

Department of Defense

Other Transactions:

An **Analysis** of Applicable Laws

A Project of the
Ad Hoc Working Group on Other Transactions
Section of Public Contract Law
American Bar Association



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TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	3
I. EVOLUTION OF OTHER TRANSACTION AUTHORITY.....	3
A. Other Transactions (OTs) For Cost-Shared Dual-Use Research & Development	4
B. Extension Of OT Authority To Military Weapon System Prototypes	5
C. Possible Extension Of Prototype Authority To Production.....	6
II. TWO TYPES OF OTHER TRANSACTIONS	7
III. IMPLEMENTATION OF OTHER TRANSACTION AUTHORITY	9
A. DARPA’s Draft Guidance	9
B. General Accounting Office Report	9
C. DoD Integrated Product Team Report	10
D. The Kaminski Memorandum	11
E. 1997 DoD Inspector General Report	12
F. 1998 DoD Inspector General Report	12
G. Director of Defense Research and Engineering Guidance.....	12
IV. ISSUES IN USING OTHER TRANSACTIONS	13
V. THE APPLICABILITY OF THE STATUTES IDENTIFIED IN THE KAMINSKI MEMORANDUM	14
A. OTs Are Other Than <i>Procurement</i> Contracts, Cooperative Agreements, And Grants, As Defined In The Chiles Act.....	15
B. Determining Whether “Procurement-Related” Statutes Apply Only To Procurement Contracts	17
C. Determining Which Statutes Apply To OTs (And Historical Background On The Chiles Act).....	20

VI. RESULTS OF ANALYSES

Table I.....

Table II.....

26
7
0

APPENDIX A..... A-1

ANALYSIS OF APPLICABILITY OF SPECIFIC STATUTORY PROVISIONS A-1

1. The Competition in Contracting Act, Division B, Title VII of Pub. L. No. 98-369, 98 Stat. 494 (1984), codified as amended, at 10 U.S.C. §§ 2301 *et seq.*; 41 U.S.C. §§ 253 *et seq.* (Kaminski Memorandum, Item 1.)..... A-1
2. 41 U.S.C. §§ 601 *et seq.*, the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (1978), as amended (Kaminski Memorandum, Item 2.) A-2
3. 31 U.S.C. §§ 3551 *et seq.*, Procurement Protest System, Subtitle D of the Competition in Contracting Act, Division B, Title VII, Subtitle D of Pub. L. No. 98-369, 98 Stat. 494 (1984) (Kaminski Memorandum, Item 3.)..... A-3
4. 50 U.S.C. §§ 1431-1435, Extraordinary Contractual Authority and Relief Act, Pub. L. No. 85-804, 72 Stat. 972 (1958) (Kaminski Memorandum, Item 4.) A-5
5. 10 U.S.C. § 2207, Expenditure of Appropriations: Limitation (Kaminski Memorandum, Item 5.) A-7
6. 10 U.S.C. § 2306, Kinds of Contracts (Kaminski Memorandum, Item 6.) A-8
7. 10 U.S.C. § 2313, Examination of Records of Contractor (Kaminski Memorandum, Item 7.) A-9
8. 10 U.S.C. § 2353, Contracts: acquisition, construction, or furnishing of test facilities and equipment (Kaminski Memorandum, Item 8.) A-11
9. 10 U.S.C. § 2354, Contracts: Indemnification Provisions (Kaminski Memorandum, Item 9.) A-12
10. 10 U.S.C. § 2393, Prohibition against doing business with certain offerors (Kaminski Memorandum, Item 10.)..... A-14
11. 10 U.S.C. § 2403, Major Weapon Systems: Contractor Guarantees (Warranties) (Kaminski Memorandum, Item 11.) A-15
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.)..... A-17

