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DOD

Guidance Extends Other Transaction Authority To Services, Lists Inapplicable Statutes

Under Secretary of Defense for Acquisition and Technology Paul G. Kaminski Dec. 14 issued policy guidance that will significantly broaden the Defense Department's use of statutory authority to enter into "other transactions"--arrangements with private firms that are radically different from traditional contracts--for certain prototype projects.

The guidance implements a provision (Section 804) of the fiscal 1997 defense authorization act that extends the authority of the Defense Advanced Research Projects Agency (DARPA) to enter into transactions other than contracts until Sept. 30, 1999, and makes it available to the military services and other defense agencies designated by the secretary of defense.

The original statutory authority to use "other transactions"--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 allow the military services to use the authority as well. Other transactions bypass many of the statutory and regulatory restrictions of traditional contracting. Among other things, Section 845 authority makes the Competition in Contracting Act, the Federal Acquisition Regulation, the DFARS, and DOD directives and milspecs inapplicable. Under Section 845, use of competitive procedures when entering into other transactions is required to the "maximum extent practicable"--a much more discretionary standard than the current CICA "full and open competition" standard.

Other transactions are akin to a government-industry partnership and typically entail cost sharing, which keeps the government's price down. Using other transactions to acquire technology is seen as a way to attract commercial firms that might refuse to do business with the government under conventional contract terms and conditions. The virtues of such arrangements include flexibility, simplicity, speed, and ability to leverage commercial state-of-the-art technology. "Thinking outside the box" is at the heart of all such arrangements. Among other things, other transactions allow for allocation of intellectual property rights on a negotiated basis. A whole different terminology is used; in lieu of detailed statements of work and specifications, there are "task

description documents" and "system capability documents." Because there are virtually no standard provisions, other transactions entail a significant amount of tailoring to each transaction.

Good Business Sense, Safeguards 'Essentials'; Thus, good judgment and close cooperation are essential. Conventional audit and oversight mechanisms are replaced by government-industry integrated teams.

In his memo, Kaminski says, "I believe it is essential that section 845 instruments incorporate good business sense and appropriate safeguards to protect the government's interest. This includes assurances that the cost to the government is reasonable, the schedule and other requirements are enforceable, and the payment arrangements promote on-time performance."

Under Section 845, other transactions may be used for purely military R&D, and for technology demonstrations or prototypes "directly relevant" to a weapon system or systems proposed to be acquired or developed by the DOD.

Kaminski's guidance says that "[w]hen a prototype project, under the authority of Section 845, is used as a precursor to a major defense acquisition program, I expect to be advised of the transition strategy for follow-on contracts at least 30 days prior to award of the "other transaction," Kaminski says. The transition strategy must address how the DODD 5000.1 and DOD 5000.2R requirements will be applied to the acquisition program.

Inapplicability of Certain Procurement Statutes An attachment to Kaminski's guidance lists 19 statutes inapplicable to other transactions. However, Kaminski says that the list is provided "for guidance only, and is not intended to be definitive." 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 determine its applicability or inapplicability to a particular funding arrangement using an other transaction, Kaminski says. "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' is contemplated."

That list of inapplicable statutes includes:

- (1) CICA.
- (2) Contract Disputes Act.
- (3) Procurement protest system (Subtitle D of CICA).
- (4) PL 85-804, extraordinary contractual relief.
- (5) 10 USC 2313, examination of contractor records by agencies and the General Accounting Office, includ-

ing subpoena authority for the Defense Contract Audit Agency.

(6) Procurement Integrity Act.

(7) 10 USC 2409, protection for contractor employees from reprisal for disclosure of certain information.

Annual reporting requirements listed in a second attachment to the guidance include:

- Reasons for use of Section 845 authority.
- Extent of cost-sharing.
- Technology and industrial base implications.
- Payments received and credited.
- Lessons learned.

Industry Concerned About Authority According to Director of Defense Procurement Eleanor Spector, who played a key role in developing the guidance, this authority “provides relief from procurement statutes and immense flexibility in structuring contractual instruments.”

However, a number of attorneys from the private bar have criticized this kind of “blank check” approach to

R&D. They argue that these vehicles should be subject to some guidance (66 FCR 324). One attorney predicted that Section 845 authority is a foot-in-the-door-approach that could ultimately lead to fixed-price, cost-shared development efforts, with “other transactions” becoming the preferred legal vehicle for the military services for development contracts.

Their predictions appear to be right on the mark. At the conclusion of his memorandum, Kaminski himself leaves the door open for expanding other transaction authority further. He says: “If we use this authority wisely, I will request that it be extended or made permanent by the Congress.”

What is more, a DARPA official told FCR recently that DOD would like to extend the authority beyond the development phase and into production. This would require a statutory change and may be included in DOD’s legislative package for FY 1998. However, it is likely to be controversial not only in Congress but also within industry, and so will probably take more than one round of legislation to “make it happen,” the official noted.