

“OTHER TRANSACTION” AUTHORITY:
NASA’S DYNAMIC ACQUISITION INSTRUMENT
FOR THE COMMERCIALIZATION OF MANNED
SPACEFLIGHT OR COLD WAR RELIC?

Surya Gablin Gunasekara

I. Introduction.....	893
II. Other Transaction Authority	895
A. Traditional Procurements Briefly	895
B. NASA and Space Act Agreements	896
C. The DoD and OTA.....	898
III. The Competition in Contracting Act and GAO Review	900
A. Overview.....	900
B. OTA and GAO Review	901
IV. NASA’s Future and OTA.....	905
V. Conclusion.....	908

While [the National Aeronautics and Space Act of 1958] has many interesting provisions, some provided in later years, there is a widespread appreciation that the most useful among them is NASA’s “other transactions” authority.¹

I. INTRODUCTION

On October 4, 1957, the Soviet Union successfully launched *Sputnik* into orbit and, for the first time, the United States realized that it was behind in the space race.² There was a sense of surprise and “bitter disappointment”

1. David S. Schuman, *Space Act Agreements: A Practitioner’s Guide*, 34 J. SPACE L. 277, 278 (2008).

2. See Paul G. Dembling, *The National Aeronautics and Space Act of 1958: Revisited*, 34 J. SPACE L. 203, 203 (2008).

Surya Gablin Gunasekara (surya.gunasekara@dla.mil) is Assistant Counsel for the Defense Logistics Agency Energy. He received his Juris Doctor cum laude from the University of Mississippi School of Law with a certificate in Remote Sensing, Air and Space Law. The author would like to thank Professor Joanne Irene Gabrynowicz, Director of the National Center for Remote Sensing, Air and Space Law, for her guidance throughout the research and writing process. This Article won first place in Division II of the American Bar Association Section of Public Contract Law 2010 Writing Competition. The views contained herein are solely those of the author and do not reflect those of the Defense Logistics Agency, the Department of Defense, or the U.S. Government.

in the U.S. space community.³ As the Cold War raged on, the space race between the United States and the Soviet Union began to heat up.⁴ The United States quickly realized that a military agency would not be the appropriate venue for a program focused on creating scientific satellites intended to carry out missions for “peaceful purposes.”⁵ As a result, *Sputnik* inspired the “creation of a civilian space organization within the United States.”⁶ This new federal agency would require an immense amount of authority “to accomplish feats of exploration and discovery unparalleled in human history.”⁷

The National Aeronautics and Space Act of 1958 (Space Act)⁸ established such an agency with “broad powers to plan and coordinate the efforts” of the United States in relation to aeronautical and space activities.⁹ This act created the National Aeronautics and Space Administration (NASA), a civilian organization with a stated policy and purpose that outer space activities “should be devoted to peaceful purposes for the benefit of all mankind.”¹⁰ Despite this lofty mission statement, NASA’s primary goal was to catch up with the Soviet Union in the space race and restore the United States as the preeminent nation in outer space activities.¹¹

One mechanism for achieving NASA’s goal of beating the Soviet Union was built directly into the Space Act; Congress, for the first time, authorized an agency to enter into “other transactions.”¹² This authority was without limitation and since transactions entered into pursuant to this other transaction authority (OTA) are not classified as procurement agreements, they are “not subject to the laws, regulations, and other requirements applicable to contracts, leases, [and] cooperative agreements.”¹³ Since its inception, OTA has been an effective acquisition instrument, prompting many other agencies to seek congressional approval for OTA.¹⁴ Today, five additional agencies enjoy the privileges of OTA.¹⁵

3. *Id.*

4. *See id.*

5. *See* H.R. Con. Res. 332, 85th Cong. (1958) (enacted) (stating that the United States should seek to ban the use of outer space for military purposes through international agreements and other appropriate means); Dembling, *supra* note 2, at 204–06.

6. Dembling, *supra* note 2, at 203.

7. Michael D. Griffin, Message from the NASA Administrator (Feb. 22, 2008), in NASA: 50 YEARS OF EXPLORATION AND DISCOVERY 16 (Faircount 2008), available at http://www.nasa.gov/50th/50th_magazine/griffinLetter.html.

8. National Aeronautics and Space Act of 1958 (Space Act), Pub. L. No. 85-568, 72 Stat. 426 (current version at 51 U.S.C. §§ 20101–20164 (Supp. IV 2010)).

9. Dembling, *supra* note 2, at 206.

10. Space Act § 102(a), 72 Stat. at 426.

11. Dembling, *supra* note 2, at 208 (“The goal was to make and maintain this nation preeminent in outer space activities.”).

12. *Id.* at 211.

13. *Id.*

14. *See* Exploration Partners, B-298804, 2006 CPD ¶ 201, at 4 n.1 (Comp. Gen. Dec. 19, 2006). Since 1958, Congress has extended “other transaction” authority (OTA) to several federal agencies including the Department of Defense, the Department of Homeland Security, the Department of Energy, and the Department of Transportation. *Id.* (citations omitted); *see also infra* notes 67–69 and accompanying text.

15. *Exploration Partners*, 2006 CPD ¶ 201, at 4.