13.	10 U.S.C. § 2409, Contractor employees: protection from reprisal for disclosure of certain information (Kaminski Memorandum, Item 13.)	A-20
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.)	A-21
15.	41 U.S.C. §§ 51-58, Anti-Kickback Act of 1986 (Kaminski Memorandum, Item 15.)	A-24
16.	41 U.S.C. § 423, Procurement Integrity Act (Section 27 of the Office of Procurement Policy Act) (Kaminski Memorandum, Item 16.)	A-25
17.	41 U.S.C. §§ 351 <i>et seq.</i> , 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.)	A-27
17a.	41 U.S.C. §§ 351 <i>et seq.</i> , Service Contract Act.	A-27
17b.	41 U.S.C. §§ 35-45, Walsh-Healey Act.	A-30
17c.	29 U.S.C. §§ 201-219, Fair Labor Standards Act.	A-31
18.	41 U.S.C. §§ 701-707, Drug-Free Workplace Act of 1988 (Kaminski Memorandum, Item 18.)	A-31
19.	41 U.S.C. §§ 10a -10d, Buy American Act (Kaminski Memorandum, Item 19.)	A-32
20.	28 U.S.C. § 1491, Tucker Act (Added by Working Group)	A-35
21.	35 U.S.C. §§ 200-212, Bayh-Dole Act (Added by Working Group)	37
22.	10 U.S.C. § 2320 and § 2321, Technical data provisions applicable to DoD (Added by Working Group)	A-43
23.	18 U.S.C. § 1905, Trade Secrets Act (Added by Working Group)	A-46
24.	5 U.S.C. § 552, Freedom Of Information Act (FOIA) (Added by Working Group)	A-47
25.	31 U.S.C. § 1304, Judgments, awards, and compromise settlements (Added by Working Group)	A-48
26.	31 U.S.C. § 1341, Limitations on expending and obligating amounts (Added by Working Group)	A-49

- 27. 31 U.S.C. §§ 3801 *et seq.*, Administrative Remedies for False Claims and Statements (Added by Working Group)..... A-51
- 28. 10 U.S.C. § 2306a and 41 U.S.C. § 254b, Truth in Negotiations Act (Added by Working Group)..... A-51
- 29. 41 U.S.C. § 422, Cost Accounting Standards (Added by Working Group) A-53
- 30. 10 U.S.C. § 2324, Cost Principles (Added by Working Group)..... A-55

ATTACHMENT 1 – Memorandum from Under Secretary of Defense for Acquisition and Technology Paul G. Kaminski to Secretaries of the Military Departments and Directors of Defense Agencies, Dec. 14, 1996 (referred to herein as “Kaminski Memorandum”).

ATTACHMENT 2 – 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 (enacted by Congress in 1989).

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CASES

<i>City of El Centro v. United States</i> , 922 F.2d 816 (Fed. Cir. 1990)	A-35
<i>Council on Env'tl. Quality and Office of Env'tl. Quality— Coop. Agreement with Nat'l Academy of Sciences</i> , 65 Comp. Gen. 605 (1986)	23
<i>Electronic Space Systems Corp.</i> , 61 Comp. Gen. 428, 82-1 CPD ¶505 (1982)	23
<i>Energy Conversion Devices, Inc.</i> , B-260514, 95-2 CPD ¶ 121 (June 16, 1995).....	A-4
<i>Fidelity Construction Co. v. United States</i> , 700 F.2d 1379 (Fed. Cir.), <i>cert. denied</i> , 464 U.S. 826 (1983).....	A-2
<i>Fincke v. United States</i> , 675 F.2d 289 (Ct. Cl. 1982).....	A-35
<i>Hammond v. Donovan</i> , 538 F. Supp. 1106 (W.D. Mo. 1982).....	24
<i>Menlo Service Corp. v. United States</i> , 765 F.2d 805 (9th Cir. 1985)	A-29
<i>Ober United Travel Agency v. Department of Labor</i> , No. 97-5046 (D.C. Cir. Feb. 13, 1998).....	A-29, A-30
<i>Perkins v. Lukens Steel Co.</i> , 310 U.S. 113 (1940).....	A-30
<i>S.J. Amoroso Construction Co. v. United States</i> , 12 F.3d 1072 (Fed. Cir. 1993).....	A-34
<i>Textron, Inc. v. Adams</i> , 493 F. Supp. 824 (D.D.C. 1980).....	A-34
<i>Thermalon Indus., Ltd. v. United States</i> , 34 Fed. Cl. 411 (1995).....	A-19, A-23, A-35, A-36, A-38
<i>Total Med. Management, Inc. v. United States</i> , 104 F.3d 1314 (Fed. Cir. 1997).....	16, A-19, A-35
<i>Trauma Service Group v. United States</i> , 33 Fed. Cl. 426 (1995).....	A-35
<i>Trauma Service Group v. United States</i> , 104 F.3d 1321 (Fed. Cir. 1997)	A-19, A-36

