment [to R&D contractors]		X
9.	10 U.S.C. § 2354, Contracts: indemnification provisions (Kaminski Memorandum, Item 9).		X
10.	10 U.S.C. § 2393, Prohibition against doing business with certain offerors.		X
11.	10 U.S.C. § 2403, Major Weapon Systems: Contractor Guarantees.		X
12.	10 U.S.C. § 2408, Prohibition on persons convicted of defense contract related felonies and related criminal penalty as defense contractors		X
13.	10 U.S.C. § 2409, Contractor employees: protection from reprisal for disclosure of certain information.		X

Item No.	Statute	Applies to OTs	Does Not Apply to OTs
14.	31 U.S.C. § 1352, Limitation on the use of appropriated funds to influence certain Federal contracting and financial transactions.		X
15.	41 U.S.C. §§ 51-58, Anti-Kickback Act.	**Applies to prototype OTs**	**Does not apply to S&T OTs**
16.	41 U.S.C. § 423, Procurement Integrity Act.		X
17.	a. 41 U.S.C. §§ 351 *et seq.*, Service Contract Act.	X	
	b. 41 U.S.C. §§ 35-45, Walsh-Healey Act.		X
	c. 29 U.S.C. §§ 201-219, Fair Labor Standards Act.	X	
18.	41 U.S.C. §§ 701-707, Drug-Free Workplace Act.		X
19.	41 U.S.C. §§ 10a - 10d, Buy American Act.		X
20.	28 U.S.C. § 1491, Tucker Act.	X	**May not have protest jurisdiction.**
21.	35 U.S.C. §§ 200-212, Bayh-Dole Act.		X
22.	10 U.S.C. § 2320 and § 2321, Technical data provisions applicable to DOD.		X
23.	18 U.S.C. § 1905, Trade Secrets Act.	X	
24.	5 U.S.C. § 552, Freedom Of Information Act, (FOIA).	X	

Item No.	Statute	Applies to OTs	Does Not Apply to OTs
25.	31 U.S.C. § 1304, Judgments, awards, and compromise settlements.	X	
26.	31 U.S.C. § 1341, Limitations on expending and obligating amounts.	X	
27.	31 U.S.C. § 3801 *et seq.*, Administrative Remedies for False Claims and Statements.	X	
28.	10 U.S.C. § 2306a, Truth in Negotiations Act.		X
29.	41 U.S.C. § 422, Cost Accounting Standards.		X

APPENDIX A

APPENDIX A

Analysis of Applicability of Specific Statutory Provisions

1. The Competition in Contracting Act, Pub. L. No. 98-369 (1984), as amended, codified at 10 U.S.C. § 2301 *et. seq.*, and 41 U.S.C. § 401 *et. seq.* (Kaminski Memorandum, Item 1.)

Purpose of the Statute: 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 (Truth in Negotiations).

Summary Conclusion on Applicability: The Act is not applicable to OTs.

Analysis: Section 845 (as amended by Section 804) requires the use of competitive procedures to the "maximum extent practicable" in awarding OTs, even for transactions for which a "standard [procurement] contract" would be "feasible or appropriate." Specifically, Section 804(a)(2) amends Section 845(b)(2) to require:

> "(2) To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out projects under subsection (a)" [" . . .prototype projects that are directly relevant to weapons or weapons systems proposed to be acquired or developed by the Department of Defense."]

CICA does not include a definition of "contract," but by its own terms applies only to the procurement of goods and services. *See, e.g.*, 41 U.S.C. § 401 (policy is to promote economy, efficiency and effectiveness in the *procurement of property and services* by the executive branch"). Because OTs are, by statute, other than procurement contracts and other Chiles Act instruments, CICA does not apply to OTs. This conclusion is reinforced by the establishment in the OT authorizing statutes of a competition standard different than that contained in CICA.

Section 845, as amended, requires the "maximum practical" competition, as opposed to the "full and open" standard of competition that is at the heart of CICA. Established rules of statutory construction dictate that a specific statute covering a particular area always controls over a statute covering the same and other subjects in more general terms, and the more specific statute is considered to be an exception to the general terms of the more comprehensive statute. 73 Am. Jur. 2, *Statutes* § 257.

2. 41 U.S.C. §§ 601 *et seq.*, the Contract Disputes Act, Pub. L. No. 95-563 (1987), as amended, (Kaminski Memorandum, Item 2.)

Purpose of the Statute: To create a comprehensive, fair, and balanced statutory scheme of administrative and legal remedies for contract claims against the Government. *See* H.R. Rep. 95-1556, 95th Cong., 2d Sess. 5 (1978).

Summary Conclusion on Applicability: The CDA does not apply to OTs.

Analysis: Because the Government waived sovereign immunity to suit in the CDA, the statute, as well as the contracts to which it applies, must be strictly construed. *Fidelity Constr. Co. v. United States,* 700 F.2d 1379 (Fed. Cir.), *cert. denied,* 464 U.S. 826 (1983).

In the section entitled "Applicability of law," the CDA states:

> (a) Executive agency contracts.
>
> Unless otherwise specifically provided herein, this Act applies to any express or implied *contract* (including those of the nonappropriated fund activities described in Sections 1346 and 1491 of title 28) entered into by an executive agency for --
>
> (1) the *procurement of property*, other than real property in being;
>
> (2) the *procurement of services*;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or
>
> (4) the disposal of personal property.

41 U.S.C. § 602(a) (emphasis added).

On its face, the use of the term "procurement" is a fairly persuasive indication that Congress intended for the CDA to apply only to procurement contracts, and not all instruments through which the Government acquires property or services.

The House Bill also included a clause that stated, "[t]his Act shall also apply to any other contract or agreement with the United States which by its terms is expressly made subject to the provisions of this Act." H.R. 11002, 95th Cong., 2d Sess. § 3 (1978). This provision, however, was deleted from the Public Law for no reason discussed in the legislative history. Pub. L. 95-563, § 3, 92 Stat. 2383, 2384. It could be argued that Congress did not intend to permit Federal agencies to invoke the CDA by including the Disputes clause in a contract that otherwise was not covered. In the absence of further explanation of its action, however, deletion of the provision is not strong evidence.

As a policy matter, it is unlikely that when Congress granted separate statutory authority for OTs, as distinguished from procurement contracts, it intended to apply procurement laws and regulations to some OTs and not to others. And, as discussed, the term "procurement" in the CDA suggests Congress intended to limit the applicability of the CDA to standard procurement contracts.

3. 31 U.S.C. §§ 3551 *et seq.*, Procurement Protest System, Subtitle D of the Competition in Contracting Act, Pub. L. No. 98-369 (1984), (Kaminski Memorandum, Item 3.)

Purpose of the Statute: To provide a statutory basis for procurement protests by interested parties to the Comptroller General.

Summary Conclusion on Applicability: Neither S&T nor Section 845/804 OTs are not subject to the procurement protest provisions of Subtitle D of CICA. However, the GAO will

likely review the agency's use of OTs to determine whether the statutory requirements of 10 U.S.C. 2371 and § § 845/804 are met.

Analysis: The relevant sections of CICA require that a protest to the GAO "concern[-] an alleged violation of a procurement statute or regulation." 31 U.S.C. Section 3552. S&T OTs involve cost-shared, collaborative research efforts with the potential for both Government and commercial applications. The statute that authorizes S&T OTs – 10 U.S.C. 2371 – specifically authorizes use of OTs when a procurement contract is "not feasible or appropriate." As long as the OT is entered into as authorized by the statute, the procurement protest provisions under CICA including the GAO bid protest system are inapplicable because the transaction amounts to an "assistance" agreement rather than a procurement contract.

The Comptroller General has applied this analysis to DARPA's S&T OTs for cost-shared, "dual-use" technology development, characterized as "assistance" transactions. *See, Energy Conversion Devices, Inc.*, B-260514, 95-2 CPD Par. 121 (June 16, 1995) (protest of selection leading to an "other transaction" following Broad Agency Announcement for development and demonstration of vapor phase manufacturing technology in the area of thin-film photovoltaics). The GAO acknowledged the restriction of its jurisdiction under CICA to review only protests involving violations of procurement statutes or regulations. The GAO also acknowledged its general practice of not reviewing protests involving cooperative agreements or "other non-procurement instruments" because they do not involve the award of a "contract." The Comptroller General proceeded with a review of whether a procurement contract was required in this instance, or whether DARPA might be attempting to avoid the requirements of procurement laws and regulations. In its analysis, the GAO cited the criteria of 31 U.S.C. Section 6301, et seq. (Chiles Act), for use of procurement contracts (purchase of goods or services for the direct

benefit of the Government) versus cooperative agreements (support or stimulation). The GAO held that the protester failed to refute DARPA's position that the "primary" purpose of the transaction was not to acquire goods or services for the direct benefit of the Government, but instead to "advance the state-of-the-art by supporting and stimulating research and development." Thus it appears that the GAO will only determine whether the use of an OT is permitted under § 2371.

The expansion of OT authority blurs the distinction between (a) "assistance"-type OTs for "dual use" research, and (b) Section 845/804 agreements to "carry out prototype projects that are directly relevant to weapons development or weapon systems proposed to be acquired or developed by the Department of Defense." Section 845 specifically exempts such "prototype projects" from 10 U.S.C. 2371(c)(2) and (c)(3), permitting use of OTs even if use of a procurement contract would be "feasible or appropriate." Thus, Congress exempted OTs from the restrictions of those statutes that apply to procurement contracts. Since the Procurement Protest System applies only to procurement contracts, it would not apply to prototype OTs. *See* analysis of the applicability of CICA to OTs, item 1 *supra.*

4. 50 U.S.C. §§ 1431-1435, Extraordinary Contractual Authority and Relief, Public Law 85-804 (Kaminski Memorandum, Item 4.)

Purpose of the Statute: To authorize certain remedies for contractors such as formalization of informal commitments, amendments without consideration, and correction of mistakes, and to permit indemnification for unusually hazardous risks.

Summary Conclusion on Applicability: The statute and legislative history indicate that Public Law 85-804 applies to both S&T and Section 845/804 OTs. Moreover, it is in the

interests of both the Government and the contractor to include both types of OTs within coverage of the statute.

Analysis: Public Law 85-804, *codified as amended at* 50 U.S.C. §§ 1431-35, authorizes the Government to make payments and enter into contracts, amendments, or modifications to contracts, when not otherwise provided by law and for national defense purposes, as follows:

> The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense.

50 U.S.C. § 1431.

Specific instructions which are contained in Executive Order No. 10789 define the contracts authorized. These contracts include:

> *agreements of all kinds* (whether in the form of letters of intent, purchase orders, or otherwise, for all types and kinds of property or services necessary, appropriate, or convenient for the national defense, or for the invention, development, or production of, or research concerning, any such property or services . . . *without any restriction of any kind as to type, character, location, or form.*

Exec. Order No. 10789, *reprinted in* 50 U.S.C. § 1431 (emphasis added).

