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## OTHER TRANSACTION AUTHORITY

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### I. Purpose

The intent of this Management Directive (MD) is to provide policy regarding the Department of Homeland Security's (DHS's) use of "Other Transaction" (OT) authority. This MD pertains to OTs for Research and OTs for Prototype Projects issued pursuant to Section 831 of the Homeland Security Act, 6 U.S.C. § 391.

### II. Scope

This MD applies to all DHS Organizational Elements.

### III. Authorities

- A. Section 831 of the Homeland Security Act, 6 U.S.C. § 391.
- B. 10 U.S.C § 2371, Pub. L. 103-160, § 845, as amended, 10 U.S.C. § 2371 note.
- C. DHS Management Directive 0010.1, "Management Directives System and DHS Announcements."

### IV. Definitions

- A. **Business Unit**: Any segment of a business organization, or an entire business organization that is not divided into segments.
- B. **Chief Procurement Officer (CPO)**: Senior Procurement Executive responsible for the maintenance and oversight of a Department-wide acquisition program.
- C. **Head of Contracting Activity (HCA)**: The individual responsible for management of the entire acquisition function within an organizational element.

D. **Non-Traditional Government Contractor**: A business unit that has not, for a period of at least one year prior to the date of the OT agreement, entered into or performed on:

1. Any contract that is subject to full coverage under the Cost Accounting Standards prescribed pursuant to Section 26 of the Office of Federal Procurement Policy Act (41 US Code 422) and the regulations implementing that section; or

2. Any other contract in excess of \$500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a federal agency that is subject to compliance with the Federal Acquisition Regulation (FAR).

E. **Organizational Element (OE)**: DHS Organizational Elements are defined in MD 0010.1, "Management Directives System and DHS Announcements."

F. **Other Transaction (OT)**: A transaction other than a procurement contract, grant, or cooperative agreement. Since this type of transaction is defined in the negative, it could take an unlimited number of potential forms. The statutory authority authorizes the Secretary of Homeland Security to enter into transactions other than procurement contracts, grants, and cooperative agreements, in carrying out activities that:

1. Support basic, applied, and advanced research and development that would promote homeland security;

2. Advance the development, testing and evaluation, and deployment of critical homeland security technologies;

3. Accelerate the prototyping and deployment of technologies that would address homeland security vulnerabilities.

"Other transactions" is the term commonly used to refer to the instruments authorized by 10 USC 2371 and employed under the authority granted above. In exercising this authority, DHS may use two major types of OTs: OTs for Research and OTs for Prototype Projects.

G. **Prototype**: With regard to OTs for Prototype Projects, a "prototype" generally can be described as a physical or virtual model used to evaluate the technical or manufacturing feasibility or utility, to the DHS mission, of a particular technology, process, concept, end item, or system.

H. **Significant Contribution**: Examples of what might be considered a *significant contribution* include supplying a new key technology or products, accomplishing a significant amount of the effort, in some other way causing a material reduction in cost or schedule, or an improvement in performance.

## V. Responsibilities

A. **Under Secretary for Management (USM)** shall be responsible for all aspects of this MD. USM has been assigned Other Transaction authority from the Secretary of the Department of Homeland Security. The USM assigns this authority and accompanying responsibilities to the DHS Chief Procurement Officer.

B. **Chief Procurement Officer** shall be responsible for setting policy, conducting oversight, and approving the use of OT authority. CPO has designated the DHS Director, Acquisition Policy and Oversight as the authority for DHS OT.

## VI. Policy & Procedures

A. The HCA or designated official must follow policies and procedures of this MD when executing OT authority. This policy will be revised to incorporate best practices and lessons learned from DHS' use of OT authority.

B. **General Policy**

1. The approval to use OTs is conveyed to the HCA for the Office of Procurement Operations, DHS Headquarters, through this MD.

2. Any other HCA within DHS wishing to use OT authority shall develop an acquisition strategy document detailing the rationale for use of OTs and the benefits expected, and submit for approval to the Director, Acquisition Policy and Oversight.

3. The HCA shall ensure that any further delegation to use this authority shall only be to warranted Contracting Officers possessing Level III acquisition certification (as defined in MD 0781 (series), "Contracting Professional Career Information"). These individuals shall possess a level of experience, responsibility, business acumen, and judgment that enables them to operate in this relatively unstructured business environment. This delegation can be made only after the potential delegate has received appropriate OT training. These individuals are hereafter referred to as Other Transactions Contracting Officers (OTCO).