OTHER MATERIAL

73 Am. Jur. 2d <i>Statutes</i> § 257 (1998)	A-2
Acting Deputy Director, Research & Engineering Memorandum, <i>Revision 1 to Guidance on Instruments for Stimulation or Support of Research 4</i> (Mar. 24, 1988).....	8, 12, 13, A-41
American Bar Association, Section of Public Contract Law, Bid Protest Committee, <i>Post Award Bid Protests at the U.S. Court of Federal Claims</i> (1998).....	A-37
DCAA Memorandum 98-PSP-077(R) (May 12, 1998)	A-55, A-57
Defense Advanced Research Projects Agency, <i>Draft Guidance for the Use of Other Transactions</i> (Feb. 1995).	7, 9, A-43, A-44
Defense Advanced Research Projects Agency, <i>Legal Opinion - Use of Other Transactions</i> (Mar. 17, 1997).....	15
Department of Defense Integrated product Team, <i>Final Report of the Integrated Product Team on the Services' Use of 10 U.S.C. §. 2371 "Other Transactions" and 845 Prototype Authorities</i> (June 10, 1996).....	10, A-25, A-41
Department of Defense, Office of Inspector General, <i>Award and Administration of Contracts, Grants, and Other Transactions Issued By The Defense Advanced Research Projects Agency</i> , Rep. No. 97-114, (Mar. 28, 1997).....	12
Department of Defense, Office of Inspector General, <i>Financial and Cost Aspects of Other Transactions</i> , Rep. No. 98-191, (Aug. 24, 1998)	12
Deputy Director, Research & Engineering Memorandum, <i>Instruments for Stimulation or Support of Research</i> (Dec. 2, 1997)	8, A-41
General Accounting Office, <i>DoD Research: Acquiring Research by Nontraditional Means</i> , GAO/NSAID-96-11 (Mar. 29, 1996)	9, A-40
General Accounting Office, <i>Principles of Federal Appropriations Law 10-11</i> (2d ed. 1992)	21

Letter from Judith A. Miller, DoD General Counsel, to Albert Gore, Vice President of the United States, enclosure (Mar. 28, 1997)	A-2
NASA Memorandum from G.P. Miller to G. Frankle, <i>Technology Reinvestment Project (TRP): Funded Space Act Agreements and Intellectual Property Rights</i> (May 28, 1993).....	A-40
Office of Management and Budget Circular A-21, <i>Cost Principles for Educational Institutions</i>	A-57
Ralph C. Nash, Jr. & John Cibinic, Jr., <i>Federal Procurement Law 1931-34</i> (3d ed. 1980)	A-13
Richard L. Dunn, <i>Using Other Transactions in Cooperative Government-Industry Relationships to Support the Development and Application of Affordable Technology</i> (1995)	A-43, A-47

DEPARTMENT OF DEFENSE "OTHER TRANSACTIONS": AN ANALYSIS OF APPLICABLE LAWS

INTRODUCTION

The American Bar Association's 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. This paper presents the Working Group's analysis and conclusions resulting from that review.

Within the last several years Congress has bestowed upon various Department of Defense (DoD) organizations the authority to enter into "transactions . . . *other than* contracts, cooperative agreements and grants" to fund research and development (R&D) and to develop or "prototype" new weapon systems. 10 U.S.C. § 2371, and note (emphasis added). The term "Other Transaction" (or "OT") is derived from this statutory language. DoD has viewed the use of its OT authority to be virtually exempt from the statutes and regulations that normally govern DoD's R&D and prototyping efforts. For example, in December 1996 then Under Secretary for Acquisition and Technology Paul G. Kaminski identified 21 procurement-related statutes that "are not necessarily applicable to 'other transactions.'" Memorandum from Under Secretary of Defense for Acquisition and Technology Paul G. Kaminski to Secretaries of the Military Departments and Directors of Defense Agencies, Dec. 14, 1996 [hereinafter, "Kaminski Memorandum"; Attachment 1]. Such statutory exemption has profound implications. For example, 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 agree to statutorily mandated intellectual property provisions and cost accounting procedures. In addition, the Government may benefit from the leveraging of private-sector R&D investment. But to the extent that certain statutes and regulations do not apply to OTs, the parties may encounter increased risks and uncertainties in areas such 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.

Thus, the touted benefits and potential pitfalls of OTs follow from the statutory exemption that OTs enjoy. And yet the extent to which OTs are exempt from procurement-related statutes is less than clear. Confusion over OTs' statutory exemption can be costly either in litigation or in the misuse of OTs. The objective of this monograph, then, is to consider the extent to which OTs are exempt from the panoply of statutes normally governing DoD's R&D and weapon system development efforts. Specifically, this monograph considers as a legal matter whether the 21 statutes identified by Kaminski, plus 11 statutes that the Working Group found to be significant, do in fact apply to OTs. The result is intended to help clear up the confusion surrounding OTs' statutory exemption, and to identify those areas where legislative clarification may be necessary to avoid confusion. The first section discusses the development and implementation of OT authority, including a discussion of recent DoD guidance on the use of OTs. The second section discusses the various approaches the Working Group used to analyze the applicability of procurement-related statutes to OTs, and summarizes the results of the Working Group's analysis. Appendix A contains the specific analyses of the applicability of the statutes to OTs.