NASA currently uses OTA to achieve many goals, one of which is to stimulate the commercial development of systems for manned space flight by awarding government funds to private companies for this purpose.¹⁶ This funding helped launch the first private rocket capable of carrying humans into space.¹⁷ Recently, President Barack Obama announced his plans to use commercially developed vehicles for all future manned space flights.¹⁸ As NASA continues to commercialize the space industry, its OTA could be the key to successfully facilitating this public to private sector transition. While OTA gives NASA and other government agencies a certain degree of flexibility,¹⁹ it should receive serious scrutiny since "other transactions" circumvent many of the legal and administrative constraints placed on typical government procurements.

First, this Article examines the development and implementation of NASA's OTA, as well as the spread of OTA to additional federal agencies, namely the Department of Defense (DoD). Second, this Article provides an overview of the legal and administrative regime that governs traditional government contracting and describes how the Government Accountability Office (GAO) has dealt with OTA. Finally, this Article uses NASA's present policy goals to analyze the potential future of NASA's OTA, and balances NASA's need for flexibility with the need for fair and open competition in government contracting.

II. OTHER TRANSACTION AUTHORITY

A. *Traditional Procurements Briefly*

The Federal Grant and Cooperative Agreement Act (FGCA)²⁰ provides federal agencies with mandatory guidance for selecting appropriate procurement instruments.²¹ For instance, an executive agency must use a procurement contract when the "principal purpose" is to acquire "property or services for the direct benefit or use of the United States Government."²² FGCA requires agencies to use grants when "the principal purpose of the relationship is to transfer a thing of value to carry out a public purpose of support or stimulation" and "substantial involvement" between the granting federal agency and the recipient is not expected.²³ When substantial

16. See Tiphany Baker Dickerson, *Patent Rights Under Space Act Agreements and Procurement Contracts: A Comparison by Examination of NASA's Commercial Orbital Transportation Services (COTS)*, 33 J. SPACE L. 341, 342 (2007).

17. See Kenneth Chang, *Private Rocket's First Flight Is a Success*, N.Y. TIMES, June 5, 2010, at A11.

18. *Id.*

19. See, e.g., L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL 34760, OTHER TRANSACTION (OT) AUTHORITY 2 (2008).

20. 31 U.S.C. §§ 6301–6308 (2006).

21. Schuman, *supra* note 1, at 279.

22. 31 U.S.C. § 6303.

23. *Id.* § 6304.

involvement is required, however, the Government must use a cooperative agreement.²⁴

The Federal Acquisition Regulation (FAR) establishes the framework that controls the solicitation, award, and administration of government contracts.²⁵ NASA has chosen to supplement the FAR through the NASA Federal Acquisition Regulation Supplement (NFS), which prescribes policies and procedures for procurements as they relate specifically to NASA operations.²⁶ The breadth of the FAR, coupled with the NFS, is vast; one commentator has stated:

In combination, these regulations impose a wide range of requirements on the Agency when it acquires goods or services, including the need for advertising competition, source selection, implementation of socio-economic goals, and contract administration. The rules also provide a well understood framework for challenging NASA contract awards both before the Agency and GAO.²⁷

While the FAR and the administrative procedures connected with the regulation help to ensure fair and open procurement, the process is not known for its efficiency and can be quite cumbersome.²⁸

B. *NASA and Space Act Agreements*

The Space Act provides NASA with the authority to “enter into and perform such contracts, leases, cooperative agreements, or *other transactions* as may be necessary in the conduct” of NASA’s mission or as the agency may deem appropriate.²⁹ This OTA gives NASA a tremendous amount of flexibility to accomplish its mission.³⁰ Almost every federal agency has the ability to “enter into contracts, grants, and cooperative agreements, but not all enjoy the OTA.”³¹

In contrast to traditional government contracts, Space Act Agreements (SAAs) “entered into under [OTA] in the Space Act”³² are not procurements, and therefore are not subject to the legal framework established by the FAR and NFS.³³ Instead, SAAs are a set of legally binding promises between

24. *Id.* § 6305 (“An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when . . . substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.”).

25. Schuman, *supra* note 1, at 279.

26. *See id.* at 279–80.

27. *Id.* at 280.

28. *See id.*

29. 42 U.S.C. § 2473(c)(5) (2006) (emphasis added).

30. Schuman, *supra* note 1, at 279.

31. *Id.*

32. *See* NASA Policy Directive (NPD) 1050.II ¶ 1 (2008), available at <http://nodis3.gsfc.nasa.gov/displayDir.cfm?t=NPD&c=1050&s=II>.

33. Schuman, *supra* note 1, at 280.

NASA and other entities, which "constitute commitments by the Agency of resources (including personnel, funding, services, equipment, expertise, information or facilities) to accomplish stated objectives of a joint undertaking with an Agreement Partner."³⁴ David S. Schuman, attorney-advisor for the NASA Goddard Space Center, has stated:

SAAs are most suited to the accomplishment of mutually agreeable goals within the Agency's mission. Examples include partnerships with other Federal agencies, State and local governments, educational institutions, for profit companies, and not-for-profit entities. One of the most common uses is a provision of NASA facilities on a non-interference basis to allow technological or scientific development, such as use of Agency wind tunnels at Langley Research Center and Ames Research Center, or use of thermal-vacuum test chambers at Goddard Space Flight Center, or Johnson Space Center.³⁵