The Executive Order describes a broad application of Governmental authority, to include agreements for "research concerning, any such property or services" "without any restriction of any kind as to . . . form." This language does not limit the authority to contracts for property or services themselves. Because S&T and Section 845/804 OTs are for research and development, the statute appears to include them.

The legislative history of P.L. 85-804 makes it clear that neither the interests of the contractor or subcontractor, nor form of contract, is relevant to the exercise of § 85-804 authority. Rather, only the national defense may be considered:

> The authority contained in this bill is not, therefore, authority by which the departments and agencies of Government may dispense aid solely for the benefit of contractors or subcontractors. While contractors or subcontractors may be the recipients of aid in some instances, the primary consideration is, and must be, whether such aid will facilitate the national defense.

S. Rep. No. 2281, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 4041, 4045; Fed. Pub. ECR Rep. at 3023 (1958).

Because S&T and Section 845/804 OTs are already outside the standard procurement system, Public Law 85-804 contractual authority and relief may seem unnecessary. But in the event that indemnity clauses for unusually hazardous work or ratification of informal commitments are needed, Public Law 85-804 has potential application. *See* analysis of the applicability of 10 U.S.C. § 2354, item 9, *infra* (concluding that 10 U.S.C. § 2354 would not be available to authorize the Government's indemnification of the other party to an OT for unusually hazardous activities). A prototype or other research and development project under an OT well might become a necessity in a national defense emergency. In that event, it would be in the Government's interest to have the authority to amend or modify the OT to require immediate delivery or production of any or all of the prototypes or research results.

5. 10 U.S.C. § 2207, Expenditure of Appropriations: Limitation (Kaminski Memorandum, Item 5.)

Purpose of the Statute: To discourage bribery to obtain a contract.

Summary Conclusion on Applicability: Section 2207 applies to contracts whether or not they are procurement contracts and therefore it would apply to both S&T OTs and Section 845/804 OTs.

Analysis: Section 2207 provides that appropriated funds may not be spent "under a contract other than a contract for personal services" unless certain conditions are included in the contract. Specifically, the contract must permit the Government to terminate the contract if the Government finds that the contractor has given any gifts or gratuities to Government officials to influence the award or administration of that contract. Paragraph (b) exempts contracts under the simplified acquisition threshold from the provisions of § 2207.

There appears to be no definition of "contract" applicable to this provision.[11] Thus, the analysis turns to other indications of the meaning of the term.

First, Section 2207 is itself located in Chapter 131 of U.S.C. Title 10, which deals with Planning and Coordination. That Chapter instructs DOD on various appropriations and funding matters and, unlike Chapter 137, does not limit its scope to procurement related matters.

Second, the exemption in paragraph (b) for contracts under the simplified acquisition threshold similarly reveals no reason to limit the provision to procurement or acquisition contracts. Paragraph (b) refers the reader to § 4(11) of the OFPP Act, which simply states that "[t]he term 'simplified acquisition threshold' means $100,000." Notably, the definition is limited to a dollar amount but is not limited to any particular contracts or actions for that dollar amount.

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[11] Interestingly, the FAR defines "contract" as "a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them." FAR 2.101. The notion of "furnishing" services or supplies seems consistent with the concept of "acquiring property or services" that is used to define "procurement contract" under 31 U.S.C. § 6303.

Based on the above, there is no reason to conclude that the reference to "contract" in § 2207 is limited to "procurement contracts." This leads to the conclusion that § 2207 applies to contracts whether or not they are procurement contracts and therefore that section applies to both S&T OTs and Section 845/804 OTs.

6. 10 U.S.C. § 2306, Kinds of Contracts (Kaminski Memorandum, Item 6.)

Purpose of the Statute: Establishes various restrictions on the terms and conditions of contracts.

Summary Conclusion on Applicability: This statute does not apply to any type of OT as such transactions specifically are not procurement contracts.

Analysis: This section prohibits cost-plus-percentage-of-costs type contracts, requires contractors to provide covenants against contingent fees paid to obtain contracts and limits fee amounts on certain types of cost-type contracts.

Section 2306 is in Chapter 137 of title 10. The Chapter is entitled Procurement Generally and specifically states that it applies "to the *procurement* . . . of all property (other than land) and all services for which payment is to be made from appropriated funds." 10 U.S.C. § 2303(a) (emphasis added). Additionally, the chapter applies to contracts for the installation or alteration of property acquired under procurement contracts. 10 U.S.C. § 2303(b).

The clear limitation of the scope of Chapter 137 leads to the conclusion that it does not apply to OTs; such transactions specifically are not procurement contracts.

7. 10 U.S.C. § 2313, Examination of records of contractor (Kaminski Memorandum, Item 7.)

Purpose of the Statute: To provide authority to the contracting agency to access a contractor's records or plants in order to perform audits of the contractor.

Summary Conclusion on Applicability: Consistent with the conclusion set forth in Item 6 above, Section 2313 arguably does not apply to either S&T or Section 845/804 OTs, because by statute such OTs are not "procurement contracts." Furthermore, OT's frequently do not have payment schemes that would require the contracting agency to conduct the audits contemplated by Section 2313.

Analysis: Section 2313 provides the authority to inspect a contractor's records in two situations. Because OTs are not negotiated under either of these situations, the audit authority of Section 2313 logically would not apply to OTs. [Legislative history and case law to assist in the analysis could not be found.]

First, Section 2313 provides that the contracting agency is authorized to examine a contractor's records when "a contractor is performing a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-determinable contract, or any combination of such contracts, made by that agency under this chapter." 10 U.S.C. § 2313(a)(1)(A). "This chapter" refers to U.S.C. title 10, chapter 137 which addresses "procurement generally." The authority to use OTs does not emanate from chapter 137 but from 10 U.S.C. § 2371, which is in chapter 139. This basis may be stronger with respect to S&T OTs authorized by Section 2371 than to Section 845/804 prototype OTs. The latter could, and normally would be the subject of a procurement contract.

In OTs, the Government essentially allots funds to a project and wants to make certain the funds are expended on the project, but understands that the contractor most likely would refuse to enter into the agreement if its records were open to Government examination. Because OTs frequently do not have the same payment schemes as cost-reimbursement, incentive, time and materials, labor-hour, or price redeterminable contracts, the need for the contracting agency to audit the contractor's records is less compelling.

The second situation under Section 2313 in which the contracting agency may inspect a contractor's records or plant arises when an audit is needed to evaluate the accuracy, completeness, and currency of certified cost or pricing data required to be submitted pursuant to 10 U.S.C. § 2306(f), the Truth in Negotiations Act (TINA). Based on the discussion of the application of Chapter 137 above, and here, OTs are not procurement contracts. Neither TINA not this second requirement under Section 2313 applies. See § 28, *infra.* In other words, because the parties do not negotiate a price of an OT based on certified cost and pricing data under TINA -- there is no need to audit certified data. Therefore, the second situation in which a contracting agency may exercise audit authority does not apply to OTs.

8. 10 U.S.C. § 2353, Contracts: acquisition, construction, or furnishing of test facilities and equipment [to R&D contractors] (Kaminski Memorandum, Item 8.)

Purpose of the Statute: To provide authority for acquisition, construction, or furnishing of test facilities or equipment in connection with R&D contracts.

Summary Conclusion on Applicability: This statute does not apply to either S&T OTs or Section 845/804 OTs.

Analysis: Section 2353 of Title 10 pertains to acquisition, construction or furnishing of test facilities or equipment in connection with contracts. It provides as follows:

> (a) A contract of a military department for research or development, or both, may provide for the acquisition or construction by, or furnishing to, the contractor, of research, developmental, or test facilities and equipment that the Secretary of the military department concerned determines to be necessary for the performance of the contract. The facilities and equipment, and specialized housing for them, may be acquired or constructed at the expense of the United States, and may be lent or leased to the contractor with or without reimbursement, or may be sold to him at fair value. This subsection does not authorize new construction or improvements having general utility.

(b) Facilities that would not be readily removable or separable without unreasonable expense or unreasonable loss of value may not be installed or constructed under this section on property not owned by the United States, unless the contract contains --

(1) a provision for reimbursing the United States for the fair value of the facilities at the completion or termination of the contract or within a reasonable time thereafter;

(2) an option in the United States to acquire the underlying land; or

(3) an alternative provision that the Secretary concerned considers to be adequate to protect the interests of the United States in the facilities.

(c) Proceeds of sales or reimbursements under this section shall be paid into the Treasury as miscellaneous receipts, except to the extent otherwise authorized by law with respect to property acquired by the contractor.

10 U.S.C. § 2353.

The Kaminski memorandum identifies this statute as not applicable to Section 845/804 OTs.

The statute applies to *contracts* for research and development entered into under 10 U.S.C. § 2358. The statute that authorizes OTs (Section 2371) identifies them as transactions "other than" *contracts* for research and development; the Section 2371 authority is "in addition to" the authority under Section 2358 to enter into contracts for research and development. Therefore, Section 2353, which applies by its terms to contracts for research and development, presents perhaps the clearest case of a requirement that would not apply to either Section 2371 or Section 845/804 OTs.

9. **10 U.S.C. § 2354, Contracts: indemnification provisions, (Kaminski Memorandum, Item 9.)**

Purpose of the Statute: To authorize the Military Departments to include provisions in DOD R&D contracts indemnifying the contractor for certain claims and losses.

Summary Conclusion on Applicability: This statute does not apply to either Section 845/804 or to S&T OTs. Nevertheless, to the extent that statutory authority is required for DOD to indemnify an R&D provider under an OT, Public Law 85-804 may provide such authority under certain conditions.

Analysis: 10 U.S.C. § 2354 provides that any "contract of a military department for research or development, or both" may provide that the Government will indemnify the contractor against claims for injury to persons or property resulting from "unusually hazardous" activities conducted in the performance of the R&D contract. Any such indemnification provision must be approved by the Secretary of the military department concerned (§ 2354(a)), and must allow the Government to control the defense of the claim (§ 2354(b)). In addition, no payment can be made under the indemnification provision unless the Secretary or a designee certifies that the amount is "just and reasonable."

Section 2354 does not apply to either S&T or Section 845/804 OTs, because OTs are expressly "other than" the contracts to which Section 2354 does apply. Like Section 2371 (authorizing OTs) and Section 2358 (describing the authorized means for obtaining R&D), Section 2354 is contained in Chapter 139 of Title 10, entitled "Research and Development." Section 2354 applies only to contracts entered into under the authority of Section 2358.[12] But Section 2371 authorizes transactions *other than contracts authorized under* Section 2358.

[12] Section 2354 only applies to R&D contracts (§ 2354(a)), and Section 2358 provides the authority for and places restrictions upon DOD's execution of R&D contracts (§ 2358(b)).

