

Measuring “Other Transaction” Authority Performance Versus Traditional Contracting Performance: A Missing Link to Further Acquisition Reform

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Just one area that I wanted to mention that I think consumed a lot of our conversation on procurement was the issue of cost overruns in the Defense Department [Y]our helicopter is now going to cost as much as Air Force One [M]ost importantly, we have to make some tough decisions—you, Mr. President, have to make some tough decisions about not only what we procure, but how we procure it¹

—Senator John McCain

[T]his is going to be one of our highest priorities The helicopter I have now seems perfectly adequate to me. (Laughter.) Of course, I’ve never had a helicopter before—(laughter)—maybe I’ve been deprived and I didn’t know it. (Laughter.) But I think it is a—it is a—an example of the procurement process gone amuck. And we’re going to have to fix it.²

—President Barack Obama

I. Introduction

In 1986, the Packard Commission³ blamed an “increasingly bureaucratic and over-regulated” acquisition process for weapons systems costing too much, taking too long to develop, and incorporating obsolete technology by the time they are fielded.⁴ Research studies conducted in the late 1980s and 1990s confirmed the Packard Commission’s findings and suggested that Department of Defense (DoD) contractors incur substantial increased costs to comply with DoD-specific procurement statutes and regulations.⁵ In response, DoD engaged in acquisition reform initiatives which focused on making the defense acquisition process “faster, better, and cheaper.”⁶ Other transaction (OT) authority for the development of

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¹ Press Release, White House Office of the Press Sec’y, Remarks by the President in Question and Answer Session at the Closing of the Fiscal Responsibility Summit (Feb. 23, 2009) [hereinafter Fiscal Summit Press Release] (statement of Sen. John McCain), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-QandA-session-at-closing-of-Fiscal-Responsibility-Summ/.

² *Id.* (President Obama’s response to Sen. McCain).

³ Formally known as the Blue Ribbon Commission on Defense Management, the Packard Commission was established by President Reagan with Executive Order 12,526 on July 15, 1985. Exec. Order No. 12,526, 50 Fed. Reg. 29,203 (July 18, 1985). The primary objective of the Commission was to “study defense management policies and procedures, including the budget process, the procurement system, legislative oversight, and the organizational and operational arrangements” *Id.* § 2(b). David Packard, co-founder of the Hewlett-Packard Company and former U.S. Deputy Secretary of Defense from 1969 to 1971, chaired the Commission. Biography of David Packard, <http://www.hp.com/hpinfo/execteam/bios/packard.html> (last visited June 30, 2009). Membership on the Commission included many prominent individuals in the defense acquisition industry including Jacques Gansler, former Under Secretary of Defense (Acquisition Technology and Logistics) and more recently the chairman of the Commission on Army Acquisition and Program Management in Expeditionary Operations. See COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING (2007), available at http://www.army.mil/docs/Ganslwer_Commission_Report_Final_071031.pdf.

⁴ PRESIDENT’S BLUE RIBBON COMM’N ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT BY THE PRESIDENT’S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT 44 (1986) [hereinafter PACKARD COMMISSION REPORT], available at <http://www.ndu.edu/library/pbr/36ex2.pdf>.

⁵ See generally JEFFREY A. DREZNER ET AL., RAND NATIONAL DEF. RESEARCH INST., MEASURING THE STATUTORY AND REGULATORY CONSTRAINTS ON DOD ACQUISITION: RESEARCH DESIGN FOR AN EMPIRICAL STUDY, TR-347-OSD, at 9 (2006) [hereinafter RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN], available at http://www.rand.org/pubs/technical_reports/TR347/ (referencing twelve studies from 1986 to 1997 that identified a “DoD regulatory cost premium” to comply with DoD-specific statutes and regulations).