Since SAAs are not considered procurements, they can be developed and implemented quickly in a variety of factual situations.³⁶ SAAs, however, are not a "substitute for procurements conducted under the FAR when the Agency is acquiring goods or services for its direct benefit" and cannot "be used to avoid a statutory and regulatory framework, or to accomplish an acquisition objective more quickly."³⁷

When Congress granted NASA OTA, and subsequently the ability to enter into SAAs, it plainly distinguished between contracts and "other transactions."³⁸ While the Space Act does not define OTA, Congress recognized during promulgation that OTA was a grant of "broad authority."³⁹ As such, NASA's interpretation of OTA is equally broad and allows the agency to use OTA "for a wide variety of innovative and useful purposes."⁴⁰ One of the major benefits of OTA is that it gives NASA a "commercial-like freedom" to shape each agreement to the needs of the partner and the mission.⁴¹ This flexibility provides the authority to structure agreements in accordance with standard business practices and has made NASA the envy of many executive agencies. For over three decades, NASA exclusively enjoyed OTA until Congress extended this mechanism to the DoD, so that it too could escape the regulatory framework of conventional procurements.⁴²

34. NPD 1050.11, *supra* note 32, ¶ 1.

35. Schuman, *supra* note 1, at 280.

36. *Id.*

37. *Id.*

38. Exploration Partners, B-298804, 2006 CPD ¶ 201, at 4 (Comp. Gen. Dec. 19, 2006).

39. See H.R. REP. NO. 85-1770, at 19 (1958), reprinted in 1958 U.S.C.C.A.N. 3160, 3178; H.R. REP. NO. 85-1758, at 50 (1958).

40. Schuman, *supra* note 1, at 283.

41. Dickerson, *supra* note 16, at 348.

42. See Thomas C. Modeszto, *The Department of Defense's Section 845 Authority: An Exception for Prototypes or a Prototype for a Revised Government Procurement System?*, 34 PUB. CONT. L.J. 211, 217 & n.19 (2005).

C. The DoD and OTA

Much like NASA, Congress created the Defense Advanced Research Projects Agency (DARPA) in response to the Soviet Union launching *Sputnik*.⁴³ Congress created this agency to acquire research and development for the DoD.⁴⁴ Under the original charter, DARPA had the authority to enter into contracts and agreements with individuals; private business entities; and educational, research, or scientific institutions.⁴⁵ In the 1980s, however, a shift in technological development occurred as cutting-edge technology was increasingly being produced by private companies instead of the government sector.⁴⁶

DARPA discovered that many of the companies developing these new technologies were reluctant to enter into contracts with the Government.⁴⁷ This reluctance was primarily motivated by fear that the Bayh-Dole Act⁴⁸ would undermine the companies' intellectual property rights.⁴⁹ One commentator has described the Bayh-Doyle Act as follows:

The Bayh-Dole Act sets forth the government's policy regarding allocation of patent rights to "subject inventions," that is, those inventions conceived or first actually reduced to practice under contracts, grants, and cooperative agreements with small business firms, educational institutions, and other nonprofit organizations. . . . In general, subject to certain conditions, a contractor (or recipient, in the case of grants and cooperative agreements) is permitted to elect to retain title to a subject invention, with the government receiving certain minimum rights in that invention.⁵⁰

In addition to the troublesome patent rights issues presented by the Bayh-Dole Act, DARPA discovered that innovative companies did not want to work within the confines of the FAR legal framework.⁵¹

Between the Bayh-Dole Act and the FAR provisions, DARPA was having difficulty contracting with the best and brightest companies.⁵² In 1989, the Office of the Secretary of Defense issued a report recommending that the DoD prepare legislation giving DARPA authority to enter into "innovative contractual

43. *Id.* at 215.

44. *Id.*

45. Gregory J. Fike, *Measuring "Other Transaction" Authority Performance versus Traditional Contracting Performance: A Missing Link to Further Acquisition Reform*, ARMY LAW., July 2009, at 33, 35.

46. *Id.*

47. *Id.*

48. 35 U.S.C. §§ 200–212 (2006).

49. Fike, *supra* note 45, at 35.

50. Richard N. Kuyath, *Barriers to Federal Procurement: Patent Rights*, PROCUREMENT LAW., Fall 2000, at 1, 12 ("The conditions include timely (a) disclosure of the subject invention to the agency, (b) election of right to retain title, and (c) filing of domestic and foreign patents. The government's minimum rights include a nonexclusive, irrevocable, paid-up license to practice for or on behalf of the United States any subject invention throughout the world.")

51. Richard N. Kuyath, *The Untapped Potential of the Department of Defense's "Other Transaction" Authority*, 24 PUB. CONT. L.J. 521, 526 (1995) [hereinafter Kuyath, *Untapped Potential*].