Section 2371(a). Therefore, Section 2371 authorizes transactions "other than" the contracts for which Section 2354 is applicable; therefore, section 2354 does not apply to OTs, and does not provide DOD authority to indemnify a party to an OT for unusually hazardous R&D activities.[13]

This result may not be very significant. Although it is conceivable that activities conducted in the performance of an OT would be "unusually hazardous," and commercial organizations would not be able to insure against that risk, DOD still may be able to provide the necessary indemnification. To the extent that statutory authority is required to provide for the Government's indemnification of the R&D provider,[14] Public Law 85-804 may authorize such indemnity under certain conditions. Nash & Cibinic, II *Federal Procurement Law* 1934 (3d ed. 1980). We conclude, § 4 of this Appendix, *supra*, that P.L. 85-804 applies to OTs.

10. 10 U.S.C. § 2393, Prohibition against doing business with certain offerors, (Kaminski Memorandum, Item 10.)

Purpose of the Statute: 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.

Summary Conclusion on Applicability: This statute does not apply to either S&T or Section 845/804 OTs because the statute by its terms applies only to procurement contracts.

Analysis: The operative part of Section 2393 provides as follows:

> (a)(1) Except as provided in paragraph (2), the Secretary of a military department may not solicit an offer from, award a contract to, extend an existing contract with, or, when approval by the Secretary of the award of

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[13] One can generalize from this analysis that any statute that applies to contracts authorized by § 2358 (i.e., that are contained within the same chapter as § 2358) would not apply to OTs. See, e.g., Appendix A, § 8, supra.

[14] It is believed that, at least regarding fixed price contracts, special statutory authority is required for the inclusion of indemnity clauses because of statutory provisions (still applicable to OTs, we conclude) barring the Government from making contractual obligations in advance of appropriations. Nash & Cibinic, II *Federal Procurement Law* 1931 (3d ed. 1980).

> a subcontract is required, approve the award of a subcontract to, an offeror or contractor which to the Secretary's knowledge has been debarred or suspended by another Federal agency unless --
>
> > (A) in the case of a debarment, the debarment of the offeror or contractor by all other agencies has been terminated or the period of time specified for such debarment has expired; and
> >
> > (B) in the case of a suspension, the period of time specified by all other agencies for the suspension of the offeror or contractor has expired.
> >
> > (2) Paragraph (1) does not apply in any case in which the Secretary concerned determines that there is a compelling reason to solicit an offer from, award a contract to, extend a contract with, or approve a subcontract with such offeror or contractor.

10 U.S.C. § 2393.

The section is codified in Chapter 141 of U.S.C. Title 10, "Miscellaneous Procurement Provisions." The legislative history of the section is not helpful on the issue of its applicability to other than procurement contracts. *See, e.g.* H.R. Rep. No. 97-311 (1981). The section was amended by the Federal Acquisition Streamlining Act of 1994 (FASA), to exempt from certain reporting requirements subcontracts for commercial items or below the simplified acquisition threshold of $100,000. Because the statute applies by its terms to "contracts," and appears to envision "procurement contracts," [explain] it does not apply to OTs under Section 2371 or Section 845/804.

It should be noted, however, that OTs (under either Section 2371 or Section 845/804) arguably would qualify as non-procurement transactions subject to the "Common Rule." [cite]? Thus an OT recipient arguably could be excluded from federal non-procurement programs and activities under different authority. [example] Similarly, debarment under this section arguably would result in debarment from OTs.

11. 10 U.S.C. § 2403, Major Weapon Systems: Contractor Guarantees (Warranties), (Kaminski Memorandum Item 11.)

Purpose of the Statute: To provide warranty protection to the Government for major weapons systems it acquires.

Summary Conclusion on Applicability: This statute does not apply to Section 845/804 OTs. [what about S&T OTs?]

Analysis: The Weapon System Warranty Act, 10 U.S.C. § 2403, requires performance warranties to the effect that:

- the item provided under the contract conforms to the design and manufacturing requirements specifically delineated in the production contract (or in any amendment to that contract);
- the item provided under the contract, at the time it is delivered to the Government, is free of defects in material and workmanship;
- the item provided under the contract conforms to the essential performance requirements of the item as specifically delineated in the production contract (or in any amendment to that contract);
- if the item provided under the contract fails to meet the guarantees specified set forth above, the contractor will at the election of the Secretary of Defense or as otherwise provided in the contract:
- promptly take such corrective action as may be necessary to correct the failure at no additional cost to the Government; or
- pay costs reasonably incurred by the Government in taking such corrective action.

The FY 1985 Defense Department Authorization Act required that DOD obtain warranties in all its weapon system production contracts for systems that exceed $100,000 in unit cost, or when the total procurement cost exceeds $10 million. A contract for mature, full-scale production of weapon systems may not be entered into unless the prime contractor guarantees

that the weapon system and subsystems meet performance, reliability, and mission capability requirements as agreed to in the contract.

DOD has authority under the statute to waive the warranty requirements, if necessary, in the interest of national defense or if the warranty would not be cost effective. DOD must give Congress written notice of its intention to waive any or all of the guarantee requirements on a major defense acquisition, as well as the reason for doing so.[15]

Section 2403(f) states, in pertinent part, *that the requirement for a guarantee under subsection (b)(3) applies only in the case of a contract for a weapon system that is in mature full-scale production.* Consequently, by virtue of the clear language of the statute, performance warranties are not intended to be applicable to the acquisition of "prototypes," however procured or acquired.[16] In addition, production programs would have to be performed pursuant to procurement contracts under the Chiles Act, so the application of this provision is therefore limited to procurement contracts.

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[15] There have been only nine waivers of the warranty requirements in the DOD since enactment of the statutory requirement. There are several reasons for this:

(a) waiver authority has been retained at the Service secretarial level, which has discouraged pursuit of waivers because of the added time, effort and associated reviews; (b) procuring activities are reluctant to predetermine and characterize, from among the many requirements set forth in the contract and its specifications, which are essential and which are nonessential; and,

(c) it is difficult, if not impossible, to accurately determine "cost effectiveness" of a warranty provision in the case of weapon systems not previously produced or fielded in the absence of empirical data.

[16] Selectively employed, performance warranties are in the interest of the Government and can be a cost-effective contract provision. Nevertheless, the effect of the Warranties Act has been the inclusion of warranty provisions in virtually every potentially applicable contract for a major system or subsystem without any consideration of essentiality, cost effectiveness or utility, or national security needs. As noted in numerous GAO and other studies, these warranties have added considerable non-value added cost to the acquisition of major weapon systems and subsystems. In many instances, it replicates remedies otherwise available to the Government.

12. 10 U.S.C. § 2408. Prohibition on persons convicted of defense contract related felonies and related criminal penalty on defense contractors, (Kaminski Memorandum, Item 12.)

Purpose of the Statute: 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 (DOD) for a specified statutory period. This statute complements the goals of other statutes designed to protect the public fisc, such as the Major Fraud Act and the False Claims Act.

Summary Conclusion on Applicability: Consistent with other sections of this analysis, Section 2408 *arguably* does not apply to either S&T or Section 845/804 OTs because § 2408 applies only to procurement contracts. This conclusion rests on the fact that (1) 10 U.S.C. § 2408 is in Chapter 141 of Title 10, entitled "Miscellaneous Procurement Provisions"; (2) several portions of 10 U.S.C. § 2408 refer specifically to procurement statutes and (3) the statute has been implemented in the Defense Department Supplement to the Federal Acquisition Regulations (DFARS). However, this conclusion leads to the possibility that a person prohibited from doing defense procurement work due to a felony conviction could perform basic research, applied research, advanced research and prototype development work for DOD on an OT, but not on a research contract issued under the FAR. Because it is unlikely that Congress intended this result, it would obviously be advisable to seek congressional clarification on this point. Furthermore, there is nothing in the statutory history or case law that would limit the application of this statute to procurement contracts. Finally, there is case law interpreting the word "contract" broadly enough to imply that 10 U.S.C. § 2408 does apply to OTs.

Analysis: Arguably the provisions of 10 U.S.C. § 2408 do not apply to S&T and Section 845/804 OTs. To accept this argument, however, one has to presume that when Congress passed

10 U.S.C. § 2408, Congress intended the statute to only apply to procurement contracts. Although there is some evidence that this is true, there is no clear expression of congressional intent upon which to rely.

The provisions of 10 U.S.C. § 2408 state:

> (a) An individual who is convicted of fraud or any other felony arising out of a contract with the Department of Defense shall be prohibited from each of the following:
>
> (A) Working in a management or supervisory capacity on any *defense contract* or any first tier subcontract of a defense contract.
>
> (B) Serving on the board of directors of any defense contractor or any subcontractor awarded a *contract* directly by a defense contractor.
>
> (C) Serving as a consultant to any defense contractor or any subcontractor awarded *a contract* directly by a defense contractor.
>
> (D) Being involved in any other way, as determined under regulations prescribed by the Secretary of Defense, with a *defense contract* or first tier subcontract of *a defense contract.*

10 U.S.C. § 2408(a)(emphasis added.).

Under the above listed prohibitions, the question becomes what type of "contracts" are referred in 10 U.S.C. § 2408 (a)(1) (A), (B), (C) and (D). There is, unfortunately, no legislative history indicating whether Congress intended to limit this statute to procurement contracts, or to include all other forms of contracts with the Department of Defense. Furthermore, there is no case law to provide any guidance.

The statutory framework within which 10 U.S.C. § 2408 is codified, however, supports a finding that only procurement contracts were intended to be covered. This provision is codified within Chapter 141 of Title 10. This chapter is entitled "Miscellaneous Procurement

Provisions." This chapter includes numerous statutory provisions relating to procurement contracts.[17]

At the same time, several provisions of 10 U.S.C. § 2408 appear to indicate that this statute was intended to apply only to procurement contracts. In particular, 10 U.S.C. § 2408(a)(4)

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[17] These provisions include the following:

2384	Supplies: identification of supplies and sources.
2384a	Supplies: economic order quantities.
2388	Liquid fuels and natural gas; contracts for storage, handling, or distribution.
2390	Prohibition on the sale of certain defense articles from the stocks of the Department of Defense.
2399	Operational test and evaluation of defense acquisition programs.
2400	Low-rate initial production of new systems.
2401	Requirement for authorization by law of certain contracts relating to vessels and aircraft.
2401a	Lease of vehicles, equipment, vessels, and aircraft.
2402	Prohibition of contractors limiting subcontractor sales directly to the United States.
2408	Major weapon systems; contractor guarantees.
2404	Acquisition of petroleum and natural gas; authority to waive contract procedures; acquisition by exchange; sales authority.
2406	Limitation on adjustment of shipbuilding contracts.
2408	Prohibition on persons convicted of defense-contract related felonies and related criminal penalty on defense contractors.
2409	Contractor employees: protection from reprisal for disclosure of certain information.
2410	Requests for equitable adjustment or other relief; certification.
2410a	Appropriated funds: availability for certain contracts for 12 months.
2410b	Contractor inventory accounting systems; standards.
2410c	Preference for energy efficient electric equipment.
2410d	Subcontracting plans: credit for certain purchases.
2410f	Debarment of persons convicted of fraudulent use of "made in America" labels.
2410g	Advance notification of contract performance outside the United States.
2410h	Acquisition fellowship program.
2410i	Prohibition on contracting with entities that comply with the secondary Arab boycott of Israel.
2410j	Displaced contractor employees: assistance to obtain certification and employment as teachers or employment as teachers' aides.
2410k	Defense contracts: listing of suitable employment openings with local employment service office.
2410l	Contracts for advisory and assistance services cost comparisons studies.

exempts contracts (1) below the simplified acquisition threshold; (2) commercial item contracts and (3) a subcontract under either (1) or (2).