⁶ CHRISTOPHER H. HANKS ET AL., RAND ARROYO CENTER, REEXAMINING MILITARY ACQUISITION REFORM: ARE WE THERE YET?, MG-291-A, at 1 (2005) available at <http://www.rand.org/pubs/monographs/MG291/>. This RAND Corporation study identified a non exhaustive list of sixty-three different acquisition reform initiatives that DoD introduced in the 1990s and into the twenty-first century. *Id.* at 10. “The list includes broad-based initiatives with wide-ranging effects (e.g., Commercial Item Procurements, Best-Value Contracting, Single Process Initiative, Evolutionary Acquisition, Logistics Transformation).” *Id.* at 9; see e.g., Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355; 108 Stat. 3243 [hereinafter FASA] (establishing preference for the purchase of commercial items to satisfy DoD requirements).

prototype programs was one of the reform initiatives specifically targeted to alleviate the burden of contractor compliance with DoD-unique requirements.⁷

Other transactions for prototype projects (OT-PPs)⁸ are unique in that they are generally not required to comply with the Federal Acquisition Regulation (FAR), its supplements, or other acquisition regulations.⁹ Therefore, OT-PPs offer DoD the opportunity for substantial cost savings in the form of reduced contractor compliance costs.¹⁰ Unfortunately, while Congress provided the Defense Advanced Research Projects Agency (DARPA) with OT-PP authority in 1994,¹¹ and the rest of DoD with OT-PP authority in 1997,¹² there still has not been a proper evaluation of OT-PP authority performance in comparison to traditional contracting methods.¹³ At a time when DoD's "procurement process has gone amuck"¹⁴ and "tough decisions [must be made] about not only what we procure, but how we procure it,"¹⁵ OT-PPs may offer the President and Congress a cost-effective alternative to traditional government procurement. However, the DoD requires useful metrics that evaluate the relative performance of OT-PPs versus traditional contracting methods so that the President and Congress can decide if expansion of OT-PPs into other areas of DoD procurement would be valuable.

This article first discusses the legislative history of DoD's OT authority. Next the article provides an overview of the acquisition reforms that took place in the mid 1990s. Special emphasis is placed on a 1994 DoD procurement cost study conducted by Coopers & Lybrand in association with The Analytic Sciences Corporation, Inc. (TASC), which estimated that on average DoD specific acquisition regulations cause an eighteen percent cost increase in DoD acquisition programs.¹⁶ The article then discusses the Government Accountability Office (GAO) criticism of DoD's failure to establish meaningful performance metrics for OT-PPs.¹⁷ The inherent difficulties the DoD encountered in establishing relevant performance

⁷ The term "other transaction" refers to the authority contained in 10 U.S.C. § 2371 for the military to "enter into transactions (other than contracts, cooperative agreements, and grants) . . ." 10 U.S.C. § 2371(a) (2006). The DoD uses "other transactions" for a variety of purposes, one of which is to enter into assistance-type relationships with commercial firms and consortia for government-sponsored research projects. See U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-96-11, DOD RESEARCH: ACQUIRING RESEARCH BY NONTRADITIONAL MEANS (1996). However, as used in this article "other transactions" and the term "OT authority" refers to the 10 U.S.C. § 2371 authority as implemented by Section 845 of the National Defense Authorization Act for Fiscal Year 1994 to "carry out prototype projects directly relevant to weapons or weapon systems proposed to be acquired or developed by the DOD." National Defense Authorization Act for Fiscal Year 1994, Pub. L. No 103-160, § 844, 107 Stat. 1547, 1721 (1993) [hereinafter NDAA 1994].

⁸ Different naming conventions and acronyms are used to reference other transactions for prototypes. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-00-33, ACQUISITION REFORM: DOD'S GUIDANCE ON USING SECTION 845 AGREEMENTS COULD BE IMPROVED (2000) [hereinafter GAO/NSIAD-00-33] (using "Section 845 agreements" in place of other transactions for prototype projects). In order to avoid any confusion with different types of "other transactions" conducted under authority of 10 U.S.C. § 2371, the acronym OT-PP has been adopted throughout this article. See Thomas C. Modeszto, *The Department of Defense's Section 845 Authority: An Exception for Prototypes or a Prototype for a Revised Government Procurement System?*, 34 PUB. CONT. L. J. 211, 218 (2005) (abbreviating "other transactions for prototype project" with OT-PP).