52. See Fike, *supra* note 45, at 35.

agreements.⁵³ In addition, various groups lobbied Congress to grant DARPA OTA patterned after the authority that Congress had granted to NASA in the Space Act.⁵⁴ During the 1989 session, Congress yielded to the pressure⁵⁵ and granted DARPA OTA for "advanced research projects" over a two-year period.⁵⁶ In 1991 Congress permanently codified DARPA's OTA authority and extended this authority to all DoD military departments⁵⁷ with the caveat that the military departments could not use their OTA until fiscal year 1993.⁵⁸

In the Federal Acquisition Streamlining Act of 1994,⁵⁹ Congress extended DoD's OTA to a broader range of transactions and granted OTA to any DoD element that the secretary may designate.⁶⁰ The act granted DoD the authority to carry out "basic, applied, and advanced research projects."⁶¹ Congress granted the DoD OTA "to further three specific Department of Defense missions: (1) enhancing American military technological superiority, (2) streamlining the acquisition process, and (3) integrating civilian and military technology industries."⁶²

Much like NASA's OTA, DoD's OTA is an extremely flexible instrument that allows the DoD "to foster dual-use technology, establish industrial capabilities, and strengthen the nation's technological capabilities to advance the national defense system."⁶³ Moreover, DoD's OTA is not subject to the FAR, the DoD's FAR Supplement, or most other procurement statutes.⁶⁴

Ultimately OTA has tremendous potential to benefit both the Government and industry. This authority allows the DoD and NASA to enter into research and development agreements with commercial companies that refuse to, or are unable to, enter into agreements using more traditional procurement instruments.⁶⁵ In addition to NASA and the DoD, Congress has extended OTA to the Department of Homeland Security (DHS),⁶⁶ the Department of

53. Kuyath, *Untapped Potential*, *supra* note 51, at 527-28.

54. Fike, *supra* note 45, at 35.

55. *See id.*

56. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 251(a), (g), 103 Stat. 1352, 1403-04 (1989).

57. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 826(a), (c), 105 Stat. 1290, 1442 (1991).

58. Act of Nov. 26, 1991, Pub. L. No. 102-172, § 813A(a), 105 Stat. 1150, 1202 (making appropriations for the Department of Defense for the fiscal year ending September 30, 1992, and for other purposes).

59. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.).

60. 10 U.S.C. § 2371(a)-(b) (2006).

61. *Id.* § 2371(a).

62. David S. Bloch & James G. McEwen, "Other Transactions" with Uncle Sam: A Solution to the High-Tech Government Contracting Crisis, 10 TEX. INTELL. PROP. L.J. 195, 210 (2002).

63. *Id.* at 209-10 (quoting Jeffery C. Walker, Note, *Enforcing Grants and Cooperative Agreements as Contracts Under the Tucker Act*, 26 PUB. CONT. L.J. 683, 704 (1997)).

64. *Id.* at 210.

65. *See* Kuyath, *Untapped Potential*, *supra* note 51, at 523-24.

66. Homeland Security Act of 2002, Pub. L. No. 107-296, § 831(a), 116 Stat. 2135, 2224 (codified as amended at 6 U.S.C. § 391(a)(1) (2006)).

Energy,⁶⁷ and the Department of Transportation.⁶⁸ It is clear that OTA's use has expanded significantly since 1958 when NASA first began to use OTA in the form of SAAs. While there are definite benefits to OTA, its use should not be without scrutiny because OTA escapes many of the "protections built into the traditional procurement system."⁶⁹

III. THE COMPETITION IN CONTRACTING ACT AND GAO REVIEW

A. Overview

For the last 25 years, the Competition in Contracting Act⁷⁰ (CICA) has helped to ensure fair and open competition in government procurements. When CICA was enacted in 1984, it revolutionized the bid protest process at the Government Accountability Office (GAO)⁷¹ and strengthened competition.⁷² CICA gives the GAO authority to review protests concerning allegations that federal agencies violated the FAR or other procurement laws in the award, or proposed award, of a contract for goods and services, and solicitations leading to such awards.⁷³ In many ways CICA's automatic stay provision helped transform the GAO into an effective bid protest forum by giving "teeth" to the agency's enforcement powers.⁷⁴ The automatic stay provision provides that "a contract may not be awarded in any procurement after the [f]ederal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending."⁷⁵ Prior to CICA's enactment, the GAO had essentially no power to stop a contract award or contract performance during a pending protest.⁷⁶ Although GAO regulations provided for a stay of performance on the contract, the contracting agency could usually avoid enforcement of the stay.⁷⁷ As a result,

67. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1007, 119 Stat. 594, 932 (codified as amended at 42 U.S.C. § 7256(g)(1) (2006)).

68. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 5102, 112 Stat. 107, 423 (1998) (codified as amended at 23 U.S.C. § 502(3)(c) (2006)).

69. See Fike, *supra* note 45, at 39 (quoting *Army Transformation and the Future Combat System: Hearing Before the Subcomm. on Airland of the S. Comm. on Armed Services*, 109th Cong. (2005) (opening statement of Sen. McCain, Chairman, S. Comm. on Armed Services)).

70. 31 U.S.C. §§ 3551-3556 (2006).

71. The Government Accountability Office (GAO) was called the General Accounting Office until it was renamed the Government Accountability Office in 2004. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8(a), 118 Stat. 811, 814.

72. See Young Cho, *Judicial Review of "The Best Interest of the United States" Justification for CICA Overrides: Overstepping Boundaries or Giving the Bite Back?*, 34 PUB. CONT. L.J. 337, 338 (2005).

73. 31 U.S.C. §§ 3551(1), 3552.

74. Cho, *supra* note 72, at 338.

75. 31 U.S.C. § 3553(c)(1).