It should also be noted that 10 U.S.C. § 2408 has been implemented in the DFARS. In particular, DFARS Section 203.570 implements 10 U.S.C. § 2408. This clearly supports its application to procurement contracts.

Unfortunately, this analysis only provides the conclusion that 10 U.S.C. § 2408 definitely applies to procurement contracts. Left unanswered is whether it applies only to procurement contracts. Unlike 10 U.S.C. § 2306 or 10 U.S.C. § 2403 discussed above, there is nothing specifically in the statute that excludes contracts other than procurement contracts from coverage of 10 U.S.C. § 2408. As such, a court could adopt the commonly accepted definition of the term "contract" in interpreting 10 U.S.C. § 2408.

As noted above, OTs contain the elements of offer, acceptance, and mutual manifestation of intent to be bound to certain requirements that the courts have held sufficient to constitute a contract. *See Trauma Serv., supra*; *Thermalon Indus., supra*, and *Total Med. Management, supra*. If an OT therefore constitutes a non-procurement contract, 10 U.S.C. § 2408 could apply. The statute refers repeatedly to a "contract" without limiting its application.

In conclusion, it appears that a strong argument can be made that 10 U.S.C. § 2408 only applies to procurement contracts. This is due to the inclusion of this section in Part 141 of Title 10, the multiple references to FAR contracts, and the implementation of the provisions in the DFARS. Nevertheless, such interpretation could result in the illogical conclusion that an individual could be prohibited from working on a defense prototype under a procurement contract but permitted to work on the same prototype if done under an OT. Therefore, it would be advisable to seek congressional clarification on this point.

13. 10 U.S.C. § 2409, Contractor employees: protection from reprisal for disclosure of certain information (Kaminski Memorandum, Item 13.)

Purpose of the Statute: To prohibit contractors from discharging, demoting, or discriminating against employees who disclose substantial violations of law related to contracts.

Summary Conclusion on Applicability: The statute by its terms only applies to procurement contracts and contractors and, therefore, does not apply to OTs under Section 2371 or Section 845/804.

Analysis: Section 2409, which is contained in chapter 141 of title 10, "Miscellaneous Procurement Provisions," provides, in pertinent part, as follows:

> (a) Prohibition of reprisals. -- An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).
>
> . . .
>
> (e) Definitions. -- In this section:
>
> (1) The term "agency" means an agency named in section 2303 of this title.
>
> (2) The term "head of an agency" has the meaning provided by section 2302(1) of this title.
>
> (3) The term "contract" means a contract awarded by the head of an agency.
>
> (4) The term "contractor" means a person awarded a contract with an agency.
>
> (5) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978.

10 U.S.C. § 2409.

Section 2409 was enacted as part of the Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-662, sec. 942. FASA recodified the section and enacted a similar prohibition applicable to employees of civilian agency contractors. Pub. L. No. 103-355, §§ 6005, 6006 Oct. 13, 1994. There is nothing in the relevant committee reports suggesting any intent that application of the section extend beyond procurement contracts. See, e.g. House Rep. No. 99-1001. The prohibition is implemented in FAR Subpart 3.9, which also does not suggest any applicability beyond procurement contracts. Because the section by its terms applies only to "contracts," it does not apply to OTs under Section 2371 or Section 845/804.

14. 31 U.S.C. § 1352, Limitation on the use of appropriated funds to influence certain Federal contracting and financial transactions. (The Byrd Amendment)(Kaminski Memorandum, Item 14.)

Purpose of the Statute: 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 decision-making in connection with the awarding of any Federal contract, grant, the making of any Federal loan, or the entering into of any cooperative agreement. 31 U.S.C. § 1352(a).

Summary Conclusion on Applicability: This is a close call; nevertheless, because the statute applies by its terms only to applicants for, or recipients of, contracts, grants, and cooperative agreements, it probably does not apply to a non-governmental party to an S&T or Section 845/804 OT.

Analysis: Section 1352, first enacted by Section 319 of the 1990 Interior Department Appropriation Act, Pub. L. No. 101-121, the so-called Byrd Amendment, provides in pertinent part as follows:

(a)(1) None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal action described in paragraph (2) of this subsection.

(2) The prohibition in paragraph (1) of this subsection applies with respect to the following Federal actions:

(A) The awarding of any Federal contract.

(B) The making of any Federal grant.

(C) The making of any Federal loan.

(D) The entering into of any cooperative agreement.

(E) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

10 U.S.C. § 1352.

Violators of the Byrd Amendment are subject to civil penalties. For all but federal contracts, the Amendment is implemented by a common rule of OMB and 28 federal agencies. 55 Fed. Reg. 6736 (Feb. 26, 1990). For contracts, the Amendment is implemented at FAR Subpart 3.8. Neither of these sources is particularly helpful on the issue of applicability to OTs.

The statute is quite specific concerning the types of instruments and relationships to which it applies, *i.e.* federal contracts, grants, loans, and cooperative agreements. The Byrd Amendment defines "federal contract" merely as "a contract awarded by an agency." Despite the fairly broad sweep of the statute, there is no indication that it was intended to cover every possible public-private relationship, and in fact there are relationships that are not listed. For example, it does not list loan guarantees or subsidies among the covered transactions. Therefore,

because S&T OTs are not listed among the relationships covered by Section 1352, it appears that Section 1352 does not apply to them.

The question is a close one because "Federal contract" is defined simply as "a contract awarded by an agency," without limiting such definition to "procurement contracts" or contracts for the acquisition of goods or services for the direct benefit of the Government. 31 U.S.C. § 1352(g)(6)(A)(i). Under this view, because OTs are "contracts" in the common law sense of the term and are necessarily awarded by a Federal agency (DOD), arguably they could be within this definition.

On the other hand, if the term "federal contract" were meant to encompass all common law contracts, it would automatically encompass "grants," "loans," and "cooperative agreements." *See, e.g., Thermalon Industries, Ltd. v. United States*, 34 Fed. Cl. 411 (1995) (federal grants are common law contracts for purposes of Tucker Act jurisdiction). Section 1352(a)(2) would not need to separately list these three types of transactions. The fact that these three items *are* specified in this section suggests a more limited definition of the term "Federal contract" than "common law contract." It is reasonable to conclude that Section 1352 applies only to those transactions expressly mentioned in the text of this section, and does not apply to items not expressly mentioned, even if the excluded items are common law contracts (***expressio unius est exclusio alterius***). Because OTs are not specified in the text of Section 1352, this provision does not apply to them.

This latter result – that Section 1352 does not apply to OTs – is supported by the legislative history of the Byrd Amendment. The Senate Report (S. Rep. No. 85, 101st Cong., 1st sess. 128 (1989)), states that the terms " 'Federal contract,' 'Federal grant,' and 'Federal Cooperative Agreement' refer primarily to these three instruments as described in 31 U.S.C.

§§ 6303-6305." 31 U.S.C. § 6303 defines a "procurement contract." This suggests that "Federal contract" means "procurement contract" only, and that the term is not intended to encompass every instrument that can be described as a common law contract. Because OTs are *other than* procurement contracts, grants, and cooperative agreements, and the Byrd Amendment applies only to procurement contracts, grants, and cooperative agreements (as suggested by this Senate Report), the Byrd Amendment would not apply to either S&T or Section 845/804 OTs.

15. 41 U.S.C. §§ 51-58, Anti-kickback Act of 1986 (Kaminski Memorandum, Item 15.)

Purpose of the Statute: 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.

Summary Conclusion on Applicability: The Anti-kickback Act generally applies to Section 845/804 OTs, but not to S&T OTs.

Analysis: The statute defines the term "prime contract" as a "contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind." 41 U.S.C. § 52(4).

Originally the Act was narrowly tailored and only applied to cost-type contracts, but it was first expanded to cover all "negotiated" contracts, and was finally expanded to cover all federal contracts. Although not totally clear, this statute applies to more than just procurement contracts, and thus would generally apply to 845/804 OTs, but not to S&T OTs. The Anti-Kickback Act applies more broadly than procurement contracts because (1) the statute's application to any "contract or contractual action" is very broad, (2) the legislative history indicates Congress' intent for the statute to have a broad reach [cite and explain], and (3) this

statute is contained in Chapter 1, General Provisions, of Title 41, which includes sections that arguably have broad application beyond procurement contracts.

Congress has authorized DOD to enter into both S&T OTs, where generally nothing is "acquired," and Section 845/804 OTs, where generally services ("purely military research and development") are "acquired." *See* Final Report of the IPT on the Services' Use of 10 U.S.C. § 2371 OTs and 845 Prototype Authorities. Therefore, a Section 845/804 OT obtains "services" using a "contract or contractual action," and therefore the Anti-Kickback Act generally applies to prototype OTs. In the case of S&T OTs, the Government does not acquire anything; therefore the Anti-Kickback Act does not apply.

16. 41 U.S.C. § 423, Procurement Integrity Act, Section 27 of the Office of Procurement Policy Act, (Kaminski Memorandum, Item 16.)

Purpose of the Statute: 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.

Summary Conclusion on Applicability: The provisions of the Procurement Integrity Act do not apply to S&T or Section 845/804 OTs.

Analysis: The Procurement Integrity Act was enacted as Section 27 of the Office of Procurement Policy Act ("OFPP Act"), and is codified at 41 U.S.C. § 423. Section 27 was originally added to the OFPP Act when that statute was reauthorized by Pub. L. No. 100-679 in 1988 and has since been modified through the Federal Acquisition Reform Act of 1996. The OFPP Act, which contains the procurement integrity provisions, authorizes the establishment of

policies, procedures, and practices applicable to procurement contracts awarded by executive agencies, and mandates a single uniform procurement regulation to be maintained by GSA, DOD, and NASA under the authority of the Federal Property and Administrative Services Act of 1949 ("FPASA"), 41 U.S.C. §§ 251 *et seq.*; chapter 137 of title 10, and the National Aeronautical and Space Act of 1958, 42 U.S.C. §§ 2451 *et seq.*

The OFPP Act does not apply to contractual agreements entered into by Executive agencies that are not procurement contracts. Nor does it apply to grants and cooperative agreements, which by statute are defined as separate types of legal instruments distinct from procurement contracts. 31 U.S.C. §§ 6303-6305. Congress's placement of the Procurement Integrity Act within the OFPP Act and the terms of the statute indicate Congress intended these provisions to apply only to conduct in connection with procurement contracts that are subject to the requirements of the general procurement statutes and the uniform Federal Acquisition Regulation system. Nothing in the legislative history suggests the Act has a broader scope than the OFPP Act of which it is a part or that it applies to transactions that are by statute not procurement contracts.

