OFFICE OF INSPECTOR GENERAL

Department of Homeland Security's Use of Other Transaction Authority

Homeland Security

November 30, 2017

OIG-18-24

DHS OIG HIGHLIGHTS

Department of Homeland Security's Use of Other Transaction Authority

November 30, 2017

Why We Did This Audit

Other Transaction Agreements (OTA) are not subject to the Federal Acquisition Regulation. Although this increases DHS' flexibility, it also makes each OTA unique and challenging to manage. Our audit objective was to determine whether DHS' use of Other Transaction Authority met statutory requirements for issuing and overseeing OTAs.

What We Recommend

We made three recommendations that, when implemented, will improve OTA reporting and ensure that DHS' use of other transaction authority meets statutory requirements.

For Further Information:
Contact our Office of Public Affairs at (202) 254-4100, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

The Department of Homeland Security had 11 OTAs with activity between fiscal years 2014 and 2016. Although DHS reported using its Other Transaction Authority to work with non-traditional contractors, DHS did not always follow statutory requirements when entering, modifying, and overseeing its agreements. Specifically, DHS did not:

- require a cost-share agreement to its only research OTA;
- ensure statutory requirements were met when it modified a prototype OTA to include separate research-related activities; and
- timely and accurately report OTA activities to Congress.

Inadequate internal policies contributed to DHS falling short of meeting all statutory requirements for using OTAs. In addition, DHS acquisition policy staff reported that competing priorities prevented timely reporting to Congress. As a result, DHS may have taken on more risks and costs than necessary and impeded Congress' ability to oversee DHS' use of OTAs. However, modifying policies and correctly reporting to Congress could help ensure statutory requirements are met, reduce OTA costs, and increase accountability.

DHS Response

DHS concurred with all three recommendations and described corrective actions it has taken and plans to take. We consider all recommendations resolved and open.

OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

NOV 30 2017

MEMORANDUM FOR: The Honorable Claire M. Grady
Under Secretary for Management and
Senior Official Performing the Duties of
the Deputy Secretary
Department of Homeland Security

FROM: John Roth
Inspector General

SUBJECT: *Department of Homeland Security's Use of Other Transaction Authority*

Attached for your action is our final report, *Department of Homeland Security's Use of Other Transaction Authority*. We incorporated the formal comments provided by your office.

The report contains three recommendations aimed at improving the DHS' use of other transaction authority. Your office concurred with all three recommendations. Based on information provided in your response to the draft report, we consider recommendations 1 through 3 open and resolved. Once your office has fully implemented the recommendations, please submit a formal closeout letter to us within 30 days so that we may close the recommendations. The memorandum should be accompanied by evidence of completion of agreed-upon corrective actions and of the disposition of any monetary amounts. Please send your response or closure request to OIGAuditsFollowup@oig.dhs.gov.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Maureen Duddy, Deputy Assistant Inspector General for Audits, at (617) 565-8723; Carolyn Hicks, Audit Director, at (202) 632-0346; or Shamika Morris, Audit Manager, at (202) 254-4156.

Background

Department of Homeland Security was granted authority to enter into other transaction agreements (OTA) to meet research and development (research) or prototype project requirements and mission needs. The *Homeland Security Act of 2002*, Section 831, authorized the Secretary of Homeland Security to exercise the same other transaction authorities granted to the Secretary of Defense under 10 United States Code (U.S.C.) § 2371, as revised. The Secretary of Homeland Security was granted this authority on November 25, 2002, for a period of 5 years, but the authority has been repeatedly extended.

OTAs are legally binding agreements exempt from the Federal Acquisition Regulation (FAR). Unlike procurement contracts, grants, and cooperative agreements, OTAs allow DHS to work with non-traditional contractors that would otherwise not do business with the Federal Government because of strict intellectual property[1] and government cost-accounting standard requirements. The Department uses OTAs when DHS and awardees need flexibility in the negotiation of the terms and conditions that go beyond what is available in the FAR and its supplements. However, due to the lack of regulatory requirements, OTAs carry the risks associated with reduced accountability and transparency. According to the Department, this makes each OTA unique and a challenge to manage.

