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DOD

DARPA to Seek Legislation for Pilot Program Expanding Use of Other Transactions Authority

The Defense Advanced Research Projects Agency plans to seek legislative authority for a pilot program that would permit the use of non-contractual "other transactions"--whose use is currently limited by statute to research and development or prototyping efforts--as some of its current prototyping programs move into the acquisition phase, a DARPA official said Feb. 27.

DARPA Deputy Director Lee Buchanan told FCR following a House National Security Committee panel hearing on the fiscal year 1998 budget request for defense research and development that without such legislation, a program would have to begin the traditional acquisition process at the beginning--that is, at Milestone 1, with approval to begin a new acquisition program--and would lose all the benefit gained from the use of "other transactions" authority in the R&D and prototyping phases.

Because the traditional acquisition process is "not tolerant" of a program that could otherwise enter at Milestone 3, with production approval, Buchanan said "we need legislation to bridge the gap." He cited the arsenal ship program as an example of such a program.

In his prepared statement, Buchanan said that "DARPA is providing assistance and sharing lessons learned with the military services and DOD components . . . to facilitate the wider use of these innovative acquisition approaches." According to Buchanan, DARPA has informed the committee of its view that further legislative authority is needed in this area.

The so-called "other transactions" authority permits arrangements with private firms that bypass many of the statutory and regulatory requirements governing federal contracting.

The original statutory authority--Section 845 of the FY 1994 defense authorization act--extended only to DARPA and was to expire Nov. 30, 1996, but DARPA has had such success with its other transaction projects that DOD pressed Congress to extend the authority. Accordingly, Congress, in Section 804 of the FY 1997 defense authorization act, extended DARPA's authority to enter into other transactions until Sept. 30, 1999, and made the authority available to the military services and other defense agencies.

Other transactions are exempt from 19 statutes, including the Competition in Contracting Act, the Contract Disputes Act, the bid protest system, access to contractor records for audit purposes, PL 85-804 extraordinary contractual relief, and the Procurement Integrity Act. Other transactions resemble government-industry partnerships, and usually involve cost-sharing. The advantages of such arrangements include flexibility, simplicity, speed, and ability to leverage commercial state-of-the-art technology. However, some within the contracting community have criticized the authority as a "blank check" approach for DOD, and have warned that it could ultimately lead to fixed-price, cost-shared development efforts (66 FCR 599).

Hill, Industry, Bar Concerns In fact, Senate Armed Services Committee staff member Jon Etherton told the American Bar Association Section of Public Contract Law at its meeting in Washington, D.C. Feb. 27, that the committee has some concerns with expanding the use of other transactions beyond R&D, and that it will be carefully reviewing any legislative proposal DOD might make along those lines.

At the Section's Council meeting March 1, concern was expressed that what started out as an experiment on a few narrowly defined R&D contracts could eventually become the norm for all R&D governmentwide. (The National Aeronautics and Space Administration has had such authority for years, and at least one other agency is considering using it.) It was evident during the discussion that there was a lack of consensus among the Section members on the merits of such authority. Some contractor members praised other transactions as a huge success, while others--chiefly from the private bar--warned that it could undermine competition and also shift too much risk to contractors. The Section has formed an ad hoc group that is preparing a white paper on the issue, but it was conceded that the DARPA legislative proposal may necessitate an expedited approach.

Likewise, the National Security Industrial Association, in a recent position paper, says it is concerned that use of other transaction authority "may be used indiscriminately to avoid measures aimed at protecting the taxpayer, the contractor and the government." NSIA says it "will continue to monitor the implementation and use of" other transaction authority.

DARPA officials have previously conceded that legislative proposals in this area are likely to be controversial in both Congress and industry, and that it may take more than one round of legislation to "make it happen" (66 FCR 599).

Jones Defends RDT&E Budget Request The hearing before the Subcommittee on Military Research and Development did not address other transaction authority, but focused more generally on the adequacy of the administration's budget request for defense research, development, test and evaluation.

Subcommittee Chairman Curt Weldon (R-Pa) noted that the \$35.9 billion RDT&E request is less than the \$36.6 billion appropriated for FY 1997. Of the total sought for FY 1998, \$7.4 billion is for DOD's core science and technology program--a decrease from the current level of \$7.8 billion.

While the budget request for basic research increases, the request for exploratory development decreases, Weldon said. Overall, in constant FY 1997 dollars, the science and technology program has been reduced about 13 percent since FY 1994, to its lowest level since FY 1980, he said.

Anita K. Jones, director of defense research and engineering, defended the request as containing "the minimum funding for science and technology to ensure that our future forces will possess the technological edge to dominate future battlefields while sustaining minimal casualties." Last year, Congress cut DOD's basic research request by \$43.8 million, bringing overall cuts to nearly \$75 million, or about 6 percent of DOD's basic

research program, she said. The request this year restores this amount. However, Jones noted that due to "tremendous budgetary pressures on the modernization account," the entire S&T budget request is 7 percent less than last year's budget in constant FY 1997 dollars.

DOD Labs Jones told the panel that DOD laboratories have reduced personnel by 20 percent over the past few years, and that DOD is currently reviewing the lab and T&E structure to explore the possibility of a further 20 percent reduction. DOD plans to draft legislation in this area, she said. Also, she noted that DOD is continuing to implement its five-year management plan for federally funded research and development centers.

When several members expressed concern about potential approaches to laboratory consolidation, Jones assured the panel that DOD will work with Congress to define a process that permits appropriate reductions, and may begin the dialog within the next month.

Buchanan noted that DARPA reorganization and downsizing is reflected in this year's budget request--down to \$2 billion from \$2.8 billion in FY 1997. He called this figure "about right," and said that no further reductions are necessary.