It should be noted that although the Procurement Integrity Act does not apply to either type of OT, other statutes that do apply to OTs may achieve the same results. The prohibition against theft of property under a contract with the United States, codified at 18 U.S.C. § 641, applies to both types of OTs because it is a statute of general applicability. This statute was successfully used in several Ill Wind prosecutions for improper receipt of insider information covered by the Procurement Integrity Act.

17. **41 U.S.C. §§ 351 et seq, Service Contract Act, 41 U.S.C. §§ 35-45, Walsh-Healey Act, 29 U.S.C. §§ 201-219, Fair Labor Standards Act, (Kaminski Memorandum, Item 17.)**

In General: The applicability of these labor statutes to OTs turns on the basis of the *substance* of the OT, and not on its form. These statutes apply to OTs to the same extent that they apply to procurement contracts. Entities engaged in OTs are neither afforded relief from such statutes nor additionally burdened by them.

17a. 41 U.S.C. §§ 351 *et seq.*, Service Contract Act.

Purpose of the Statute: To establish minimum wages and fringe benefits for service employees working under covered contracts and related subcontracts and to prohibit the contractor or subcontractor from exposing its service employees to unsafe or hazardous working conditions. *Id.*

Summary Conclusion on Applicability: Depending on the terms of the OT instrument, the Service Contract Act, 41 U.S.C. § 351 *et seq.*, could apply.

Analysis: The Service Contract Act applies to every "*contract* entered into by the United States or the District of Columbia in excess of $2,500 . . . the *principal purpose* of which is to *furnish services* in the United States through the use of service employees." 41 U.S.C. § 351(a) (emphasis added).[18] The Service Contract Act does not define "contract" for purposes of applying its terms.

To determine whether the SCA applies only to procurement contracts (and therefore not to OTs), or whether it applies more broadly, one would have to determine whether "furnishing services in the U.S." is the same as "acquiring services for the direct benefit of the Government" as procurement contracts are defined under 31 U.S.C. § 6303. According to the Department of Labor, which is charged with the enforcement of this Act, these terms do not mean the same

18 There are some statutory exemptions that would not generally apply here. *See also* FAR § 22.1001; 29 C.F.R. § 4.104.

thing; the Service Contract Act covers contracts "other than" procurement contracts (and therefore would cover OTs). DOL regulations interpreting the Service Contract Act make clear that there is no requirement that the services in question must be provided directly to the U.S. Government or even for its benefit:

> [T]here is no limitation in the Act regarding the beneficiary of the services, nor is there any indication that only contracts for services of direct benefit to the Government, as distinguished from the general public, are subject to the Act. Therefore, where the principal purpose of the Government contract is to provide services through the use of service employees, the contract is covered by the Act, regardless of the direct beneficiary of the services or the source of the funds from which the contractor is paid for the service..

29 C.F.R. § 4.133.

An OT, in general, would be a contract for the furnishing of research services in the United States by service employees. The Service Contract Act would therefore apply to S&T OTs (which are used to develop dual-use technologies), because there is no requirement that the Government "acquire" those services. It would also apply to Section 845/804 OTs, instruments through which DOD acquires "purely military" research and development services.[19]

This result is consistent with the remedial nature of the Service Contract Act, which is to be liberally construed. *See Menlo Serv. Corp. v. United States*, 765 F.2d 805 (9th Cir. 1985). This conclusion is also consistent with a provision found in DOD's prior request to extend its OT authority to certain pilot production programs:

> The Secretary of Defense may enter, on a pilot basis, into other transactions authorized by section 2371 of title 10, United States Code, for follow-on production of programs initiated as prototype projects under section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160), as amended. Pilot production programs

[19] Under the analysis above, the Service Contract Act could apply either to a S&T OT or to a Section 845/804 OT.

> designated pursuant to this section are subject to such limitations, terms and conditions. . . . as the Secretary may determine. Section 2371(e) of such title 10 is not applicable to the other transactions conducted under the authority of this section. *Nothing in this subsection shall be construed to waive civil rights or labor standards applicable to Federal contracts.*

Letter from DOD General Counsel Judith A. Miller to Vice President Al Gore, dated March 28, 1997, enclosure at 1 (emphasis added). [Attachment 4.] One cannot waive what is inapplicable in the first place; it stands to reason that the drafter of this proposed legislation considered that the "labor standards applicable to Federal contracts" do, in fact, apply to OTs.

A recent opinion of the D.C. Circuit supports this analysis as well. *See Ober United Travel Agency v. Department of Labor*, No. 97-5046 (D.C. Cir. decided Feb. 13, 1998). The *Ober* court considered whether the Service Contract Act applied to a no cost contract allowing appellant travel agency to provide travel-related services to federal employees. The travel agency argued that the Service Contract act applied only to procurement contracts, and that the travel management contract at issue was not a procurement contract as interpreted by 31 U.S.C. § 6303(1) (the Chiles Act) and department regulations because it did not draw upon appropriated funds. *Id.* slip op. at 4. The court rejected this argument in part by suggesting that the Service Contract Act applies more broadly than to procurement contracts under the Chiles Act. The court recognized that the Service Contract Act and the Chiles Act have "different purposes" and that the word "contract" may have a different meaning under the two statutes. *Id.* slip op. at 5.

17b. 41 U.S.C. §§ 35-45, Walsh-Healey Act.

Purpose of the Statute: To require all covered contracts to contain stipulations regarding minimum wages, maximum hours, safe and sanitary working conditions, child labor, and convict labor requirements.

Summary Conclusion on Applicability: Depending on the terms of the instrument, the Walsh-Healey Act could theoretically apply to OTs. As a practical matter, however, OTs would not be "for the manufacture or furnishing of materials, supplies, articles, and equipment" as required by the statute.

Analysis: The Walsh-Healey Act applies to contracts made and entered into by an agency of the United States "for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000." 41 U.S.C. § 35. This act

> [W]as to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment.

Perkins v. Lukens Steel Co., 310 U.S. 113, 128 (1940). Thus, this Act's application to "*any part* of the expenditures of the Government," and its use of the term "furnishing" rather than "procurement" of materials, etc., suggests that the Walsh-Healey Act's scope includes contracts other than procurement contracts and could include OTs. As a practical matter, however, S&T OTs would not be characterized as for the manufacture or furnishing of materials, but rather for the furnishing of R&D services. Therefore, it is unlikely that the Walsh-Healey Act would apply to these OTs.

17c. 29 U.S.C. §§ 201-219, Fair Labor Standards Act.

Purpose of the Statute: To establish minimum wage, maximum hours, and child labor requirements on an industry-wide basis.

Summary Conclusion on Applicability: Generally applies to employers engaging in S&T and Section 805/804 OTs, subject to the exemptions under Section 13 of the Act, 29 U.S.C. § 213.

Analysis: The Fair Labor Standards Act (FLSA) applies to employers with employees "engaged in commerce or in the production of goods for commerce, or . . . employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §§ 206, 207, 212. The Act defines "Commerce" broadly as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b). An entity that is a party to an OT is as likely as any other entity to be so engaged. Clearly, the applicability of this Act has nothing to do with the type of transaction in which such employer may be engaged, so the FLSA could apply to entities that are parties to S&T and Section 845/804 OTs.

18. 41 U.S.C. §§ 701-707, Drug-Free Workplace Act of 1988 (Kaminski Memorandum, Item 18.)

Purpose of the Statute: To eliminate any connection between drug use or distribution and Federal contracts, cooperative agreements, or grants.

Summary Conclusion on Applicability: The Drug-Free Workplace Act does not apply to either S&T or Section 845/804 OT instruments.

Analysis: With respect to contracts, the statute states:

> No person, other than an individual, shall be considered a responsible source, under the meaning of such term as defined in [section 403(8) of this title], for the purposes of being awarded a contract for the procurement of any property or services of a value greater than the simplified acquisition threshold . . . by any Federal agency, other than a contract for the procurement of commercial items . . . unless such person has certified to the contracting agency that it will provide a drug-free workplace by --

41 U.S.C. § 701(a)(1).

There is a similar requirement for contracts with individuals. With respect to grants, the statute says:

> No person, other than an individual, shall receive a grant from any Federal agency unless such person has certified to the granting agency that it will provide a drug-free workplace by --

Id. There is a similar provision for grants to individuals. [cite].

The statute applies to both procurement contracts and grants. Because OTs are other than procurement contracts, grants, and cooperative agreements this statute by its own terms does not apply to OTs. In addition, the statute refers to contracts greater than the simplified acquisition threshold, a term applicable only to procurement contracts (*see* 10 U.S.C. § 2302c; 41 U.S.C. § 252a). It also refers to the definition of "responsible source" in Section 403. This reference is to the statute governing the Office of Federal Procurement Policy ("OFPP Act"), found in Chapter 7 of Title 41, discussed above, which covers procurement contracts. Because OTs are not expressly included in the Drug-Free Workplace Act and because the application of the Act does not extend beyond procurement contracts and grants, the Drug Free Workplace Act does not apply to any type of OT.

19. 41 U.S.C. §§ 10a -10d, Buy American Act (Kaminski Memorandum, Item 18.)

Purpose of the Statute: To provide a preference for domestic products in Government acquisition for public use.

Summary Conclusion on Applicability: The statute does not appear to be applicable to either S&T or Section 845/804 OTs. In view of the strong policies embodied in the statute, it may be appropriate to apply it, as a matter of policy if not law to Section 845/804 OT instruments.

Analysis: The requirements of the Buy American Act are found at 41 U.S.C. § 10. The policies and procedures to implement it are found at FAR Part 25. The statute provides, in relevant part, as follows:

> Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such *unmanufactured articles, materials, and supplies* as have been mined or produced in the United States, and only such *manufactured articles, materials, and supplies* as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States, *shall be acquired for public use*. This section shall not apply . . . if articles, materials, or supplies of the class or kind to be used or the articles, materials or supplies from which they are manufactured are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. This section shall not apply to manufactured articles, materials, or supplies procured under any contract the award value of which is less than or equal to the micro-purchase threshold under [section 428 of this title].

41 U.S.C. § 10a (emphasis added).[20]

A related provision, Section 10d, provides as follows:

> **§ 10d. Clarification of Congressional intent regarding sections 10a and 10b(a)**
>
> In order to clarify the original intent of Congress, hereafter, [section 10a of this title] and that part of section [10b(a) of this title] preceding the words *"Provided, however,"* shall be regarded as *requiring the purchase, for public use* within the United States, of articles, materials, or supplies manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, unless the head of the Federal agency concerned shall determine their purchase to be inconsistent with the public interest or their cost to be unreasonable.

41 U.S.C. § 10d (emphasis added).

The Act's basic requirements were enacted in 1933, Act Mar. 3, 1993, c. 212, Title III, 47 Stat. 1520, and it was amended in 1988 and 1994.