76. Cho, *supra* note 72, at 340.

77. *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 878-89 (3d Cir. 1986).

government agencies would often proceed with the contract knowing that this would derail the protest process.⁷⁸ Since the contractor was already performing the contract by the time the GAO reached its decision, the protest effectively was moot.⁷⁹

Through CICA, Congress attempted to close this loophole in the GAO review process while encouraging competition in contracting.⁸⁰ Currently, CICA allows a potential or actual bidder to file a protest with the comptroller general⁸¹ to dispute the cancellation of a solicitation, to challenge the solicitation, or to object to the award, or proposed award, of a government contract.⁸² Once the GAO receives a protest, it must notify the agency involved within one working day⁸³ and must submit a report within thirty days.⁸⁴

After a protest has been filed, a contract cannot be awarded and contract performance cannot begin until the GAO makes a determination on the protest.⁸⁵ The comptroller general must then issue the final decision within 100 days.⁸⁶ Alternatively, the comptroller general may utilize an "express option" to expedite the review of some cases within sixty-five calendar days, and dismiss those claims that are frivolous or meritless.⁸⁷ Only after the GAO has issued a finding may an agency award the contract or authorize the contractor to proceed with contract performance.⁸⁸

B. OTA and GAO Review

The GAO derives its authority to review awards and solicitations of contracts from CICA.⁸⁹ The automatic stay provision is arguably one of the most effective tools in the GAO's arsenal.⁹⁰ By contrast, one of OTA's more useful characteristics is that they are not subject to GAO review.⁹¹ The GAO has reinforced this interpretation of OTA in three decisions, one examining

★ not subject to GAO review

78. Cho, *supra* note 72, at 340.

79. *Id.*

80. *Id.*

81. The Comptroller General of the United States is head of the Government Accountability Office and the two are used interchangeably throughout this article. 31 U.S.C. § 702(b) (2006).

82. 31 U.S.C. §§ 3551(1), 3552(a) (2006).

83. *Id.* § 3553(b)(1) ("Within one day after the receipt of a protest, the Comptroller General shall notify the Federal agency involved of the protest.").

84. *Id.*

85. *Id.* § 3553(c)(1).

86. *Id.* § 3554(a)(1) ("To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this subchapter. Except as provided under paragraph (2) of this subsection, the Comptroller General shall issue a final decision concerning a protest within 100 days after the date the protest is submitted to the Comptroller General.").

87. *Id.* § 3554(a)(2), (a)(4).

88. *Id.* § 3553(c).

89. *Id.* §§ 3551(1), 3552.

90. Cho, *supra* note 72, at 338.

91. Schuman, *supra* note 1, at 285.

DARPA's use of a non-procurement instrument⁹² and two examining NASA's use of Space Act Agreements "to provide funding to an outside partner."⁹³

In the first case, the GAO denied Energy Conversion Devices, Inc.'s (ECD) claim protesting DARPA's selection of the ITN Consortium (ITN) for the award of an OTA because ECD failed to demonstrate that a procurement contract was required in this situation.⁹⁴ DARPA had issued a broad agency announcement seeking proposals "to develop and demonstrate cost-effective, large-area, vapor phase manufacturing technology based on emerging methods of intelligent processing" of thin films in three different technical areas.⁹⁵ The announcement noted that DARPA "anticipated substantial industrial cost sharing and program funding via contract or agreements authority as applicable."⁹⁶

DARPA received proposals from six offerors including EDC and ITN.⁹⁷ Based on its evaluation, DARPA determined the most advantageous proposal was ITN's, and selected that company for funding.⁹⁸ Subsequently, EDC filed a protest challenging the evaluation of the technical and cost proposals, the decision not to conduct discussions with the offerors, and the decision to use OTA rather than a procurement contract.

Turning to CICA, the GAO acknowledged its review was limited to "protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such awards."⁹⁹ Generally, the GAO will not review protests of awards made through non-procurement instruments because they do not involve the award of a contract.¹⁰⁰ The GAO, however, will review a timely protest that an agency is improperly using a non-procurement instrument, where under the FGCA a "procurement contract" is required.¹⁰¹

DARPA contended that the principal purpose of the announcement or "other transaction" was not to acquire goods and services for the direct benefit and use of the Government,¹⁰² but, rather, DARPA's interest in "advancing national capabilities so that the United States technological base will be

92. Energy Conversion Devices, Inc., B-260514, 95-2 CPD ¶ 121 (Comp. Gen. June 16, 1995).

93. Schuman, *supra* note 1, at 284-87.

94. Energy Conversion Devices, 95-2 CPD ¶ 121, at 1, 5; Kuyath, *Untapped Potential*, *supra* note 51, at 534.

95. Energy Conversion Devices, 95-2 CPD ¶ 121, at 2.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*; see also 31 U.S.C. §§ 3551(1), 3552 (2006); 4 C.F.R. § 21.2(a) (2010).