According to the *Homeland Security Act of 2002*, DHS may enter into OTAs only for research and prototype projects. Additional conditions for DHS' use of OTAs are identified through the *National Defense Authorization Act (NDAA) for Fiscal Year 1994*, as well as Title 10 U.S.C. § 2371.

DHS policy defines the two forms of Other Transaction Agreements it may use:

1) Research OTAs provide assistance to non-Federal participants to broaden the collective homeland security technology knowledge base rather than a deliverable to satisfy an existing or immediate Government need.

2) Prototype OTAs are used to carry out projects to develop prototypes used to evaluate the technical or manufacturing feasibility of a particular technology, process, or system. These OTAs require a deliverable (i.e., prototype(s)) that satisfies an existing agency need.

[1] DHS policy defines intellectual property as patents, trademarks, copyrights, mask works, and other forms of comparable property rights protected by Federal Law related to the performance of an OTA.

The Secretary designated the DHS Office of Procurement Operations to be responsible for administering and awarding OTAs on behalf of DHS directorates and components. DHS officials explained that once awards are made, DHS Science and Technology (S&T) and the National Protection and Programs Directorate (NPPD) personnel perform the day-to-day management of OTAs. During FYs 2014–2016, DHS S&T used 10 OTAs to administer prototype projects and NPPD used 1 OTA for research. The two offices spent approximately $106 million on 11 OTAs with estimated values totaling $294 million. Table 1 illustrates the total costs and estimated values of those 11 OTAs from the time of award to the end of FY 2016.

Table 1: Total Expenditures and Estimated Values of DHS OTAs

Awarded in FY	Program Name	Type of OTA	Total Expenditures (Up to FY16)	Ceiling
07	Critical Infrastructure Protection	Research	$78,630,262	$83,152,379
08	Resilient Electric Grid	Prototype	$17,946,230	$58,694,485
09	Recovery Transformer	Prototype	$5,480,269	$20,074,273
09	Cargo Screening	Prototype	$2,854,400	$4,774,531
15	Quadrupole Resonance Based Portable Scanners	Prototype	$1,030,718	$1,951,000
15	Border Security Technology Consortium	Prototype	$0	$125,000,000
16	Internet of Things (Security) - 1	Prototype	$200,000	$200,000
16	Internet of Things (Security) - 2	Prototype	$74,925	$74,925
16	Internet of Things (Security) - 3	Prototype	$0	$119,250
16	Internet of Things (Security) - 4	Prototype	$125,000	$200,000
16	Internet of Things (Security) - 5	Prototype	$98,721	$199,350
Total			**$106,440,525**	**$294,440,193**

Source: Information obtained from DHS' OTA files and data reported to the DHS Federal Financial Management System

Results of Audit

DHS did not always follow statutory requirements when entering, modifying, and overseeing its other transaction agreements. Specifically, DHS did not:

- require a cost-share agreement to its only research OTA;;
- ensure statutory requirements were met when it modified a prototype OTA to include separate research-related activities; and
- report timely and accurately on OTA activities to Congress.

Inadequate internal policies contributed to DHS falling short of meeting all statutory requirements for using other transactions. Also, according to DHS staff within the office responsible for DHS' acquisition policy and legislation division, competing priorities contributed to not meeting statutory requirements for reporting OTA usage. As a result, DHS may have taken on more risks and costs than necessary, and impeded Congress' ability to oversee its use of OTAs. Modifying policies regarding these matters and correctly reporting to Congress may help ensure statutory requirements are met, reduce OTA costs, and increase accountability.