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[20] The analysis above ignores the provisions of the Buy American Act applicable to construction of public works and building located at 41 U.S.C. § 10b, which appear to be irrelevant to the present analysis.

The Buy American Act is concerned with manufactured and unmanufactured articles, materials, and supplies "acquired for public use,"[21] a term used interchangeably with "procured" in the statute.[22] Because any statute that applies only to procurement contracts does not apply to OTs, and the Buy American Act applies only to procurement contracts, the Buy American Act does not apply to OTs.

[In most cases, the statute would not apply to OTs; generally, the Government is not acquiring or procuring the enumerated items for public use, and, in any event, is not using procurement contracts. Research and development activities would not generally qualify as "articles, " "materials," or "supplies." Nevertheless, a prototype delivered to the United States and "used" for evaluation could be viewed as an "article" or "supply" even though the Government may not take title. Nevertheless, such an item probably is not being "acquired" or "procured" under the OT as those terms are commonly understood; the Act would not necessarily apply under its own terms.]

It has been stated that the purpose of the Act is to foster and protect American Industry, American workers and American invested capital. *Textron, Inc. Bell Helicopter Textron Div. v. Adams*, 493 F. Supp. 824, 830 (D.D.C. 1980). Moreover, the Act represents such a significant, deeply ingrained national policy for public procurement that it has been held that the correct Buy American Act clause is to be read into construction contracts by operation of law under the Christian doctrine where an incorrect clause had been included. *S.J. Amoroso Constr. Co. v.*

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[21] The terms "articles, " "materials," and "supplies" are not defined in the statute. The term "public use" means use by the United States. 41 U.S.C. § 10c(b).

[22] The sentence of the statute confirms that it is concerned with *procurement contracts*. Similarly, 41 U.S.C. § 10b-1, since repealed, specifies certain prohibitions on "procurement contracts" and exceptions to the prohibition. It provided that a Federal agency shall not award any "contract" "for the procurement of" an article, material, or supply mined, produced, or manufactured in certain countries, or a service of any contractor or subcontractor that is a citizen or national of certain countries.

United States, 12 F.3d 1072, 1075-76 (Fed. Cir. 1993). It would appear consistent with the purpose and policy of the statute to extend it, as a matter of policy, to OTs.

The Kaminski memorandum states that the Buy American Act, "[a]pplies only in part to 'Other Transactions'." It is unclear what this qualification means.

20. 28 U.S.C. § 1491, Tucker Act, (Added by Working Group.)

Purpose of the Statute: To provide jurisdiction to the Court of Federal Claims in certain contract matters.

Summary Conclusion on Applicability: S&T and Section 845/804 OTs can be considered contracts, although not necessarily "procurement contracts." Accordingly, both types of OTs would be subject to the Tucker Act; the Court of Federal Claims would have jurisdiction over such instruments.

Analysis: The Tucker Act, at 28 U.S.C. § 1491(a)(1), provides that the "Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." The Court of Federal Claims has held that a party alleging this contract jurisdiction must show, in addition to the agent's authority to bind the Government, "a mutual intent to contract including an offer, an acceptance, and consideration passing between the parties." *Thermalon Indus. v. United States*, 34 Fed. Cl. 411, 414 (1995), *citing City of El Centro v. United States*, 922 F.2d 816, 829 (Fed. Cir. 1990); *Fincke v. United States*, 675 F.2d 289, 295 (Ct. Cl. 1982). *Accord Total Med. Management, Inc. v. United States*, 104 F.3d 1314, 1319-20 (Fed. Cir. 1997) (rejecting the holding of *Trauma Serv. Group Ltd. v. United States*, 33 Fed. Cl. 426 (1995), that CHAMPUS Memoranda of Understandings are unenforceable agreements under the Tucker Act); *Trauma Serv. Group v. United States*, 104 F.3d 1321, 1325-26 (Fed. Cir. 1997).

In *Thermalon Industries*, the court rejected the Government's challenges to the court's contract jurisdiction in the case of a suit for damages under a research grant from the National Science Foundation. The court found that the grant embodied the above contractual elements. It also rejected the Government's argument that, under the Chiles Act, only federal procurement contracts came within the court's contract jurisdiction because that act distinguishes the use of procurement contracts from use of grants or cooperative agreements. Judge Andewelt, in a well-reasoned opinion, found that "[t]here is no suggestion in the Grant [Chiles] Act that procurement contracts are the only type of contracts enforceable under the Tucker Act or that grant agreements that satisfy all of the ordinary requirements for a Government contract should not be classified as contracts enforceable under the Tucker Act." *Thermalon Industries*, 34 Fed. Cl. at 417.

The "Other Transaction" authority under 10 U.S.C. 2371 is the authority of DOD to "enter into transactions (other than contracts, cooperative agreements, and grants)" for "basic, applied, and advanced research projects"; under Section 845/804 is the authority "to carry out prototype projects that are directly relevant to weapons or weapons systems proposed to be acquired or developed by the Department of Defense." Any argument that the phrase "transactions (other than contracts, cooperative agreements, and grants)" deprives the federal courts of Tucker Act contract jurisdiction should be rejected for the closely similar reasons stated by Judge Andewelt in *Thermalon Industries* in interpreting the Chiles Act.

Under Section 12 of the Administrative Disputes Resolution Act of 1996, Pub. L. 104-320, effective on 12/31/96, the U.S. Court of Federal Claims and the federal district courts have concurrent jurisdiction under amended 28 U.S.C. § 1491(b)(1) "to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for *bids or proposals for a*

proposed contract or to *a proposed award or the award of a contract* or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1) (emphasis added). The underlined language would seem broad enough to reach solicitations and awards relating to "contracts" (not necessarily limited to procurement contracts) under the S&T and Section 845/804 OT authorities. Nevertheless, absent any meaningful statutory or regulatory criteria or court decision on the exercise of this authority sufficient to provide an aggrieved party standing to sue, there is a question whether this bid protest remedy would be available unless the complaining party could show that the Government materially and prejudicially departed from the terms of its solicitation in making a competitive award.

21. 35 U.S.C. §§ 200-212 (1980), (Bayh-Dole Act) (Added by Working Group.)

Purpose of the Statute: Sets forth the 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 (subject inventions). This policy has been extended to large businesses by Executive Order No. 12591 (April 10, 1987).

Summary Conclusion on Applicability: The requirements of the Bayh-Dole Act are not mandatorily applicable to either S&T or Section 845/804 OT instruments. DARPA, however, applies such requirements as a matter of policy unless the contractor can demonstrate a need to deviate from such policy.

Analysis: The Bayh-Dole Act sets forth the 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 (subject inventions). This patent policy also has been extended to large businesses

by Presidential Memorandum dated February 18, 1983 and Executive Order No. 12,591, dated April 10, 1987. The contractor (or recipient, in the case of grants and cooperative agreements) is permitted to retain title to subject inventions and the Government receives a nonexclusive, nontransferable , irrevocable, paid-up license to practice or have practiced subject inventions on behalf of the United States throughout the world.

The Bayh-Dole Act is applicable when research is conducted under a Government "funding agreement," which is defined in the Act at 35 U.S.C. § 201(b) to be a contract, grant, or cooperative agreement. Congress evidently intended here that the term "contract" meant "procurement contract" rather than a common law contract. Grants and cooperative agreements are contracts under standard contract law. *Thermalon Indus., Ltd. v. United States*, 34 Fed. Cl. 411 (1995) ("grant" was a "contract" for Tucker Act purposes). *See* analysis of the applicability of the Byrd Amendment, item no. 14, *supra*.

In addition, the legislative history of the statute authorizing S&T OTs (10 U.S.C. § 2371) expressly indicates that the Bayh-Dole Act is not intended to apply to such transactions because they are not a contract, grant, or cooperative agreement. The conference report of the House and Senate Armed Services Committees on the National Defense Authorization Act for Fiscal Year 1992 reads as follows:

> The conferees also recognize that the regulations applicable to the allocation of patent and data rights under the procurement statutes may not be appropriate to partnership arrangements in certain cases. The conferees believe that the option to support "partnership," pursuant to section 2371 of title 10, United States Code, provides adequate flexibility for the Defense Department and other partnership participants to agree to ***allocations of intellectual property rights*** in a manner that will meet the needs of all parties involved in a transaction.[23]

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[23] H.R. Rep. 102-311, 102d Cong., 1st Sess. (1991), *reprinted* in 1991 U.S.C.C.A.N. 1132 (emphasis added).

Additionally, the House Armed Services Committee report on the 1995 National Defense Authorization reads as follows (emphasis added):

> It is the general policy of the Technology Reinvestment Project (TRP) to negotiate intellectual property rights in "partnerships" so as to optimize the chances of successful commercialization. TRP policy provides that the Federal Government should avoid acquiring rights if that will impede commercialization. Foreign access to technology is scrutinized and, if deemed necessary, restricted. Broad exposure of the technology among partnerships participants is encouraged.
>
> The Advanced Research Projects Agency (ARPA) can fully effectuate these policies because it has great flexibility to tailor ***patent and other intellectual property rights*** provisions under its "other transactions" authority. Other TRP agencies are to some degree constrained by their organic statutes; government-wide policies applicable to technology developments supported by ***contracts, grants, or by cooperative agreements***, or by agency policies developed years ago. The committee encourages the other DOD agencies participating in the TRP and the non-DOD agencies cooperating in the TRP to review their policies on intellectual property rights."[24]

In addition, the Senate National Security Committee has stated that "the committee did not intend that such transactions be subject to the provisions of Public Law 96-517, as amended" [the Bayh-Dole Act]. Senate Comm. on Armed Services, Report on the National Defense Authorization Act for FY 97, S. Rep. No. 267, 104th Cong., 2d Sess. 314 (1996).

The interpretation that the Bayh-Dole Act does not apply to DOD OTs is consistent with NASA's interpretation that the Act does not apply to OTs issued by NASA under NASA's separate statutory authority found at 42 U.S.C. § 2473(c)(5). NASA Memorandum from G. P. Miller through G. P. Mannix to G. Frankle dated May 28, 1993 re: "Technology Reinvestment Project (TRP): Funded Space Act Agreements and Intellectual Property Rights," at 2.

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[24] H.R. Rep. 103-499, 103d Cong., 2d Sess. 285 (1994). In 1991, ARPA's test authority to enter into OTs for R&D was broadened to cover all of DOD and make permanent. Pub. L. 102-190, § 826 (1991).

At the request of Congress, GAO recently conducted an extensive study of DARPA's use of S&T OTs. Although the GAO study indicated that some in DOD believed that the Bayh-Dole Act applied to OTs, GAO believed this position was wrong. *See* U.S. General Accounting Office, Publication No. NSIAD-96-11 (B-270789), "DOD Research-Acquiring Research by Non-traditional Means" (March 29, 1996), at 13.