100. Energy Conversion Devices, 95-2 CPD ¶ 121, at 2.

101. *Id.*

102. *Id.* at 3.

capable of supporting the most advanced military systems in the future."¹⁰³ Accordingly, DARPA asserted that a procurement was not required under the FGCA.¹⁰⁴ By contrast, EDC argued that under the statute, DARPA was only authorized to enter into OTAs when the use of a standard contract was not "feasible or appropriate."¹⁰⁵

Since the GAO's authority is limited to determining whether an agency improperly used a non-procurement instrument, DAPRA's satisfaction of "statutory prerequisites" to enter into "other transactions" was considered irrelevant in determining the protest.¹⁰⁶ Moreover, ECD was unable to show that the principal purpose of the announcement was the acquisition of supplies and services for the direct benefit of the Federal Government.¹⁰⁷ The GAO concluded, therefore, that the protestor failed to demonstrate that a procurement contract was required under the FGCA and denied the protest.¹⁰⁸

The second case involved Exploration Partners'¹⁰⁹ protest of NASA's decision "to provide funded SAAs totaling \$500 million over a four-year period to Space Exploration Technologies (SpaceX) and Rocketplane Kistler (Rocketplane)" for the Commercial Orbital Transportation Services (COTS) project.¹¹⁰ The COTS project was created to stimulate the commercial market for transportation services into low-Earth orbit and specifically to provide transportation between Earth and the International Space Station.¹¹¹ This project was broken up into two phases. Phase One would be the "period of development and demonstration by private industry, in coordination with NASA, of various space transportation capabilities . . . determined to be the most desirable for the Government and other customers."¹¹² Phase Two of the COTS project would be the competitive procurement of an orbital transportation system, which would resupply the International Space Station and facilitate low-Earth orbit missions.¹¹³

NASA received twenty-one proposals for Phase One and narrowed those down to six finalists.¹¹⁴ Exploration Partners was not selected as one of the six finalists for the COTS project.¹¹⁵ Ultimately, SpaceX and Rocketplane were chosen and NASA entered into funded SAAs with those companies for \$278 million and \$207 million respectively.¹¹⁶ Exploration Partners contended

103. *Id.*; see also Kuyath, *Untapped Potential*, *supra* note 51, at 535.

104. See *Energy Conversion Devices*, 95-2 CPD ¶ 121, at 3-4.

105. *Id.* at 4.

106. *Id.* at 4-5.

107. *Id.* at 5.

108. *Id.*

109. Exploration Partners, B-298804, 2006 CPD ¶ 201, at 4 n.1 (Comp. Gen. Dec. 19, 2006).

110. Schuman, *supra* note 1, at 286.

111. Dickerson, *supra* note 16, at 342.

112. *Exploration Partners*, 2006 CPD ¶ 201, at 2.

113. Schuman, *supra* note 1, at 286; see also Dickerson, *supra* note 16, at 346.

114. Dickerson, *supra* note 16, at 345-46.

115. See *Exploration Partners*, 2006 CPD ¶ 201, at 3.

116. *Id.*; Dickerson, *supra* note 16, at 346.

that, “as ‘the only company that offered a fully funded end-to-end transportation system,’ it should have received an SAA.”¹¹⁷ Alternatively, Exploration Partners argued that the COTS program should “be re-bid under the original terms and conditions without interference in obtaining Shuttle hardware, cost data or interference in commercial business relationships.”¹¹⁸

The GAO concluded that under CICA, it did not have bid protest jurisdiction over NASA’s issuances of the SAAs to SpaceX and Rocketplane because its jurisdiction is limited to protests regarding “procurement contracts” and these agreements were reached pursuant to NASA’s OTA.¹¹⁹ In reaching its conclusion, the GAO recognized that when Congress granted NASA OTA, it intended this authority to be broad.¹²⁰ Moreover, Congress clearly distinguished between OTA and contracts; therefore, by applying the language of the Space Act, there was no way OTA could be construed as “performing procurement contracts.”¹²¹ Citing *Energy Conversion Devices, Inc.*,¹²² the GAO noted, however, that it will review a timely protest alleging that an agency improperly used a non-procurement instrument, such as an OTA or SAA, when such review is required to “ensure that an agency is not attempting to avoid requirements of procurement statutes and regulations.”¹²³ In this case, however, Exploration Partners failed to file a timely challenge to NASA’s issuance of the SAAs, rendering the protest moot.¹²⁴

In the final GAO protest relating to OTA, Rocketplane protested NASA’s proposed use of SAA funding to support a continuation of the first phase of the COTS project.¹²⁵ NASA announced that it was “solicit[ing] proposals for demonstrations involving an end-to-end space transportation system of services including ground operations and integration, launch, rendezvous, proximity operations, docking or berthing, orbital operations, reentry, and safe disposal or return.”¹²⁶ According to the announcement, the participants would be required to secure the necessary funding to demonstrate the aforementioned capabilities and NASA funding would be made available only upon successful completion of those performance milestones.¹²⁷ Rocketplane contended that the principal purpose of the announcement was to obtain services for the direct benefit of NASA, and, therefore, these services should be

117. *Exploration Partners*, 2006 CPD ¶ 201, at 3.

118. *Id.*

119. *Id.* at 4.

120. *Id.*

121. *Id.*

122. B-260514, 95-2 CPD ¶ 121, at 2 (Comp. Gen. June 16, 1995).

123. *Exploration Partners*, 2006 CPD ¶ 201, at 5.

124. *Id.* at 6. In order for the challenge to be timely, Exploration Partners was required to file before the closing date set for the submission of the proposals, given NASA’s announcement that it would be issuing SAAs. 4 C.F.R. § 21.2(a)(1) (2010).

125. *Rocketplane Kistler*, B-310741, 2008 CPD ¶ 22, at 1–2 (Comp. Gen. Jan. 28, 2008).

126. *Id.* at 2.