BACKGROUND

I. EVOLUTION OF OTHER TRANSACTION 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. No. 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 frequently in the first decade of its existence to conduct cutting edge research and development. Nevertheless, with the enactment of more expansive procurement laws and regulations and with the enactment of the Federal Grant and Cooperative Agreements Act ("Chiles Act"), 31 U.S.C. §§ 6301-6308, NASA used its OT authority more restrictively. 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 OT 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.

A. Other Transactions (OTs) For Cost-Shared Dual-Use Research & Development

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 text of the statute is at Attachment 2.) The statute provided that the non-government 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 (e.g., 139 Cong. Rec. S11158, S11288 (daily ed., Sept. 9, 1993)) 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 (a) the traditional procurement rules set forth in the Armed Services Procurement Act of 1947 and the Federal Acquisition Regulation

(FAR), or (b) the laws, regulations and OMB Circulars applicable to grants and cooperative agreements. OTs were intended to be unimpaired by rigid procurement laws and regulations and permitted more flexible intellectual property clauses than those required by the Bayh-Dole Act for procurement contracts, grants, and cooperative agreements.

B. Extension Of OT Authority To Military
Weapon System Prototypes

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, Congress passed section 845 of the Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547 (1993), which 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 made inapplicable 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 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 for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422, 2605 (1996), 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 to 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." H.R. Conf. Rep. No. 104-724, at 768 (1996).

Section 241 of the National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 1920, 1954 (1998), further extended section 845 authority through September 30, 2001. The conference report on the legislation stated that any further extension would be based on a conclusion by the congressional defense committees that the authority had been used in a limited and responsible manner:

[S]ection 845 authority should only be used in the exceptional cases where it can be clearly demonstrated that a normal contract or grant will not allow sufficient access to affordable technologies. The conferees are especially concerned that such authority not be used to circumvent the appropriate management controls in the standard acquisition and budgeting process.

H.R. Conf. Rep. No. 105-736, at 590 (1998) (emphasis added). The conferees directed the Secretary of Defense to report to the congressional defense committees by March 1, 1999 on the use of section 845 OT authority. *Id.*

C. 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 might appropriately be expanded as the prototype projects transitioned into the production phase. 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. 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. It is expected that in a future legislative proposal DoD again will seek authority for a pilot test of the use of OTs for follow-on production. It is likely that the proposal will be limited to items that were developed through the prototype phase under section 845.¹

II. TWO TYPES OF OTHER TRANSACTIONS

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, is termed "OT used for assistance," "§ 2371 OT," or the term we shall use for purposes of this analysis, "S&T [science and technology] OT." S&T OTs may be 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 (thus explaining the cost-sharing requirement). See Defense Advanced Research Projects Agency, *Draft Guidance for the Use of Other Transactions* (Feb. 1995).

¹ The Department of Transportation recently received authority similar to OT authority in the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998). Section 3015 of that law authorizes DOT to enter into grants, contracts, cooperative agreements, and "other agreements" with consortia (which must pay 50 percent of the costs) for innovation in mass transportation. Section 5102 authorizes the Secretary to enter into "other transactions" for research and development relating to surface transportation.

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.

The second principal type of OT, which was initially authorized by the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547, 1721 (1993), section 845, is termed "Prototype OT," "Section 845/804 OT," or the term we shall use for purposes of this analysis "section 845 OT." Section 845 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 OTs need not meet the cost share and appropriateness/ feasibility tests that are required for S&T OTs. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845(b), 107 Stat. 1547, 1722 (1993), *as amended* by the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 804, 110 Stat. 2422, 2605 (1996) (*see* 10 U.S.C. § 2371 note). A recent Conference Report suggests, however, Congressional concern that section 845 OTs not be used indiscriminately to avoid "appropriate management controls." H.R. Conf. Rep. No. 105-736, at 590 (1998). Competitive procedures are to be used (to the maximum extent practicable) when entering into section 845 OTs.⁴

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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.

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" (Dec. 2, 1997), Attachment: "Guidance on 'Technology Investment Agreements' for Military Departments and Defense Advanced Research Projects Agency," 4; Acting DDR&E Memorandum, "Revision 1 to Guidance on Instruments for Stimulation or Support of Research," 4 (Mar. 24, 1998).