⁹ See OFFICE OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH. AND LOGISTICS, "OTHER TRANSACTIONS" (OT) GUIDE FOR PROTOTYPE PROJECTS 8 (2001) [hereinafter OT GUIDE], available at <http://www.acq.osd.mil/dpap/Docs/policy/otherTransactions/current%otguideconformed%20Jan%202001.doc>. Appendix 1 of the OT Guide provides a non-exhaustive list of twenty-one statutes inapplicable to other transactions. *Id.* app. I. The list includes the Competition in Contracting Act, Public Law 98-369 (1984), Contract Disputes Act, Public Law. 95-563 (1987), and the Buy American Act, 41 U.S.C. 10a-d (2006). *Id.* ("To the extent that a particular requirement is a funding or program requirement or is not tied to the type of instrument use, it would generally apply to an OT, e.g., fiscal and property laws."); see also Richard N. Kuyath, *The Untapped Potential of the Department of Defense's "Other Transaction" Authority*, 24 PUB. CONT. L. J. 521, 537 (1995) (stating that Title VI of the Civil Rights Act of 1964, Pub. L. No 88-352, §§ 601-605 (1964) is one example of a statute that is applicable to "other transactions").

¹⁰ See COOPERS & LYBRAND WITH THE ANALYTIC SCIENCES CORPORATION, INC., THE DOD REGULATORY COST PREMIUM: A QUANTITATIVE ASSESSMENT, DTIC Accession No. 295799, at 12 (1994) [hereinafter COOPERS STUDY], available at <http://handle.dtic.mil/100.2/ADA295799> (identifying cost savings ranging from 5 to 200%).

¹¹ See NDAA 1994, *supra* note 7, § 845(a).

¹² See National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 804(a), 110 Stat. 2422, 2605 (1996) [hereinafter NDAA 1997] (amending Section 845(a) of the NDAA 1994, *supra* note 7). Section 845(a) of the NDAA 1994 permitted the DARPA under the authority of 10 U.S.C. § 2371, 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." NDAA 1994, *supra* note 7, § 845(a). Section 804 of the 1997 National Defense Authorization Act amended Section 845 of the 1994 National Defense Authorization Act to expand the authority to carry out other transactions for prototype projects beyond DARPA to include "the Secretary of a military department, or any other official designated by the Secretary of Defense." NDAA 1997, *supra*, § 804(a).

¹³ See GILES SMITH ET AL., RAND NAT'L DEF. RESEARCH INST., ASSESSING THE USE OF "OTHER TRANSACTIONS" AUTHORITY FOR PROTOTYPE PROJECTS (DOCUMENTED BRIEFING), (2002) [hereinafter RAND 2002 OT STUDY], available at http://rand.org/pubs/documented_briefings/2005/DB375.pdf. The RAND 2002 OT Study was unable to "perform a statistical comparison of a group of OT programs versus a group of conventional programs because there are too many variables and too few programs." *Id.* at 9. The 2002 RAND OT Study examined twenty-one of the seventy-two prototype programs that started during the 1994 to 1998 time period but most of the OT programs in the study were "just under way" so RAND did not have any true outcomes. *Id.* at 7.

¹⁴ Fiscal Summit Press Release, *supra* note 1 (quoting President Barack Obama).

¹⁵ *Id.* (quoting Sen. John McCain).

¹⁶ See COOPERS STUDY, *supra* note 10, at 12.

¹⁷ See generally GAO/NSIAD-00-33, *supra* note 8.

metrics for OT-PPs are highlighted.¹⁸ Lastly, this article provides recommendations for metrics that the DoD can use to measure the performance of OT-PPs versus traditional contracting methods.

II. History of Department of Defense “Other Transaction” Authority

A. The Defense Advanced Research Projects Agency Receives “Other Transaction” Authority

The origins of DoD’s OT-PP authority can be traced to DARPA. The Defense Advanced Research Projects Agency was established on 7 February 1958 as a separate agency under the DoD for the direction and performance of certain advanced research projects.¹⁹ The original charter, DoD Directive 5105.15, granted DARPA authority to enter into “contracts and agreements with individuals, private business entities, educational, research of scientific institutions.”²⁰ However, in the 1980s a shift in technology development leadership from the government sector to the private sector began to occur.²¹ The Defense Advanced Research Projects Agency discovered that cutting edge technology companies were reluctant to enter into any contracts with them out of fear that the restrictive intellectual property provisions of the Bayh-Dole Act²² would undermine the companies’ intellectual property rights.²³ Additionally, DARPA discovered that innovative commercial companies did not follow FAR cost accounting standards, which were required to perform cost-reimbursement research and development agreements.²⁴