127. *Id.* at 2–3.

obtained under a procurement research and development (R & D) contract—not an SAA.¹²⁸

In response, NASA argued that it obtained “no vehicles, supply service, prototype, hardware, or other property, no systems or vehicle designs, and only the minimum Government-purpose data rights legally required by the Space Act.”¹²⁹ In addition, NASA claimed that the purpose of the announcement was to “encourage the growth of a future U.S. commercial market in which space transportation services will be available for commercial and [g]overnment customers.”¹³⁰ In support of this claim, NASA stated:

This purpose differs from that of an R & D contract . . . because an R & D contract is used to obtain research, and the results of that research is for an agency’s use . . . , whereas here the announcement seeks to “incentivize the private sector to develop and demonstrate their commercial technologies” and allows those firms to retain the maximum intellectual property rights allowed by the Space Act.¹³¹

The GAO sided with NASA, finding that the announcement did not principally provide for the acquisition of goods and services for the direct benefit of the agency.¹³² The GAO concluded that the announcement was aimed at stimulating the “commercial market for space transportation, from which NASA could potentially acquire orbital transportation services.”¹³³

These three GAO decisions demonstrate that OTA does not receive the same level of scrutiny as traditional procurements. Because “other transactions” are not contracts, CICA’s automatic stay provision does not apply.¹³⁴ Accordingly, the “teeth” of CICA¹³⁵ have been removed in regards to GAO review of agreements or announcements stemming from OTA. The GAO, however, does possess limited authority to review an agency’s decision to use OTA, which provides at least one check to an otherwise unchecked acquisition instrument.

IV. NASA’S FUTURE AND OTA

President Barack Obama recently unveiled his new approach to human space flight. His plan calls for abandoning former President George W. Bush’s plan to return to the Moon by 2020, “which had fallen hopelessly behind schedule and relied on outdated technology.”¹³⁶ Certainly, monetary concerns

128. *Id.* at 3.

129. *Id.* at 4.

130. *Id.*

131. *Id.* at 4–5.

132. *Id.* at 5.

133. Schuman, *supra* note 1, at 288; *see also Rocketplane*, 2008 CPD ¶ 22, at 5.

134. *See Rocketplane*, 2008 CPD ¶ 22, at 3.

135. Cho, *supra* note 72, at 338.

136. Editorial, *Now It’s the President’s Plan*, N.Y. TIMES, Apr. 16, 2010, at A26; *see also* CARL E. BEHRENS, CONG. RESEARCH SERV., REPORT NO. RL33568, THE INTERNATIONAL SPACE STATION AND THE SPACE SHUTTLE 2–4 (Mar. 18, 2009). President George W. Bush’s “Vision for Space

influenced President Obama's decision; however, the deciding factor was the total cost of the planned lunar mission—not NASA's current level of funding.¹³⁷ In fact, when adjusted for inflation, NASA's budget is the same today as it was during the *Apollo* Moon missions.¹³⁸ Unfortunately, however, Space exploration has become so costly that even an *Apollo*-era budget will not pay for a return trip to the Moon anytime soon. This fiscal reality "is what prompted the [President] to cancel the Bush administration's lunar mission."¹³⁹

The increased cost of space exploration is counterintuitive:

Normally, once a pioneer makes the first trip somewhere, the cost goes down as others follow and technology improves. That's why so many colonists could follow Columbus to the New World, and why the masses today can afford to fly in Lindbergh's path back to Europe. The real costs of shipping freight by rail and air have declined by an order of magnitude since locomotives and airplanes were invented.¹⁴⁰

With manned space exploration, however, costs have increased since the time of the *Apollo* missions.¹⁴¹ For instance, NASA estimates that for each space shuttle mission, the cost per astronaut is \$65 million.¹⁴² When the space shuttle is retired, NASA will have to pay to use the cramped Russian *Soyuz* vehicle to access the International Space Station at an estimated cost of \$50 million per astronaut.¹⁴³ By contrast, SpaceX believes that it will be able to provide the same service for \$20 million per astronaut.¹⁴⁴ SpaceX asserts that one reason for this price differential is that NASA currently uses a "cost-plus" reimbursement scheme, which guarantees government contractors a profit on top of their incurred costs.¹⁴⁵ Essentially, "[t]he cost-plus approach encourages aerospace companies to find the most expensive way to do something and drag it out as long as possible."¹⁴⁶

The president's plan calls for crewed missions deeper into space, beginning in 2025 with a visit to an asteroid, followed by a mission to Mars in the mid-2030s.¹⁴⁷ Under the president's plan, private industry will have to innovate its way to Mars with the help of the Government. In an unstable market climate, "technology companies need a stable partner," like NASA, "to develop the

Exploration" Plan called for returning to the Moon by 2020. *Id.* at 4. The NASA program consisted of the Ares booster and Orion Crew Exploration Vehicle. *Id.* Eventually, the plan sought to have a manned trip to Mars. *Id.* at 7.