4. To the maximum extent possible, OTCOs should use competitive procedures prior to entering into OT agreements.
5. Prior to award of any OT transaction, the OTCO shall obtain review by legal counsel and approval from the HCA.
6. HCAs must submit a report to the Director, Acquisition Policy and Oversight, DHS Headquarters, no later than 15 October of each year relating to awards made pursuant to OT authority. Enclosure 1 describes the report requirements.

C. **Policy for OTs for Research**

1. OTs for Research are legally binding instruments used to carry out basic, applied, or advanced research programs in instances where the principal purpose is the stimulation or support of homeland security technologies. This type of OT does not call for a deliverable that satisfies an existing government need, but rather provides support to non-Federal participants, acting alone or in consortia, seeking to broaden the homeland technology knowledge base.
2. Within DHS, OTs for Research are appropriately used in situations such as multi-party technology development arrangements without traditional prime–subcontractor relationships, and transactions for which the government’s acquisition of goods and services is not the principal purpose. These instruments reduce contractual barriers to encourage participation by for-profit firms that traditionally have not done business with the government.
3. When considering OTs for Research, DHS OTCOs should:
  - a. Use the flexibility provided in Section 831 of the Homeland Security Act, 6 U.S.C. § 391 to reduce government-specific administrative requirements for acquisition or assistance instruments.
  - b. Use OTs to develop innovative approaches to carrying out research projects when a standard procurement contract, grant, or cooperative agreement is not appropriate or feasible.
  - c. Understand that OTs for Research require, to the maximum extent practicable, a 50 percent resource sharing of program costs between the government and the contractor.

D. **Policy for OTs for Prototype Projects**

1. OTs for Prototype Projects are legally binding instruments used to carry out prototype projects directly relevant to systems proposed for development or acquisition by DHS. Because OTs are not procurement contracts, they are not required to comply with the FAR, its supplements, or laws that are limited in applicability to procurement contracts. This acquisition authority, when used selectively, is a vital tool that will help DHS achieve the commercial technology integration critical to reducing the cost of homeland security items and systems.

2. DHS is encouraged to use OTs for Prototype Projects; however, certain conditions must be met:

a. There is at least one non-traditional government contractor whose participation represents a significant contribution in the prototype project (see definitions); or

b. No non-traditional government contractor is participating to a significant extent in the prototype project, but at least one of the following circumstances exists:

(1) At least one-third of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the Federal government.

(2) DHS's CPO determines, in writing, that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a procurement contract.

3. The OTCO must consider the following before using the OT authority:

a. OTs for Prototype Projects may be used only to carry out prototype projects directly relevant to systems proposed to be acquired or developed by DHS. As such, the resulting OT awards are acquisition (as opposed to assistance) instruments, since they are used to acquire goods or services for the government's direct benefit.

b. For actions greater than \$5,000,000, the OTCO must include a provision in the OT agreement authorizing General Accountability Office (GAO) access to records in certain circumstances. This provision is included in Enclosure 2.

E. **Procedures**

1. OTCOs must ensure that OTs incorporate good business acumen and exercise 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.
2. Enclosure 3 provides more information, in the form of questions and answers, related to DHS's use of OTs. Enclosure 4 provides related statutes.

## **VII. Questions**

Any questions or concerns regarding this MD should be addressed to the Office of the Chief Procurement Officer, Director of Acquisition Policy & Oversight.

Enclosure 1 – Annual Report to Congress (Requirements and Format and Instructions)

Enclosure 2 – GAO Access to Records Provision

Enclosure 3 – Questions and Answers on OT Authority

Enclosure 4 – Statutes That May Be Inapplicable to OT Authority

**ANNUAL REPORT TO CONGRESS (REQUIREMENT AND FORMAT) TO  
MD # 0771.1**

A. Requirement for an Annual Report to Congress

Section 831 of the Homeland Security Act of 2002 (Pub. L. 107-296) requires that a report be submitted to Congress each year by 31 December for awards made in the preceding fiscal year pursuant to OT authority. This includes all initial awards and options exercised or new phases awarded. It is imperative that the rationale justifying the use of OT authority be made clear in the answers to the questions regarding how the use of an OT is expected to contribute to a broadening of the technology and industrial base and foster new relationships and practices that support homeland security. Authorized officials are required to submit a report to the DHS CPO by 15 October of each year. Reports should be submitted in the format specified below.