In response to the restrictive Bayh-Dole Act and FAR provisions, various groups lobbied Congress for additional authority so that DARPA could contract with the “best and brightest companies in the research community.”²⁵ Specifically, these groups wanted Congress to authorize DARPA’s use of a contracting vehicle known as “other transactions” which had previously only been available to the National Aeronautics and Space Administration (NASA) under the National Aeronautics and Space Act of 1958 (Space Act).²⁶ The Space Act created NASA and granted them broad authority to enter into “contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work.”²⁷

As a result, Congress granted DARPA the authority to enter into OTs for “carrying out basic, applied, and advanced research projects” for a two year period in 1989.²⁸ In 1991, DARPA’s authority to enter into OTs was codified in 10 U.S.C. § 2371 and expanded to include the “Secretary of each military department.”²⁹ However, the 1991 authority was somewhat limited because it only authorized OTs for “advanced research projects” and did not include authority to purchase tangible articles or prototypes.³⁰ It wasn’t until the passage of the National Defense Authorization Act (NDAA) for Fiscal Year (FY)

¹⁸ See RAND 2002 OT STUDY, *supra* note 13.

¹⁹ See U.S. DEP’T OF DEFENSE, DIR. 5105.15, DEPARTMENT OF DEFENSE ADVANCED RESEARCH PROJECTS AGENCY (7 Feb. 1958), *available at* http://www.darpa.mil/Docs/DARPA_Original_Directive_1958_200807180942212.pdf.

²⁰ *Id.* § II.C.3.

²¹ See generally Todd T. Hanson, An Analysis of Other Transactions: Have Other Transactions Met the Intent of Congress? 7-35 (June 2005) (unpublished M.S. thesis, Naval Postgraduate School) (on file with Naval Postgraduate School Library), *available at* <http://handle.dtic.mil/100.2/ADA435518> (providing a historical summary DoD research and development from the 1950s to the late 1990s).

²² Bayh-Dole Act, ch. 38, Pub. L. No. 96-517, 94 Stat. 3015, 3019 (1980) (codified at 35 U.S.C. §§ 200-212 (2006)).

²³ Joseph Summerill, *Homeland Security’s (Not So) Secret Weapon*, CONT. MGMT., Nov. 2002, at 35.

[W]hen a contractor receives funds . . . the government must receive a non-exclusive, non-transferable, irrevocable, paid-up license to practice . . . on behalf of the U.S. government, any invention that results from the government funding agreement. Further, the act’s reporting requirements often prevented companies from using trade secrets protection and the “march-in rights” allowed the government to “march in” and require a contractor to grant a nonexclusive license to another entity.

Id.; see 35 U.S.C. § 202 (2006).

²⁴ Kuyath, *supra* note 9, at 526.

²⁵ *Id.* at 528.

²⁶ Summerill, *supra* note 23.

²⁷ National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, 72 Stat. 426 (codified as amended at 42 U.S.C. § 2473(c)(5) (2006)). Space Act Agreements are generally used for transactions that cannot be concluded under other NASA authorities such as through standard FAR contracts. See NASA ADVISORY IMPLEMENTING INSTR., NAI 1050-1A, SPACE ACT AGREEMENTS GUIDE app. 1 (Aug. 15, 2008), *available at* http://nodis3.gsfc.nasa.gov/NPD_attachments/NAI_1050_1A.doc.

²⁸ National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No 101-189, § 251(a), 103 Stat. 1352, 1403 (1989).

²⁹ National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No 102-190, § 826(a), 105 Stat. 1290 (1991) [hereinafter NDAA 1992 and 1993]; see also Kuyath, *supra* note 9, at 528.

³⁰ See NDAA 1992 and 1993, *supra* note 29.

1994 that DARPA's OT authority was expanded beyond research projects to include the procurement of prototypes that are directly relevant to weapons systems.³¹ The rest of DoD received OT-PP authority with the passage of Section 845 of the NDAA 1997.³² The extension of OT-PP authority to the rest of DoD was due in large part to the acquisition reform studies that took place in the 1990s.