As noted above, in 1996, a DOD Integrated Product Team (IPT) conducted a study of the military services' use of both S&T OTs and those under Section 845/804. The study agreed with DARPA's[25] and GAO's interpretation that the Bayh-Dole Act does not apply to either S&T or Section 845/804 OTs. *See* "Final Report of the Integrated Product Team on the Services' Use of 10 U.S.C. 2371 'Other Transactions' and 845 Prototype Authorities" (1996), at 10.

On December 2, 1997, DOD issued guidance on Technology Investment Agreements stating that OTs are not subject to the Bayh-Dole Act. DDR&E Memorandum, "Subject: Instruments for Stimulation or Support of Research," dated December 2, 1997, Attachment: "Guidance on 'Technology Investment Agreements' for Military Departments and Defense Advanced Research Projects Agency (DARPA)," at 7. This guidance was updated on March 24, 1998 with the same interpretation that OTs are not subject to the Bayh-Dole Act.

The legislative history of Section 845/804 shows that it was the intent of Congress to expand DARPA's use of the flexible "other transaction" authority, on a test basis, to include prototype projects directly relevant to weapons systems. The legislative history indicates no change was intended regarding the non-applicability of the Bayh-Dole Act to Section 845/804 OTs. The legislative history of Section 845 reads in pertinent part as follows:

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[25] The Advanced Research Projects Agency (ARPA) was renamed the Defense Advanced Research Projects Agency (DARPA) by Pub. L. 104-106 under Title IX of the Fiscal Year 1996 Authorization Act.

Mr. BINGAMAN. Mr. President, the amendment which I am offering would allow the Advanced Research Projects Agency to use cooperative agreements authority on a pilot basis to execute some of its defense projects. ARPA already has the authority to use cooperative agreements and other transactions to implement its dual-use projects, where industry contributes its own resources, and use of contracts would not be appropriate. Indeed ARPA expects to utilize that authority extensively to implement the programs under the Technology Reinvestment Project.

My amendment would permit ARPA on a pilot test basis over the next 3 years to experiment with use of cooperative agreements in carrying out its purely military research and development projects, to which we should not expect industry to contribute its own resources. Use of this more flexible authority is consistent with the thrust of the National Performance review which the Vice President submitted to the President yesterday and with the desire for more flexibility in the defense acquisition system. ARPA led the way in use of cooperative agreements for dual-use projects, such as the high performance computing program. I am sure the agency will make good use of this new authority and urge my colleagues to support this amendment.

Mr. NUNN. This amendment allows ARPA to use the authority in section 2371 of title X, U.S.C. to carry out pilot projects that are directly relevant to weapon or weapons systems. This amendment will allow ARPA to use the cooperative agreements of purely military research as a 3-year test.

The PRESIDING OFFICER. The chair, hearing no further debate, without objection, the amendment offered on behalf of the Senator from New Mexico [Mr. Bingaman] is agreed to.

Mr. WARNER. I move to lay that motion on the table. The motion to lay on the table was agreed to.[26]

Section 804 of the National Defense Authorization Act for Fiscal Year 1997 (Pub L. No. 104-201) extended the Section 845 test authority for three years, through September 30, 1999, and broadened the authority to permit use by all of DOD.

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[26] 139 Cong. Rec. S11158, S11288 (daily ed. Sept. 9, 1993).

There is nothing in the legislative history of Section 804 that indicates a change in Congressional intent that the Bayh-Dole Act does not apply to Section 845/804 OTs for prototype projects. The House Report on Section 804 reads in pertinent part as follows.

> "This section would reauthorize and expand to the military services the authority provided by section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160) to allow additional flexibility in the acquisition of prototype technologies and systems."[27]

The legislative history of both 10 U.S.C. § 2371 and Section 845/804 indicates that the Bayh-Dole Act is not intended to apply to such transactions. GAO and DOD agree with this interpretation. Nevertheless, although DOD has flexibility under OTs to deviate from the general policy of the Bayh Dole Act, DARPA rarely deviates from the general policy of Bayh-Dole when negotiating OTs. To obtain an exemption from the general policy, DARPA requires that OT contractors demonstrate that the general policy is inconsistent with the goals of a particular research project. Moreover, in all cases the OT contractor must provide for march-in rights [citation] to allow the Government to license subject inventions for commercial purposes if the title holder fails to take reasonable steps to achieve practical application or if other specified conditions occur.[28]

Some of the concessions granted by DARPA when compelling justification is shown include delaying the effective date of the Government purpose license (*e.g.*, the license begins 5 years after the end of the term of the OT) and specifically defining what are reasonable efforts toward practical application that preclude exercise of march-in rights.[29]

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27 H.R. Rep. 104-563, 104th Congress, 2d Sess. 325-326 (1996).

28 Richard L. Dunn, "Using Other Transactions in Cooperative Government-Industry Relationships to Support the Development and Application of Affordable Technology," at 5-6.

29 Advanced Research Projects Agency, Draft Guidance for Use of Other Transactions at 9 (February 1995).

22. 10 U.S.C. § 2320 and § 2321, Technical data provisions applicable to DOD (Added by Working Group.)

Purpose of the Statute: To provide for regulations to define the legitimate interest of the U.S. and of a contractor or subcontractor in technical data pertaining to an item or process.

Summary Conclusion on Applicability: The legislative history cited above with respect to the applicability of the Bayh Dole Act to OTs indicates that 10 U.S.C. § 2320 and 10 U.S.C. § 2321 and their implementing regulations are not applicable to OTs.

Analysis: In 1984, Congress enacted 10 U.S.C. § 2320 and 10 U.S.C. § 2321.[30] 10 U.S.C. § 2320 directed DOD to issue regulations covering rights in technical data developed under DOD contracts. Such regulations were issued as an interim rule in the DOD FAR Supplement (DFARS) in October 1988 and in a final rule in June 1995. 10 U.S.C. § 2321 established procedures for validation of proprietary data delivered under DOD contracts. Implementing regulations were issued in the DFARS in the technical data rights interim rule in October 1988 and in the technical data rights final rule in June 1995. 60 FR 33464 (June 28, 1995).

10 U.S.C. § 2320 is included in Chapter 137, Title 10, U.S. Code, which is concerned with procurement contracts. 10 U.S.C. § 2320(a)(1) requires DOD to prescribe regulations to define the legitimate interest of the U.S. and of a contractor or subcontractor in technical data pertaining to an item or process. 10 U.S.C. § 2320(a)(1) also requires that such regulations be made a part of the DFARS. The FAR and its supplements only apply to procurement contracts.[31] Therefore, 10 U.S.C. § 2320 does not apply to OTs.

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[30] Pub. L. No. 98-525, Section 2320 limits in certain ways the conduct of both DOD and its contractors in negotiating rights in technical data. Sections 2320 and 2321 do not cover rights in computer software.

[31] FAR §§ 1.101, 1.301 & 2.101 (definitions of "acquisition" and "contract"). Advanced Research Projects Agency, Draft Guidance for Use of Other Transactions (February 1995), at 1.

Similarly, 10 U.S.C. § 2321 (validation procedures) is also included in Chapter 137, Title 10, U.S. Code, which is applicable only to procurement contracts. 10 U.S.C. § 2321 states that it applies to any contract for supplies or services entered into by DOD that includes provisions for the delivery of technical data. 10 U.S.C. § 2321 was implemented in the October 1988 DFARS interim rule pertaining to technical data and the June 1995 final rule. The FAR and its supplements apply only to procurement contracts.[32] Again, therefore, 10 U.S.C. 2321 and its implementing regulations should not apply to OTs.

The legislative history cited above with respect to the applicability of the Bayh Dole Act to OTs indicates that 10 U.S.C. § 2320 and 10 U.S.C. § 2321 and their implementing regulations are not applicable to OTs. The conference report of the House and Senate Armed Services Committees on the National Defense Authorization Act for Fiscal Year 1992 reads as follows.

> The conferees also recognize that the regulations applicable to the allocation of patent *and data rights* under the procurement statutes may not be appropriate to partnership arrangements in certain cases. The conferees believe that the option to support partnerships pursuant to section 2371 of title 10, United States Code, provides adequate flexibility for the Defense Department and other partnership participants to agree to allocations of intellectual property rights in a manner that will meet the needs of all parties involved in a transaction.[33]

Additionally, the House Armed Services Committee report on the 1995 Fiscal Year National Defense Authorization Act reads as follows:

> It is the general policy of the Technology Reinvestment Project (TRP) to negotiate intellectual property rights in "partnerships" so as to optimize the chances of successful commercialization. TRP policy provides that the Federal Government should avoid acquiring rights if that will impede commercialization. Foreign access to technology is

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32 *Id.*

33 Note 25, *supra* (emphasis added).

scrutinized and, if deemed necessary, restricted. Broad exposure of the technology among partnerships participants is encouraged.

The Advanced Research Projects Agency (ARPA) can fully effectuate these policies because it has great flexibility to tailor ***patent and other intellectual property rights provisions*** under its "other transactions" authority. Other TRP agencies are to some degree constrained by their organic statutes; government-wide policies applicable to technology developments supported by ***contracts, grants, or by cooperative agreements***, or by agency policies developed years ago. The committee encourages the other DOD agencies participating in the TRP and the non-DOD agencies cooperating in the TRP to review their policies on intellectual property rights.[34]

(Emphasis supplied.)

23. 18 U.S.C. § 1905, Trade Secrets Act (Added by Working Group.)

Purpose of the Statute: To protect trade secrets or other confidential information obtained by the Government.

Summary Conclusion on Applicability: The Trade Secrets Act applies to information obtained by the Government in connection with use of both S&T and Section 845/804 OT instruments.

Analysis: The Trade Secret Act makes it a crime for an employee of the U.S. to publish or disclose trade secrets or other confidential information obtained as a result of Government employment. The Trade Secrets Act reads an follows:

§ 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the

[34] H.R. Rep. 103-499, 103d Cong., 2d Sess. 285 (1994) (emphasis added).

course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns, or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.[35]

18 U.S.C. § 1905.

Statutes of general applicability apply to OTs.[36] The language in 18 U.S.C. § 1905 applies generally and is not limited by either the type of funding instrument used by the Government or by the nature of the transaction. In fact, no Government funding instrument need be involved. Therefore, the Trades Secrets Act applies to both categories of OTs.

24. 5 U.S.C. § 552, Freedom Of Information Act (FOIA), as amended by FARA (Added by Working Group.)

Purpose of the Statute: To create uniform agency procedures designed to open the administrative process to the scrutiny of the public by increasing access to documents in Government files.

Summary Conclusion on Applicability: The act applies to OT documents to the same extent as procurement contract documents.

Analysis: There is nothing in the FOIA that would apply to a procurement contract yet not apply to an S&T or Section 845/804 OT. The FOIA makes available "records," which would cover contract documents as well as any documents memorializing OTs. 5 U.S.C.

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35 *As amended* Oct. 28, 1992, Pub. L. 102-550, Title XIII, § 1353, 106 Stat. 3970.