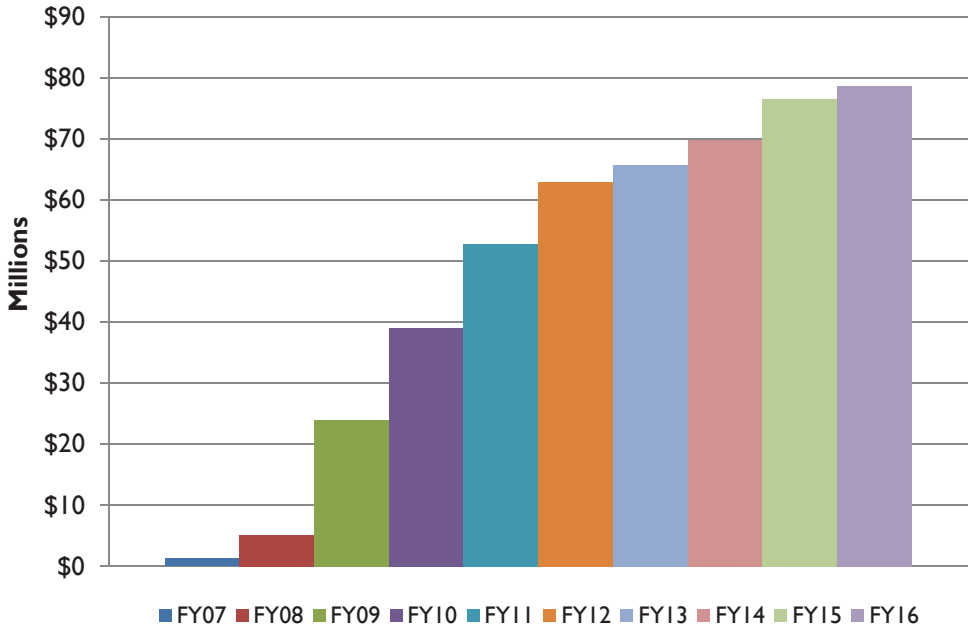
DHS Did Not Require OTA Cost Sharing

DHS' only active research OTA did not include efforts to share the costs of research. Since the *Homeland Security Act of 2002* was enacted, Congress requires the DHS Secretary to determine the extent to which the Department may share at least half the cost of research with other OTA participants. In 2005, the DHS Secretary issued a management directive requiring research OTAs include a 50 percent cost-share to the "maximum extent practicable."

A year later, DHS' rationale for entering into this research OTA was to co-invest and share the financial and technical risks of developing new applications of technology for critical infrastructure protection. Nonetheless, companies involved in the research project never shared in its costs. For example, one private company sold $450,000 in products based on research discoveries for which DHS paid. Another company secured grants outside of DHS; sold more than $400,000 in products; and raised more than $2 million in outside capital.

As figure 1 depicts, over a period of 10 fiscal years, with more than 20 contract modifications, DHS spent approximately $78 million in research without a cost-share agreement, as required. DHS did not document the justification for paying the full cost of research and accepted all of the risk. As a result, the Department potentially missed cost savings that could have been achieved if a cost-share agreement was used.

Figure 1: NPPD Research OTA Cumulative Expenditures by Fiscal Year



Source: Office of Inspector General (OIG) analysis of financial data from the DHS Federal Financial Management System

DHS Did Not Always Follow Statutory Requirements on OTA Modifications

DHS did not always ensure its statutory requirements were met when it modified an OTA. Although DHS determined the OTA was initially for a prototype, modifications that involved research-related work were added without DHS ensuring statutory requirements for research were met. Specifically, DHS may have conducted separate research-related work without first determining that a contract, grant, or cooperative agreement was not feasible, as required by the *Homeland Security Act of 2002*.

Department policy describes research OTAs and prototype OTAs as two separate types of other transactions. Research OTAs may be used to carry out basic, applied, or advanced research programs as a means of broadening the collective homeland security technology knowledge base. Prototype OTAs may be used to develop prototypes for evaluating the technical or manufacturing feasibility of a particular technology, process, or system and requires a deliverable that satisfies an existing agency need.

In one prototype OTA, DHS initially determined that entering into an OTA with a non-traditional government contractor was the appropriate method of procurement for the prototype. The OTA was awarded in part to test breakbulk cargo screening technology to determine whether the technology could be applied in the air cargo environment. This met DHS' definition for a prototype because it required a deliverable for testing.

After the initial award, DHS modified the OTA twice to study checkpoint security equipment, vulnerability assessments, and research biometric systems used throughout DHS. The S&T General Counsel's office questioned whether the new work met the definition of a prototype, and requested that justification for using an OTA be updated to include assurances that perceived research-related work could not be accomplished by traditional procurement methods. However, we did not find any documentation in the OTA files nor did DHS provide additional evidence to ensure the work was not research-related. The Other Transaction Agreement Officer did not believe additional justification for the research work was necessary and believed that the original justification for the prototype was sufficient. The original prototype justification was 2 years old when the last of these modifications was awarded.