B. Influence of Acquisition Reform Studies in the 1990s

The DoD received OT-PP authority because congressional studies in the 1990s determined that regulatory controls were an important factor in the decline of the defense industrial base.³³ A 1992 congressional study found that "[the] Defense Department provisions requiring compliance with the Government Cost Accounting Standards and the Truth in Negotiations Act are serious impediments to commercial companies wishing to sell to the department."³⁴ Congress and DoD were concerned that government unique procurement requirements required by the FAR "inhibited DOD's ability to take advantage of technological advances made by the private sector and increased the costs of goods and services DOD acquired."³⁵ Many of the studies conducted in the early 1990s revealed that contractor compliance with government unique acquisition provisions imposed a significant "cost premium" on government-procured items.³⁶ The results of the studies indicated that government regulation increased the costs of DoD contracts anywhere from 5% to 200%.³⁷

A true empirical quantitative analysis of the burden imposed by DoD unique regulations wasn't completed until December 1994.³⁸ A study by Coopers & Lybrand with TASC, Inc. entitled *The DoD Regulatory Cost Premium: A Quantitative Assessment* (Coopers Study) determined that compliance with DoD regulations resulted in an eighteen percent cost premium on defense contracts.³⁹ The Coopers Study identified 120 separate DoD regulatory drivers that imposed compliance costs on the ten DoD contractors surveyed.⁴⁰ Furthermore, the study concluded that the top ten regulatory cost drivers accounted for nearly half (8.5%) of the 18% DoD cost premium.⁴¹

In response to the Coopers Study, DoD established working groups and ultimately a Reducing Oversight Cost Reinvention Laboratory (Reinvention Laboratory) to test ways that agencies can improve efficiency and eliminate the cost drivers identified in the Coopers Study.⁴² In addition, in June 1994, Secretary of Defense William Perry issued a directive that eliminated the requirement to comply with overly restrictive military specifications in favor of commercial standards.⁴³

³¹ See NDAA 1994, *supra* note 7.

³² See NDAA 1997, *supra* note 12.

³³ See RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN, *supra* note 5, at 8 (citing U.S. Congress, Office of Technology Assessment (1991); U.S. Department of Defense, Defense Systems Management College (1993)).

³⁴ RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN, *supra* note 5, at 8 (quoting 1992 U.S. Congress, House of Representatives Committee on Armed Services study).

³⁵ GAO/NSIAD-00-33, *supra* note 8, at 3.

³⁶ See RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN, *supra* note 5, at 9. The "cost premium" is defined as "what the DoD pays contractors to cover the added cost of complying with DoD specific statutes and regulations." *Id.* Stated differently it refers to "all the additional costs DoD pays to contractors in order to cover the cost of complying with DoD-unique statutes and regulations beyond the cost in a purely commercial environment." *Id.* at 9 n.8.

³⁷ *Id.* at 9.

³⁸ *Id.* at 11.

³⁹ See COOPERS STUDY, *supra* note 10, at 47. The study collected data from April 1994 to September 1994 at a diverse group of ten defense contractor sites including Boeing Defense and Space Group, Oshkosh Truck—Chassis Division, Motorola Government Systems Technology Group, and Hughes Space and Communications Company. *Id.*

⁴⁰ *Id.* app. A.

⁴¹ *Id.* at 18a. The 8.5% of costs attributed to compliance with the top ten cost drivers are broken down as follows: (a) 1.7% for compliance with MIL-Q-9858A (a quality assurance military specification), (b) 1.3% for compliance with the Truth in Negotiations Act (TINA), (c) 0.9% for adhering to the cost/schedule control system, (d) 0.8% for configuration management requirements, (e) 0.7% for contract-specific requirements, (f) 0.7% for DCAA/Defense Contract Management Area Operations (DCMAO) interface, (g) 0.7% for cost accounting standards, (h) 0.6% for material management and accounting system, (i) 0.6% for engineering drawings, (j) 0.5% for government property administration. *Id.*

⁴² See, RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN *supra* note 5, at 15; see also U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-97-48, ACQUISITION REFORM: DO D FACES CHALLENGES IN REDUCING OVERSIGHT COSTS (1997) [hereinafter GAO/NSIAD-97-48].

⁴³ See Policy Memorandum from William Perry, Sec'y of Defense to the Secretaries of the Military Dep'ts et al., subject: Specifications & Standards—A New Way of Doing Business (June 29, 1994), available at <http://sw-eng.falls-church.va.us/perry94.html>.