III. IMPLEMENTATION OF OTHER TRANSACTION AUTHORITY

The following is a brief summary, in chronological order, of guidance that DoD and other agencies have issued regarding the use of OTs.

A. 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. Defense Advanced Research Projects Agency, *Draft Guidance for the Use of Other Transactions* (Feb. 1995). Therefore, DARPA concluded that it was not required to include FAR or Defense FAR Supplement (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 S&T OTs should be used when the principal purpose is to stimulate or support research and development and that the transactions should be characterized by a strong mutuality of benefit.

B. General Accounting Office 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. General Accounting Office, *DoD Research: Acquiring Research by Nontraditional Means*, GAO/NSIAD-96-11 (Mar. 29, 1996). The GAO analysis did not specifically address the additional authority to use OTs for prototype projects as set forth in section 845.

C. DoD Integrated Product Team Report

A DoD Integrated Product Team ("IPT") reported in June 1996 that DARPA had used the section 845 OT authority to enter into a few commercial-type agreements for prototypes of weapon systems. Department of Defense, *Final Report of the Integrated Product Team on the Services' Use of 10 U.S.C. § 2371 "Other Transactions" and 845 Prototype Authorities* (June 10, 1996). 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. *Id.* at 24. The report indicated that DARPA awarded a total of 40 OTs in fiscal year 1995 with a value of more than \$400 million. *Id.* at 18. Within this total, six projects valued at more than \$130 million were awarded for section 845 OTs in fiscal year 1995. (More recently, projects authorized or contemplated under section 845 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 OT authority as an alternative to the traditional FAR-based system for prototype development by military departments. *Id.* at 29.

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 Defense Contract Audit Agency (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). *Id.* at 24-25.

D. The Kaminski Memorandum

In December 1996, the Under Secretary 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 OTs. 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 No. 85-804 (extraordinary contractual relief), 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. *Id.* The Kaminski memorandum specifically noted that the list was provided for guidance only and was not intended to be definitive. The memorandum 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 § 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.

Id.

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.

E. 1997 DoD Inspector General Report

In March 1997, the DoD Office of Inspector General (DoD IG) issued a report on DARPA's administration of contracts, grants, and S&T OTs. Department of Defense, Office of Inspector General, *Award and Administration of Contracts, Grants, and Other Transactions Issued By The Defense Advanced Research Projects Agency*, Rep. No. 97-114, (Mar. 28, 1997). 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. *Id.* The report identified four OTs issued pursuant to section 845, but did not address those OTs in any substantial way.

F. 1998 DoD Inspector General Report

In August 1998 the DoD IG reported that administration of OTs was improving and was "generally adequate" for the OTs reviewed. Department of Defense, Office of Inspector General, *Financial and Cost Aspects of Other Transactions*, Rep. No. 98-191, (Aug. 24, 1998) at ii. Nevertheless, the DoD IG recommended that policy guidance be issued to improve research and prototype performance reporting and to establish quantifiable performance measures for OTs. *Id.*

G. Director of Defense Research and Engineering 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 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," (Mar. 24, 1998).

IV. ISSUES IN USING OTHER TRANSACTIONS

Both S&T and section 845 OTs offer the potential for significant benefits to both the Government and the private sector. For example, using either S&T or sections 845/804 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 plans, 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 section 845 OTs, however, there are issues not generally applicable to S&T OTs that should be considered.

(1) The potential for leveraging private sector resources would be diminished in the development of a weapon system or other military-unique end item.

(2) Cost sharing, which is not required, is likely to be appropriate only to the extent there is a potential commercial benefit.

(3) 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).

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

V. THE APPLICABILITY OF THE STATUTES IDENTIFIED IN THE KAMINSKI MEMORANDUM

This section analyzes whether OT instruments are indeed exempt from the 21 statutes identified in the Kaminski memorandum and from 11 additional statutes identified by the Working Group. In doing so, the Working Group developed the following analytical framework: First, we considered what specifically section 2371 and section 845 authorized, and determined that these statutes authorize transactions other than *procurement* contracts, cooperative agreements, and grants, as the latter terms are defined in the Chiles Act. Second, we reviewed the statutory language and legislative history of each of the 32 statutes under consideration to determine whether that statute applied only to Chiles Act procurement contracts, grants and/or cooperative agreements, or whether the statute applied more broadly. Third, we concluded (a) that statutes applying only to procurement contracts would not apply to OTs, regardless of the specific terms of the OTs, and (b) that statutes applying more broadly than to procurement contracts would likely apply to OTs, but such application may depend on the terms of the OT.