Furthermore, DHS could not locate the OTA program manager's file, and the file only contained supporting documentation for the base and the first two modifications. Without program management documentation, we could not determine whether prototype or research-related work was actually conducted. As a result, DHS did not provide evidence showing what it received after reportedly spending $2.8 million.

Even though the requirements for using an OTA for research and prototypes are different, DHS policy does not provide guidance on OTAs that include both prototype and research activities. In addition, it does not specifically require that modifications to OTAs continue to meet all statutory requirements. Without proper guidance, DHS may risk deviating from its statutory authorities in future OTAs.

DHS Did Not Provide Timely or Accurate Reporting to Congress

DHS did not report its OTA usage to Congress on an annual basis. Congress requires DHS to report the usage of other transaction authority each year. The annual report should include the following:

- Details about the project
- Rationale for use
- Funds spent
- Project outcomes
- Results of any OTA audits

DHS did not submit annual reports for FYs 2013, 2014, and 2015 detailing its OTA activities. According to DHS personnel, they misinterpreted that the *FY 2012 Appropriations Act* eliminated the reporting requirement. In April 2016, DHS submitted a summary report containing the missing fiscal years. However, DHS submitted its FY 2016 Congressional report on September 12, 2017; approximately 17 months after the last report had been submitted.

In its April 2016 summary report, DHS accurately reported details about each OTA project, rationale for OTAs use, and results of any audits. In addition, DHS reported and documented its use of non-traditional contractors. However, for one of its prototype OTAs, DHS—

- did not include all project outcomes;
- reported expenditures that were different from expenditures reported in its official financial record system; and
- did not properly identify the OTA as a prototype project.

As a result, untimely and inaccurate reporting may impede Congress' ability to effectively oversee and monitor DHS' use of OTAs.

Conclusion

DHS did not always follow its statutory requirements for entering, modifying, and overseeing its OTAs. Specifically, DHS entered into an OTA without sharing the cost for research, and awarded modifications for research activities to an existing OTA without ensuring the research could be accomplished by traditional procurement methods. In addition, DHS has not timely reported to Congress on its use of OTAs. As a result, DHS may have taken on more risks and costs than would otherwise be necessary, as well as impeded Congress' ability to oversee its use of OTAs.

Recommendations

Recommendation 1: We recommend the Under Secretary for Management establish DHS policies designated to provide reasonable assurance that the Department justifies and documents any deviations in cost sharing between

the government and contractor regarding other transaction agreements for research.

Recommendation 2: We recommend the Under Secretary for Management establish DHS policies designated to provide reasonable assurance that the Department requires that modifications to OTAs meet all statutory requirements.

Recommendation 3: We recommend the Under Secretary for Management establish DHS policies designated to provide reasonable assurance that the Department adheres to statutory requirements by timely and accurately reporting OTA use annually to Congress.

Management Comments and OIG Analysis

In its response to our draft report, DHS concurred with all three report recommendations. We analyzed DHS responses to our recommendations, and included a copy of the management comments in their entirety in appendix A. We also received technical comments and made revisions to the report as appropriate.

DHS Response to Recommendation 1: Concur. Although research OTAs do not require cost-sharing arrangements, the DHS Office of the Chief Procurement Officer (OCPO) will issue an Acquisition Alert to remind components authorized to award OTAs that, as outlined in the *DHS Other Transactions for Research and Prototype Projects Guide* (OT Guide), authorized components must justify and document deviations to cost sharing arrangements, including those involving basic, applied, and advanced research and development. In addition, OCPO is updating the OT Guide to expand the cost sharing guidance, which will include additional documentation requirements for OTAs. Estimated Completion Date (ECD): December 31, 2017.

OIG Analysis: DHS' corrective action is responsive to the recommendation. The recommendation is resolved and will remain open until the department provides evidence to support that corrective actions are completed.