137. John Tierney, *NASA, We've Got a Problem. But It Can Be Fixed.*, N.Y. TIMES, Apr. 12, 2010, at D2.

138. *See id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Now It's the President's Plan*, *supra* note 136, at A26.

next generation of commercial technology."¹⁴⁸ Over the next five years, the Obama administration intends to commit \$6 billion "to finance the development of rockets and crew capsules by commercial companies."¹⁴⁹ NASA officials have suggested that the plan would be set up to attract both new space transportation companies, like SpaceX, as well as established companies, like Lockheed Martin and Boeing.¹⁵⁰ NASA will likely split the funds between two or more companies based upon the strengths of their respective proposals, although the specifics of the planned competition have not been released.¹⁵¹

While the details of President Obama's vision for NASA's human spaceflight program have yet to be fully articulated, it is clear that the future of the program lies with the private sector. Based on the recent success of SpaceX's SAA-funded *Falcon 9*, NASA may model the acquisition of the rockets and crew capsules after the COTS program.¹⁵² This would require dividing the Obama administration's plan into two distinct phases. Phase One would consist of using the president's proposed figure of \$6 billion to stimulate the commercial market. Companies would submit proposals and those with the best proposals would be selected to enter into funded SAAs.¹⁵³ Phase Two would consist of a competitive procurement for the launch vehicle and crew capsule, or the services of the launch vehicle and crew capsule to transport NASA astronauts to an asteroid and eventually Mars. Ideally, this proposal would create competition, spurring innovation while driving down launching costs and opening "vibrant new markets."¹⁵⁴ In addition, this program would eliminate the traditional "cost plus" system where NASA pays for everything, thereby lowering the cost to the Government.¹⁵⁵

If the president's plan follows this seemingly natural course, then OTA will play a major role in NASA's human spaceflight program for years to come. The Space Act's OTA will allow NASA to enter into "funded SAAs with for-profit companies to implement Phase One."¹⁵⁶ Presumably, over the next five years, \$6 billion will be distributed to private companies through SAAs to stimulate the commercial market for these space transportation systems.¹⁵⁷ Moreover, the GAO has already ruled that funded SAAs used to stimulate a

148. Bloch & McEwen, *supra* note 62, at 216.

149. Kenneth Chang, *Aerospace Business Has Its Doubts About Plans to Revamp NASA*, N.Y. TIMES, Apr. 11, 2010, at A14 [hereinafter Chang, *Aerospace*].

150. *Id.*

151. *Id.*

152. See *supra* notes 119–21 and accompanying text.

153. For more information about the Commercial Orbital Transportation Services (COTS) project, see Schuman, *supra* note 1, at 284–88, and Dickerson, *supra* note 16, at 345–47.

154. Chang, *Aerospace*, *supra* note 149, at A14.

155. See *id.*

156. Schuman, *supra* note 1, at 284.

157. As Congress looks to cut costs across the Federal Government, however, NASA is exploring whether it could fund the commercial crew program with half of the president's current commitment. See Kenneth Chang, *Liftoff of Private Rocket to Usher in a New Phase*, N.Y. TIMES, Dec. 8, 2010, at A19.

public purpose do not require the use of a procurement contract since their principal purpose is not the acquisition of goods and services.¹⁵⁸ Therefore, NASA could proceed with the funded SAAs knowing that their issuance was outside of the GAO's CICA bid protest jurisdiction.

This fact does not, however, fully eliminate the possibility of fair and open competition in Obama's space transportation acquisition process. While Phase One would rely on funded SAAs outside of the GAO's jurisdiction, Phase Two would consist of a traditional procurement contract for the space transportation system. This contract would have to be in compliance with the FAR and the NFS, and would be subject to CICA's automatic stay provision and GAO review. The two-phase approach of the COTS project could serve as an example of how to balance the flexibility required to foster innovation and commercial development with the need for accountability that is naturally built into the traditional procurement system. In sum, NASA could accomplish the president's vision for the future of manned spaceflight using OTA without completely usurping regulatory and administrative safeguards.

V. CONCLUSION

More than fifty years ago, Congress bestowed upon NASA an unprecedented power to enter into "other transactions."¹⁵⁹ Born out of the Cold War, OTA was created to catch up with the Soviet Union in the space race. This authority was without limitation and, because OTA was not subject to the laws and regulations of traditional procurement agreements, NASA enjoyed an unparalleled amount of flexibility in structuring agreements.¹⁶⁰ OTA provided NASA with the "potential for the promotion and development of unexpected scientific and technological innovations," helping NASA to open up the solar system and ultimately win the space race.¹⁶¹

While OTA may seem like just another Cold War relic, it is actually a dynamic acquisition tool. After the Cold War, Congress granted OTA to the DoD to "eliminate the legal and regulatory cost drivers associated with traditional DoD procurement" and to help the DoD "gain access to leading edge technologies."¹⁶² Today, OTA helps the DoD and NASA stimulate commercial development by streamlining the integration of private sector ingenuity with public sector funding.¹⁶³ Although the purpose behind NASA's OTA has shifted over time, its current use is now in line with DoD's later-enacted

158. Rocketplane Kistler, B-310741, 2008 CPD ¶ 22, at 4 (Comp. Gen. Jan. 28, 2008).

159. Dembling, *supra* note 2, at 211.

160. *See id.*

161. Schuman, *supra* note 1, at 288.

162. Fike, *supra* note 45, at 43.

163. *See* Kuyath, *Untapped Potential*, *supra* note 51, at 576.

statutory authority. The lasting legislative legacy of OTA is a testament to the Space Act's "legislative prowess."¹⁶⁴ As long as OTA is not abused, "other transactions" will continue to be an invaluable acquisition instrument for agencies without compromising the need for fair and open competition in government procurements. OTA, therefore, could be just the acquisition instrument necessary to facilitate NASA's transition to the commercialization of manned spaceflight.

164. Schuman, *supra* note 1, at 289.