A. OTs Are Other Than Procurement Contracts, Cooperative Agreements, And Grants, As Defined In The Chiles Act

In authorizing the use of OTs, Congress distinguished them from “standard contract(s).” 10 U.S.C. § 2371(e)(2) (1998). While the term “standard contract” is not expressly defined, DARPA, the first DoD agency authorized to use OTs, considers this term to mean “procurement contract” as defined in the Chiles Act. See Defense Advanced Research Projects Agency, *Legal Opinion - Use of ‘Other Transactions’* (Mar. 17, 1997). Congress has arguably ratified this interpretation by renewing and expanding DARPA’s OT authority five times (in 1991, 1993, 1994, 1996 and 1998) making only relatively minor changes.⁵ See, e.g., 110 Stat. 2422, 2605 (1996), National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845(b), 107 Stat. 1547, 1722 (1993), as amended by National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 804.

DARPA’s 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.

10 U.S.C. § 2371(a) (emphasis added).

⁵ 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.

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 the Chiles Act, chapter 63 of title 31:

(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, 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 thus 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 or use 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, but by statute are not procurement contracts.

B. Determining Whether "Procurement-Related" Statutes Apply Only To Procurement Contracts

Because OTs are other than procurement contracts, a particular statute that applies only to procurement contracts would not apply to OTs. Determining the applicability of the statutes at issue is not always simple, however. The starting point for such an analysis is the express language of the statute itself. In many cases, it is clear from the language whether or not the statute applies only to procurement contracts. In other cases, however, it is not so clear. In such cases, the Working Group considered the statute's legislative history, and to a lesser extent, 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 of the United States Code, entitled "Armed Forces," and in Title III of the Federal Property and Administrative Service Act of 1949 (the "Property Act"), subchapter IV of chapter 4 of title 41, United States Code. Title 10 of 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 §§ 2351-2374.⁶ Title 10 also includes a separate chapter 137, "Procurement

⁶ Chapter 139 includes the following sections:

§ 2351 Availability of Appropriations.
§ 2358 Research and Development Projects.

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Generally" in §§ 2302a-2331,⁷ and chapter 141, "Miscellaneous Procurement Provisions."⁸
Title 41 of the U.S. Code includes, among others, Title III of the Property Act, "Procurement

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- § 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.
- § 2374 Merit-based Award of Grants for Research and Development.

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Chapter 137 contains the following sections:

- § 2302a Simplified Acquisition Threshold.
- § 2302b Implementation of Simplified Acquisition Procedures.
- § 2302c Implementation of Electronic Commerce 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.
- § 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 Undefined Contractual Actions: Restrictions.

Provisions," found in §§ 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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- § 2327 Contracts: Consideration of National Security Objectives.
- § 2328 Release of Technical Data Under Freedom of Information Act: Recovery of Costs.
- § 2331 Contracts for Professional and Technical Services.

8 Chapter 141 includes 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.
- 2403 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.

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 Electronic Commerce Capability.

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For these reasons, the statutes contained in title 10, chapters 137 and 141, and Title III of the Property Act, probably apply to procurement contracts only, and therefore probably would not apply to OTs, unless the language of the particular statute or its legislative history indicates otherwise.

C. Determining Which Statutes Apply To OTs
(And Historical Background On The Chiles Act)

Finally, the Working Group concluded that statutes applying only to procurement contracts necessarily do not apply to OTs, regardless of the terms of the OT; those statutes that apply more broadly would probably apply to OTs, depending on their terms. Because the Working Group has interpreted OTs to be essentially an exemption to the Chiles Act requirements, some analysis of the Chiles Act's requirements is useful in understanding this conclusion.

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§ 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.
§ 253l	Severable Services Contracts for Periods Crossing Fiscal Years.
§ 254	Contract Requirements.
§ 254a	Cost-Type Research and Development Contracts with Educational Institutions.
§ 254b	Cost or Pricing Data: Truth in Negotiations.
§ 254c	Multiyear Contracts.
§ 254d	Examination of Records of Contractor.
§ 255	Contract Financing.
§ 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 Relating to Procurement of Commercial Items.
§ 264b	Preference for Acquisition of Commercial Items.
§ 265	Contractor Employees: Protection From Retaliation for Disclosure of Certain Information.
§ 266	Merit-Based Award of Grants for Research and Development.