DHS Response to Recommendation 2: Concur. Within the previously mentioned Acquisition Alert, the OCPO will include a reminder that authorized components must adhere to all statutory requirements when modifications are made to OTAs. The OT Guide already requires authorized components to confirm that the use of the Department's authority is still appropriate when agreements are modified. However, OCPO will update the OT Guide to expand

the instructions on modifications in order to reiterate statutory requirements applicable to both research and prototype projects, and requires that modifications to OTAs conform to statutory requirements. ECD: December 31, 2017.

OIG Analysis: Although the Department does require documentation that its OT authority is permitted for each new phase, and throughout the life of the agreement; DHS did not specify what documentation must be maintained to ensure all statutory requirements are met when modifications add research-related work to an existing prototype project. DHS' corrective action is responsive to the recommendation. The recommendation is resolved and will remain open until the department provides evidence to support that corrective actions are completed.

DHS Response to Recommendation 3: Concur. DHS is required to submit an annual report to Congress regarding the Department's use of OTAs. DHS did not submit FYs 2013 and 2014 annual reports because the Department had interpreted the Appropriations Act as having removed this reporting requirement, when it had actually only removed the reporting requirement for the Comptroller General. DHS discovered this error during the FY 2015 reporting period, and subsequently combined and submitted the omitted reports for these FYs with the FY 2015 report.

Aside from the FY 2013 and 2014 reports, the Department has historically provided Congress with its report during the second and third quarters of the FY (February to April) following the close of the reporting period. DHS, however, submitted the FY 2016 report in the fourth quarter of the FY (September), rather than the second and third quarters.

DHS is presently updating its OT Guide to require that the report be submitted to Congress no later than September 30, following the close of the reporting period. This will allow the Department sufficient time for mandatory internal and external coordination of the report and submission to Congress. ECD: December 31, 2017.

OIG Analysis: DHS' corrective action is responsive to the recommendation. The recommendation is resolved and will remain open until the department provides evidence to support that corrective actions are completed.

Objective, Scope, and Methodology

The Department of Homeland Security Office of Inspector General was established by the *Homeland Security Act of 2002* (Public Law 107-269) by amendment to the *Inspector General Act of 1978*.

Our audit objective was to determine whether DHS' use of other transaction authority met statutory requirements for issuing and overseeing other transaction agreements (OTA). The scope of our audit included DHS Directorates and Offices with OTA activity between FYs 2014 and 2016, with the exception of Transportation Security Administration (TSA). We excluded TSA because the Government Accountability Office is reviewing TSA's use of contracts and OTAs.

We identified and reviewed pertinent Federal regulations, as well as Departmental policies, procedures, and directives. We interviewed DHS-HQ officials from the Office of Chief Procurement Officer (OCPO); the Office of Procurement Operations; Science and Technology Directorate (S&T); Domestic Nuclear Detection Office (DNDO); and the National Protection and Programs Directorate (NPPD); who are responsible for the management, oversight, and execution of OTAs.

Using a review of the Federal Procurement Database System, we identified 11 OTAs administered and awarded by the Office of Procurement Operations with activity between FYs 2014 and 2016. Our review of the data, as well as other OTA reported information, allows us to believe the universe of OTAs is accurate and support the conclusions in this report. Of the 11 OTAs, 10 were for prototype projects on behalf of S&T and 1 was for research on behalf of NPPD. Supporting documentation from OTA files that DHS officials provided were reviewed and tested against requirements identified in the *Homeland Security Act of 2002*, the *2005 Other Transaction Authority Management Directive* and the *2013 DHS Other Transaction for Research and Prototype Guide*. We did not audit the reliability of the Federal Procurement Database System as a data system but compared data from the system to hardcopy files, an internal tracking system, and the Department's report to Congress. We also did not audit the reliability of Federal Financial Management System as a data system, but we relied on the Department's OTA expenditure information recorded in the system to identify reported expenditures for each OTA reviewed.

We conducted this audit pursuant to the *Inspector General Act of 1978*, as amended, and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings

and conclusions based upon our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based upon our audit objectives.