§ 552(a)(3). The exceptions to FOIA availability under 5 U.S.C. § 552(b) similarly do not turn on the form of the document but rather on the content.

Nevertheless, Section 821 of the National Defense Authorization Act for FY 1997, Pub. L. 104-201 (effective Sept. 23, 1996) in effect created a new exception to FOIA availability that may affect OTs differently from contracts. Section 821 created new subsections 10 U.S.C. § 2305 (g) and 41 U.S.C. § 253b(m), which prohibit the release of unsuccessful proposals under the FOIA. "Proposal" is defined in Section 821 as any proposal submitted by a contractor in response to a solicitation for a competitive proposal. It may be that proposals for OTs are more likely to be unsolicited or otherwise submitted in a non-competitive context, than are proposals for traditional procurement contracts.[37] To that extent, unsuccessful OT proposals may be less likely to be excluded from FOIA coverage. On the other hand, Section 804 of the National Defense Authorization Act for FY 1997, Pub. L. 104-201, which extended Section 845 authorization for three more years, requires that competitive procedures be used to the maximum extent possible on Section 845 projects. This may bring more OT proposals within the scope of the FOIA exception created by Section 821 for normal competitive proposals.

In addition, the National Defense Authorization Act of 1998, P.L. 105-85, § 832, 111 Stat. 1629 (1997), to be codified at 10 U.S.C. § 2371(i), expressly exempts from release under FOIA the following types of information submitted to DoD in a competitive or noncompetitive process having the potential for award of an OT: (1) a proposal, proposal abstract, and supporting documents, (2) a business plan submitted on a confidential basis, and (3) technical

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[36] Richard L. Dunn, "Using Other Transactions in Cooperative Government-Industry Relationships to Support the Development and Application of Affordable Technology," at 6.

[37] *See, however*, footnote 5, *supra*

information submitted on a confidential basis. The foregoing types of information are exempt from release under FOIA for five years after receipt by DoD.

25. 31 U.S.C. § 1304, Judgments, awards, and compromise settlements (Added by Working Group.)

Purpose of the Statute: To provide an appropriation to pay judgments, awards, compromise settlements, interest, and costs under a number of prescribed circumstances, including a board of contract appeals decision.

Summary Conclusion on Applicability: Payment from the Judgment Fund would be permitted for an OT entered into under Section 2371 or Section 845/804, provided one of the circumstances described in section 1304 exists.

Analysis: The operative part of Section 1304 is as follows:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when -
>
> (1) payment is not otherwise provided for;
>
> (2) payment is certified by the Secretary of the Treasury; and
>
> (3) the judgment, award, or settlement is payable--
>
> (A) under section 2414, 2517, 2672, or 2677 of title 28;
>
> (B) under section 3723 of this title;
>
> (C) under a decision of a board of contract appeals; or
>
> (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 § 42 U.S.C. 2473).

31 U.S.C. § 1304.

Provided one of the circumstances listed in (a)(3) exists, the Judgment Fund would be available in the case of a S&T or Section 845/804 OT.

26. 31 U.S.C. § 1341, Limitations on expending and obligating amounts, (Added by Working Group.)

Purpose of the Statute: To prohibit involving the Government in a contract or obligation for the payment of money in advance of an appropriation.

Summary Conclusion on Applicability: Because the statute applies to "obligations," in addition to "contracts," it would apply to any OTs that commit the Government to expend funds.

Analysis: Section 1341 of title 31, the "Anti-Deficiency Act," provides as follows:

> (a)(1) An officer or employee of the United States Government or of the District of Columbia government may not --
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;
>
> (C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 902] or
>
> (D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 902].
>
> (2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.
>
> (b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

31 U.S.C. § 1341.

The section applies to any "expenditure or obligation," regardless of the nature or form of the instrument or transaction involved. The Comptroller General has applied the prohibition in a number of circumstances other than contracts.

27. **31 U.S.C. §§ 3801 *et seq.*, Administrative Remedies for False Claims and Statements, (Added by Working Group.)**

Purpose of the Statute: To provide civil penalties for any person who knowingly submits a false claim.

Summary Conclusion on Applicability: The coverage of the statute is very broad, and would appear to include an OT under either Section 2371 or Section 845/804.

Analysis: The Civil False Claims Act is chapter 38 of title 31. A "claim" is defined in Section 3801(3) as:

> (3) "claim" means any request, demand, or submission --
>
> (A) made to an authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

31 U.S.C. § 3801(3).

If a party to either category of OT submits a false claim, as defined, to the Government, the administrative sanctions of Section 3801 *et seq.* would apply.

28. **10 U.S.C. § 2306a and 41 U.S.C. § 254b (Truth in Negotiations Act) (Added by the Working Group)**

Purpose of the Statute: Requires the submission of cost or pricing data on negotiated contracts in excess of $500,000, as well as for certain subcontracts and contract modifications.

Summary Conclusion on Applicability: The statute applies only to procurement contracts, and therefore does not apply to OTs under either section 2371 or 845/804.

Analysis: The Truth in Negotiations Act, as amended, provides that an agency must require offerors, contractors, and subcontractors to submit cost or pricing data for negotiated contracts and contract modifications in excess of $500,000. The term "cost or pricing data" is defined as all facts that, as of an agreed upon date, a prudent buyer or seller reasonably would expect to affect price negotiations significantly. The data must be certified as accurate, complete, and current; the Government is entitled to a price adjustment if the data prove to be defective, i.e., inaccurate, incomplete, or not current. Certified cost or pricing data are not required to be submitted when the contract price is based on adequate price competition, the price is set by law or regulation, or the contract is for the acquisition of a commercial item.

The statutory requirement for the submission of cost or pricing data initially applied only to the Department of Defense and the National Aeronautics and Space Administration. The provision, now codified as section 2306a of title 10, was enacted in 1962 as an amendment to the Armed Services Procurement Act of 1947. Section 2306a is part of Chapter 137 of title 10, entitled "Procurement Generally." Although for many years the requirement applied to civilian agencies by regulation, Congress extended the statute to civilian agencies in section 2712 of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175, 1181 (1984), which added a TINA requirement to Title III ("Procurement Provisions") of the Federal Property and Administrative Services Act, now codified at 41 U.S.C. § 254b.

The legislative history of the original TINA statute indicates that it was one of a number of "changes in the law controlling procurement of property and services." S. Rep. No. 87-1884 (1962). The Senate report cited audits by the General Accounting Office disclosing "unwarranted profits" on defense procurement contracts because of deficiencies in the data used to price the contracts. Requiring contractors to provide cost or pricing data was designed to

place the Government on equal footing with the contractor when negotiating prices in a noncompetitive environment. The reports accompanying CICA indicate that the intent was to extend the statutory requirement to civilian agencies and create a uniform dollar-value threshold at which the requirement would apply. See, e.g. H.R. Rep. No. 861, 98th Cong., 2d Sess. (1984). There is nothing in the legislative history of either enactment that would suggest an intent for the requirements of TINA to apply outside the procurement arena.

Under 10 U.S.C. section 2371, an OT is an instrument other than a contract, grant, or cooperative agreement that is used to carry out a research project. Generally, the authority may be used when a "standard contract, grant, or cooperative agreement for such project is not feasible or appropriate." 10 U.S.C. § 2371(e)(2). OTs for prototypes under 845/804, however, are not subject to this limitation. Nevertheless, as used in section 2371, "standard contract" refers to a "procurement contract" under the Chiles Act. Thus, OTs under sections 2371 and 845/804 are a means for carrying out research and acquiring prototypes without using procurement contracts. Although OTs under 10 U.S.C. 2371 and sections 845/804 may contain the elements of common law contracts, under this statutory scheme they are not procurement contracts.

Based on the statutory enactments and their legislative histories, it is clear that the requirement of TINA for cost or pricing data applies only to procurement contracts. The requirement is part of the general procurement-related provisions found in chapter 137 of title 10, U. S. Code, and Title III of the Federal Property and Administrative Services Act. "Cost or pricing data" is defined in terms of the expectations of buyers and sellers in procurement transactions. The legislative history of TINA indicates that Congress was concerned about procurement issues, and there is no suggestion that the requirements were intended to apply to

instruments other than procurement contracts. Because OTs authorized by sections 2371 and 845/804 are not procurement contracts, the requirements of TINA do not apply to them.

29. 41 U.S.C. § 422 (Cost Accounting Standards) (Added by the Working Group)

Purpose of the Statute: Provides for the promulgation of uniform standards for allocating costs to Government contracts.

Summary Conclusion on Applicability: The statute applies only to procurement contracts, and therefore does not apply to OTs under 10 U.S.C. 2371 or section 845/804.

Analysis: Section 26 of the Office of Federal Procurement Policy (OFPP) Act of 1974, 41 U.S.C. 422, established within OFPP an independent Cost Accounting Standards (CAS) Board. The Board has the exclusive authority to make, amend, and interpret cost accounting standards designed to achieve uniformity and consistency in the measurement, assignment, and allocation of costs to Government contracts. The standards promulgated by the Board must be used on "all negotiated prime contract and subcontract procurements with the United States in excess of $500,000." The standards need not be used, however, in an acquisition of commercial items or when the negotiated price is based on prices set by law or regulation.

The legislative history of section 26 indicates that Congress believed there was a need to update and revise the cost accounting standards promulgated by the predecessor board, which had gone out of existence in 1980 for lack of an appropriation. *See, e.g.*, S. Rep. No. 424, 100th Cong. 2d Sess. 15 (1988). The Senate report cited pension costs and insurance costs as examples of areas in need of attention. The standards of the previous board applied only to procurement contracts, [cite] and there is no indication that Congress intended in 1988 to extend the applicability of cost accounting standards to other types of arrangements or instruments.

Under 10 U.S.C. section 2371, an OT is an instrument other than a contract, grant, or cooperative agreement that is used to carry out a research project or, under section 845/804 to carry out weapon system prototype projects. As used in section 2371, "contract" refers to a "procurement contract" under Chapter 63 of title 31, U.S. Code, the so-called Chiles Act. Thus, sections 2371 and 845/804 provide authority for carrying out research and acquiring prototypes without using procurement contracts. Although OTs under 10 U.S.C. 2371 and sections 845/804 may contain the elements of common law contracts, under this statutory scheme they are not procurement contracts.

The statute requiring the use of cost accounting standards applies only to procurement contracts, and therefore does not apply to OTs under sections 2371 or 845/804. Section 422 of title 41, U.S.C., was enacted as section 26 of the OFPP Act, a Government-wide procurement statute. The only instruments referenced in the statute are contracts and subcontracts. In terms of applicability, section 26 specifically provides that the cost accounting standards promulgated under the section are required for use on "all negotiated prime contract and subcontract *procurements*." 41 U.S.C. 422(f)(2)(A) (emphasis added). There is nothing in the legislative history to suggest an intent that statutory cost accounting standards would be required for use on other than procurement contracts. Because OTs are not procurement contracts, section 26 of the OFPP Act, 41 U.S.C. 422, does not apply to them.