B. Format

Each OTCO must prepare this Annual Report in accordance with the format provided at Attachment 1. Individual agreement summaries should not exceed two pages.

ENCLOSURE 1

Attachment #1: **Sample Report Format** (Delete all italicized instructions from the actual report.) to Enclosure #1

*(DHS Letterhead)*

**Agreement Number:** XXXXX-XX-X-XXXX *(The ninth digit in the agreement number will be coded "3" for all OTs for Research and "9" for all OTs for Prototype Projects.)*

**Type of Agreement:** Other Transaction for Prototype Project *(Specify the type of OT.)*

**Title:** *Next Generation Electrical Architecture (Provide a short title describing the research or prototype project.)*

**Awarding Office:** *U.S. Secret Service (Identify the buying office.)*

**Awardee:** *Boom Electronics, Inc. (Use initial capital letters as for a title; do not include address.)*

**Effective Date:** *29 SEP 1999 (Enter as DD MMM YYYY.)*

**Estimated Completion or Expiration Date:** *30 SEP 2001 (Enter as DD MMM YYYY.)*

**U. S. Government Dollars:** *\$ 2,285,000 (Enter as \$ xxx,xxx; if zero, use \$ 0. Identify the total dollar value of expected government contributions to the agreement.)*

**Non-Government Dollars:** *\$ 2,665,000 (Identify the total dollar value of expected non-government contributions to the agreement. If cost-sharing is the reason for using OT authority, then this amount must represent one-third of the total dollars.)*

**Dollars Returned to Government Account:** *\$ 0 (Identify the amount of any payments made to the government in accordance with Section 831 of Pub. L. 107-296.)*

**Technical objectives of this effort including the technology areas in which the project was conducted:**

*The technical objectives of this effort... (Describe the technical objectives and the technology areas that are the focus of the agreement.)*

**Extent to which the Other Transaction has contributed to a broadening of the technology and industrial base available for meeting Department of Homeland Security needs:**

The use of an Other Transaction agreement has *(Discuss how the use of the OT has contributed to a broadening of the technology and industrial base available for meeting DHS needs. If OT authority is used because non-traditional defense contractors are participating to a significant extent, then the answer to this question should identify who these non-traditional defense contractors are and what significant contribution they are making. The answer should also address how the use of OT authority facilitated their participation.)*

**Extent to which the Other Transaction has fostered, within the technology and industrial base, new relationships and practices that support the national security of the United States:**

The use of an Other Transaction agreement has ... *(Discuss how the use of the OT has fostered new business relationships or practices that support the national security of the United States. If OT authority is used on the basis of cost-sharing or exceptional circumstances, explicitly state that reason and explain it fully.)*

**Other benefits to DHS through the use of this agreement:**

The use of an Other Transaction has resulted in additional benefits not addressed above... *(This is an optional field that can be completed if there are other benefits that warrant reporting beyond those addressed above. If there are no other benefits to be reported, delete this header from the report.)*

## **GAO ACCESS TO RECORDS PROVISION**

### GAO Access to Records

Comptroller General Access to Records: To the extent that the total government payments under this agreement exceed \$5,000,000.00, the Comptroller General, at its discretion, shall have access to and the right to examine records of any party to this agreement, or any entity that participates in the performance of this agreement, that directly pertain to, and involve transactions relating to, the agreement for a period of three (3) years after final payment is made. This requirement applies only to any party (or any subordinate element of such party or entity) to this agreement that has participated in the performance of any agreement (contract, grant, cooperative agreement, or "other transaction") that provided for audit access by GAO in the year prior to the date of this agreement. This requirement applies only to any record that is created or maintained in the ordinary course of business or pursuant to a provision of law. The terms of this paragraph shall be included in all sub-agreements to the agreement.

## QUESTIONS AND ANSWERS ON OT AUTHORITY

Q: What can OTs do for DHS?

A: Because OTs for Research and OTs for Prototype Projects are instruments that generally are not subject to the federal laws and regulations governing procurement contracts, they are not required to comply with the FAR, its supplements, or laws that are limited in applicability to procurement contracts, such as the Truth in Negotiations Act and Cost Accounting Standards. Similarly, OTs are not subject to those laws and regulations that are limited in applicability to grants and cooperative agreements. However, to the extent that a particular statute is funding- or program-related (e.g., fiscal and property laws) or is not tied to the type of instrument used, it generally will apply to an OT. A list of key statutes that apply to procurement contracts, but that are not necessarily applicable to OTs, is in Enclosure 4.