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* 10-11 (2d ed. 1992). 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. No. 95-449 at 6 (1977), reprinted in 1978 U.S.C.C.A.N. 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 at 4 (1981), *reprinted in* 1982 U.S.C.C.A.N. 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 at 6, *reprinted in* 1978 U.S.C.C.A.N. 11, 16; S. Rep. No. 97-180 at 1, *reprinted in* 1982 U.S.C.C.A.N. 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.”¹⁰ S. Rep. No. 97-180 at 2, *reprinted in* 1982 U.S.C.C.A.N. at 3-4. The Chiles Act is not exhaustive: It does not cover any other funding transactions, 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.

Grants and cooperative agreements are considered to be “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 at 4, 6, *reprinted in* 1978 U.S.C.C.A.N. 11, 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, the 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., Council on Env'tl. Quality and Office of Env'tl. Quality--Coop. Agreement with Nat'l Academy of Sciences*, 65 Comp. Gen. 605 (1986), (agency prohibited from using a cooperative agreement to fund a study); *Electronic Space Systems Corp.*, 61 Comp. Gen. 428, 82-1 CPD ¶505 (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

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

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 a letter to The Honorable Parren J. Mitchell, Chairman, Committee on Small Business, House of Representatives, B-222665 (July 2, 1986), the Comptroller General determined that contracts the Department of Interior awarded to Native American 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. Donovan*, 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 the general public and not a particular agency).

By separately authorizing (outside of the Chiles Act) DoD to use OTs to fund research activities, Congress effectively exempted such research activities from the requirements of the Chiles Act, regardless of the terms of the OT. In short, under section 845 agencies were given independent authority to enter into binding agreements that might include significant funding for the acquisition of goods or services, but were not subject to the formalities and cumbersome rules applicable by statute to procurement contracts. For example, section 845 OTs are to be used for the development of "purely military" weapon systems. *See* analysis at section 21, *infra* (quoting legislative history of section 845 as providing for "purely military research"). Such a use can only reasonably be described as the acquiring of a service for the direct benefit or use of the Government, for which, absent section 845, the Chiles Act would require the use of a procurement contract. Likewise, S&T OTs might include substantial assistance, but would not

be subject to rules applicable specifically to grants and cooperative agreements. The Chiles Act would require the use of a grant or cooperative agreement for the performance of cost-shared R&D, absent the OT authority of 10 U.S.C. § 2371. Because, absent OT authority, a Chiles Act instrument would be required to perform the functions permitted under OTs, one cannot look at the substance of the OT to determine whether, for example, a statute applying only to procurement contracts would apply to OTs. The OT authority constitutes a "safe harbor" against the applicability of such statutes to OTs, regardless of the substance and terms of the OTs.

In particular, 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 (section 2371 and section 845) 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 only to procurement contracts or assistance agreements. Only the statutory conditions for entering into an OT need be 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. Thus, in the analyses in Appendix A, once it is determined that a particular statute applies only to procurement contracts, we conclude that the statute necessarily does not apply to OTs. But statutes that apply more broadly may apply to OTs, depending on the substance of such OTs.

VI. RESULTS OF ANALYSES

The Working Group analyzed 32 statutes to determine their applicability to OTs. Tables

I and II summarize the results of these analyses. The detailed analyses are set forth at Appendix

A. Although the Working Group considers its analyses to be correct, in a number of cases the conclusions are somewhat tenuous. For example, in many cases it is simply not clear from the text of the statute whether it applies only to procurement contracts, or whether it applies more broadly. In such cases the analysis turns on factors such as the placement of the statute in a particular statutory scheme, its legislative history, etc. This uncertainty may lead to unnecessary litigation.