The Office of Audits major contributors to this report are Carolyn Hicks, Audit Director; Shamika Morris, Audit Manager; Matthew Noll, Auditor-In-Charge; Shawn Hatch, Senior Auditor; James Diaz, Program Analyst; Andre Marseille, Program Analyst; Jessica Jackson, Auditor; Kevin Dolloson, Communications Analyst; and Ryan McCarthy, Independent Referencer.

Appendix A
DHS Comments to the Draft Report

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

October 24, 2017

MEMORANDUM FOR: John Roth
Inspector General

FROM: Jim H. Crumpacker, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

SUBJECT: Management's Response to OIG Draft Report: "Department of Homeland Security's Use of Other Transaction Authority" (Project No. 16-084-AUD-DHS)

Thank you for the opportunity to review and comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

The Department is pleased to note the OIG's positive recognition that, for the fiscal year (FY) 2016 reporting period, DHS accurately reported details about each other transactions agreement (OTA) project, including the rationale for using other transaction (OT) authority, the results of any audits, and the use of non-traditional contractors. DHS remains committed to providing Congress with timely and accurate information regarding the Department's use of this authority.

The draft report contained three recommendations with which the Department concurs. Attached find our detailed response to each recommendation.

Again, thank you for the opportunity to review and comment on this draft report. Technical comments were provided under separate cover. Please feel free to contact me if you have any questions. We look forward to working with you in the future.

Attachment

Attachment: DHS Management Response to Recommendations Contained in 16-084-AUD-DHS

The OIG recommended that the Under Secretary for Management:

Recommendation 1: Establish DHS policies designated to provide reasonable assurance that the Department justifies and documents any deviations in cost sharing between the government and contractor regarding other transaction agreements for research.

Response: Concur. Although research OTAs do not require cost-sharing arrangements, the DHS Office of the Chief Procurement Officer (OCPO), will issue an Acquisition Alert to remind Components authorized to award OTAs that, as outlined in the *DHS Other Transactions for Research and Prototype Projects Guide* (OT Guide), authorized Components must justify and document deviations to cost sharing arrangements, including those involving basic, applied, and advanced research and development. In addition, OCPO is updating the OT Guide to expand the cost sharing guidance, which will include additional documentation requirements for OTAs. Estimated Completion Date (ECD): December 31, 2017.

Recommendation 2: Establish DHS policies designated to provide reasonable assurance that the Department requires that modifications to OTAs meet all statutory requirements.

Response: Concur. Within the previously mentioned Acquisition Alert, the OCPO will include a reminder that authorized Components must adhere to all statutory requirements when modifications are made to the OTAs. The OT Guide already requires authorized Components to confirm that the use of the Department's authority is still appropriate when agreements are modified. However, OCPO will update the OT Guide to expand the instructions on modifications in order to reiterate statutory requirements applicable to both research and prototype projects, and require that modifications to OTAs conform to statutory requirements. ECD: December 31, 2017.

Recommendation 3: Establish DHS policies designated to provide reasonable assurance that the Department adheres to statutory requirements by timely and accurately reporting OTA use annually to Congress.

Response: Concur. DHS is required to submit an annual report to Congress regarding the Department's use of OTAs.[1] DHS did not submit FYs 2013 and 2014 annual reports because the Department had interpreted the Appropriations Act as having removed this reporting requirement, when it had actually only removed the reporting requirement for the Comptroller General.[2] DHS discovered this error during the FY 2015 reporting period, and subsequently combined and submitted the omitted reports for these FYs with the FY 2015 report.

Aside from the FY 2013 and 2014 reports, the Department has historically provided Congress with its report during the second and third quarters of the FY (February to April) following the

[1] The report is required by Section 831(c) of the Homeland Security Act of 2002 (Pub. L. 107-296), 6 U.S.C. § 391(c), as amended.
[2] Pub. L. 112–74, §527(2) and (3).

close of the reporting period. DHS, however, submitted the FY 2016 report in the fourth quarter of the FY (September), rather than the second and third quarters.

DHS is presently updating its OT Guide to require that the report be submitted to Congress no later than September 30th following the close of the reporting period. This will allow the Department sufficient time for mandatory internal and external coordination of the report and submission to Congress. ECD: December 31, 2017.

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Appendix B
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