Q: How are OTs for Research potentially useful to DHS?

A: The authority to enter into OTs for Research can be used to help develop the support technologies that are of importance to DHS but are not required to meet an immediate need of the Department. These arrangements normally are made for programs in which industry and government share in both the expenses and the results. The focus is on programs where both parties see a future benefit in the resulting products, such as dual-use science and technology programs.

Q: How are OTs for Prototype Projects potentially useful to DHS?

A: The authority to enter into OTs for Prototype Projects may be used to carry out prototype projects that are directly relevant to systems to be developed by DHS. Prototype projects could include prototypes of systems, subsystems, or components. The quantity developed should be limited to that needed to prove technical or manufacturing feasibility or to accelerate the deployment of critical homeland security technologies.

Q: When should DHS consider using OTs?

A. DHS should consider using OT authority if the OT requirements are met and if, in order to provide terms and conditions appropriate for the program, both the government and the awardee need flexibility in their solicitation and negotiation of the terms and conditions that goes beyond what is available in the FAR and its supplements. In assessing the anticipated benefit of an OT, the OTCO and project manager should consider cost, schedule, and performance. There should be some anticipated cost savings, schedule savings, or improved performance expected from using an OT, beyond what could be expected if a FAR contract were used.

## ENCLOSURE 3

Because OTs provide the flexibility to depart from the government-unique requirements that apply to traditional instruments, they can help integrate the government and commercial sectors, whether the commercial companies or business units participate as prime awardees or sub-awardees. A prime awardee that is a traditional government contractor should be encouraged to integrate the OT into its commercial projects. It also should be encouraged to seek commercial companies or commercial business units as sub-awardees when the commercial companies can provide state-of-the-art technologies and off-the-shelf products that can reduce DHS's acquisition costs.

## **STATUTES THAT MAY BE INAPPLICABLE TO OT AUTHORITY TO MD # 0771.1**

This list of key statutes that apply to procurement contracts, but that are not necessarily applicable to OTs, is provided for guidance only, and is not intended to be definitive. OTCOs should review each statute with regard to any particular arrangement using an OT, to determine its applicability. To the extent a particular statute is funding- or program-related (e.g., fiscal and property laws), or is not tied to the type of instrument used, it generally *will* apply to an OT. OTCOs should consult with their General Counsel on these matters.

1. Sections 202-204 of the Bayh-Dole Act (Title 35 of the US Code, Sections 200-212). Prescribes the government's rights in patentable inventions made with government funds.
2. Competition in Contracting Act (Pub. L. 98-369 [1984]), as amended. Promotes the use of competitive procurement procedures and prescribes uniform, government-wide policies and procedures regarding contract formation, award, publication, and cost or pricing data (truth in negotiations).
3. Contract Disputes Act, Pub. L. 95-563 (1987), as amended, 41 US Code 601 *et seq.* Provides for the resolution of claims and disputes relating to government contracts.
4. Procurement Protest System, Subtitle D of Competition in Contracting Act, Pub. L. 98-369 (1984), 31 US Code 3551, *et seq.* Provides statutory basis for procurement protests by interested parties to the Comptroller General.
5. 31 US Code 1352, Limitation on the use of appropriated funds to influence certain federal contracting and financial transactions. Prohibits the use of funds to influence or attempt to influence government officials or members of Congress in connection with the award of contracts, grants, loans, or cooperative agreements.
6. Anti-Kickback Act of 1986, 41 US Code 51-58. Prohibits kickbacks in connection with government contracts, and provides civil and criminal penalties.
7. Procurement Integrity Act, Section 27 of the Office of Federal Procurement Policy Act, 41 US Code 423. Imposes civil, criminal, and administrative sanctions against individuals who inappropriately disclose or obtain source selection information or contractor bid and proposal information.
8. Service Contract Act, 41 US Code 351 *et seq.*; Walsh Healey Act, 41 US Code 35-45; and Fair Labor Standards Act of 1938, 29 US Code 201-219. Provides protections for contractor employees.

## ENCLOSURE 4

9. Drug-Free Workplace Act of 1988, 41 US Code 701-707. Applies to contracts and grants.
10. Buy American Act, 41 US Code 10a-d. Provides preferences for domestic end-products in production.