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 OTs.
2.	41 U.S.C. §§ 601 <i>et seq.</i> , the Contract Disputes Act, Pub. L. No. 95-563 (1987), as amended (Kaminski Memorandum, Item 2).	CDA does not apply to OTs.
3.	31 U.S.C. §§ 3551 <i>et seq.</i> , 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 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 are met.
4.	50 U.S.C. §§ 1431-1435, Extraordinary Contractual Authority and Relief Act, Pub. L. No. 85-804, 72 Stat. 972 (1958) (Kaminski Memorandum, Item 4).	Public Law No. 85-804 applies to OTs.
5.	10 U.S.C. § 2207, Expenditure of Appropriations: Limitation (Kaminski Memorandum, Item 5).	Section 2207 applies to OTs.
6.	10 U.S.C. § 2306, Kinds of Contracts (Kaminski Memorandum, Item 6).	Section 2306 does not apply to OTs.
7.	10 U.S.C. § 2313, Examination of records of contractor (Kaminski Memorandum, Item 7).	Section 2313 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).	Section 2353 does not apply to OTs.
9.	10 U.S.C. § 2354, Contracts: indemnification provisions (Kaminski Memorandum, Item 9).	Section 2354 does not apply to OTs.
10.	10 U.S.C. § 2393, Prohibition against doing business with certain offerors (Kaminski Memorandum, Item 10).	Section 2393 does not apply to OTs.
11.	10 U.S.C. § 2403, Major Weapon Systems: Contractor Guarantees (Warranties) (Kaminski Memorandum Item 11).	Section 2403 does not apply to 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 does not apply to OTs.
13.	10 U.S.C. § 2409, Contractor employees: protection from reprisal for disclosure of certain information (Kaminski Memorandum, Item 13).	Section 2409 does not apply to 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).	Section 1352 does not apply to 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 OTs. The Act does not apply to S&T OTs.
16.	41 U.S.C. § 423, Procurement Integrity Act, § 27 of the Office of Procurement Policy Act (Kaminski Memorandum, Item 16).	The Procurement Integrity Act does not apply to OTs.
17.	<p>a. 41 U.S.C. §§ 351 <i>et seq.</i>, Service Contract Act.</p> <p>b. 41 U.S.C. §§ 35-45, Walsh-Healey Act.</p> <p>c. 29 U.S.C. §§ 201-219, Fair Labor Standards Act.</p>	<p>a. The Service Contract Act generally applies to OTs.</p> <p>b. The Walsh-Healey Act could theoretically apply to section 845 OTs, but not to S&T OTs.</p> <p>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 OTs.</p>
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 OTs.
19.	41 U.S.C. §§ 10a - 10d, Buy American Act (Kaminski Memorandum, Item 19).	The Buy American Act does not apply to OTs.
20.	28 U.S.C. § 1491, Tucker Act (Added by Working Group.)	The Tucker Act applies to OTs, and the Court of Federal Claims has jurisdiction over matters involving such instruments.
21.	35 U.S.C. §§ 200-212 (1980) (Bayh-Dole Act) (Added by Working Group.)	The Bayh-Dole Act does not apply to OTs.
22.	10 U.S.C. § 2320 and § 2321, Technical data provisions applicable to DoD (Added by Working Group.)	These provisions do not apply 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 OTs.
24.	5 U.S.C. § 552, Freedom Of Information Act, (FOIA), as amended by the Clinger-Cohen Act of 1996 (Added by Working Group.)	FOIA applies to OTs. In addition, the National Defense Authorization Act of 1998, Pub. L. No. 105-85, § 832, 111 Stat. 1629 (1997), 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.

Item No.	Statute	Applicability of Statute to OTs
25.	31 U.S.C. § 1304, Judgments, awards, and compromise settlements (Added by Working Group.)	Section 1304 applies to OTs.
26.	31 U.S.C. § 1341, Limitations on expending and obligating amounts (Added by Working Group.)	Section 1341 applies to OTs.
27.	31 U.S.C. §§ 3801 <i>et seq.</i> , Administrative Remedies for False Claims and Statements (Added by Working Group.)	Section 3801 applies to OTs.
28.	10 U.S.C. § 2306a, Truth in Negotiations Act (added by Working Group.)	TINA does not apply to OTs.
29.	41 U.S.C. § 422, Cost Accounting Standards (added by Working Group.)	Cost Accounting Standards do not apply to OTs.
30.	10 U.S.C. § 2334, Cost Principles (added by Working Group.)	Cost Principles do not apply to 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, Pub. L. No. 85-804, 72 Stat. 972 (1958).	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.		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
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.		
16.	41 U.S.C. § 423, Procurement Integrity Act.	May apply to prototype OTs	Does not apply to S&T OTs
			X

Item No.	Statute	Applies to OTs	Does Not Apply to OTs
17.	a. 41 U.S.C. §§ 351 <i>et seq.</i> , Service Contract Act.	X	
	b. 41 U.S.C. §§ 35-45, Walsh-Healey Act.	May apply to § 845 OTs	Does not Apply to S&T OTs
	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	
21.	35 U.S.C. §§ 200-212 (1980), 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	
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 <i>et seq.</i> , Administrative Remedies for False Claims and Statements.	X	X
28.	10 U.S.C. § 2306a, Truth in Negotiations Act.		X
29.	41 U.S.C. § 422, Cost Accounting Standards.		X
30.	10 U.S.C. § 2324, Cost Principles.		X