This policy change eliminated the number one cost driver identified in the Coopers Study.⁴⁴ However, according to the GAO, the Reinvention Laboratory had little other success in addressing the other nine cost drivers identified in the Coopers Study.⁴⁵

During this time, individual members of Congress began to look at other alternatives to improve DoD acquisitions. Congressman Robert L. Walker, the Chairman on the U.S. House Committee on Science, discussed the Coopers Study and raised the prospect of expanding the use of “other transaction” authority during a 8 November 1995 hearing on NASA procurement in the Earth Space Economy.⁴⁶ Congressman Walker asked Mr. Richard L. Dunn, the General Counsel of DARPA, if there was any other way for DARPA to escape these defense procurement cost drivers other than by engaging in “other transactions.”⁴⁷ Mr. Dunn responded by saying:

Other than engaging in “other transactions,” a fundamental reform of the procurement system is necessary to eliminate many of the legal and regulatory cost drivers identified in the Coopers and Lybrand study.

Equally if not more profound than the specific cost penalties identified by Coopers and Lybrand are the lost opportunity costs which these government requirements cause. These include the potential benefits of commercial-government integration, access to leading edge technology, and expanded competition resulting from an integrated technology base.⁴⁸

Leaders in the commercial sector were also recommending that all government agencies should be granted DARPA’s other transaction authority for prototype projects.⁴⁹ Removing the barriers to entry presented by the FAR would allow for nontraditional defense contractor participation by leading edge, high-technology commercial companies who otherwise wouldn’t have participated in a DoD program.⁵⁰

As a result of the Coopers Study, and positions of people like Mr. Dunn, Congress granted DoD authority to enter into OT-PPs with the passage of Section 845 of the NDAA for FY 1997.⁵¹ The authority specifies that it is only 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.”⁵² The OT-PP authority provides DoD with a vital tool in its procurement strategy since instruments awarded pursuant to this authority generally are not required to comply with the FAR, its supplements, or laws that are limited in applicability to procurement contracts.⁵³ Consequently, DoD contracting officials have the freedom to structure agreements as they consider appropriate.⁵⁴ However, as will be discussed in the next section, the DoD has been unable to measure if the expected benefits of using OT-PP agreements such as reduced acquisition costs, increased commercial-government integration, access to leading edge technology, and expanded competition,⁵⁵ are taking place.

Performance specifications shall be used when purchasing new systems, major modifications, upgrades to current systems, and non-developmental and commercial items, for programs in any acquisition category. If it is not practicable to use a performance specification, a non-government standard shall be used. . . . [T]he use of military specifications and standards is authorized as a last resort

Id.

⁴⁴ See COOPERS STUDY, *supra* note 10.

⁴⁵ See GAO/NSIAD-97-48, *supra* note 42, at 6.

⁴⁶ *NASA Procurement in the Earth-Space Economy: Hearing Before the H. Comm. on Science*, 104th Cong. 183 (1995) [hereinafter NASA Hearing].

⁴⁷ *Id.*

⁴⁸ *Id.* at 184. (Mr. Dunn’s response to Congressman Walker’s question). Mr. Dunn was a former member of the Air Force Judge Advocate General Corps, who previously worked for seven years in the General Counsel’s office of NASA.

⁴⁹ See Kuyath, *supra* note 9, at 528.

⁵⁰ *Id.* at 523–24.

⁵¹ See NDAA 1997, *supra* note 12.

⁵² *Id.*

⁵³ See OT GUIDE, *supra* note 9, at 11.

⁵⁴ See generally GAO/NSIAD-00-33, *supra* note 8, at 3.

⁵⁵ See NASA Hearing, *supra* note 47.

III. Criticisms of Department of Defense's "Other Transaction" Authority Use

While DoD received basic OT authority in 1991⁵⁶ and OT-PP authority in 1997⁵⁷ an April 2000 report by the GAO indicated mixed results with DoD's ability to utilize its OT authority.⁵⁸ Increasing participation by nontraditional defense contractors was one of the aims of granting DoD OT authority; however, the GAO reported that as of 1998 only thirteen out of ninety-seven OT projects were awarded to nontraditional defense contractors.⁵⁹ Additionally, the GAO noted that while DoD claimed that OT agreements reduced negotiating, administrative, or overhead costs typically associated with a standard contract, few programs provided any estimates of specific dollar savings.⁶⁰ Only thirty-four of the ninety-seven projects established performance metrics and the metrics used in those thirty-four programs were of little value because they did not evaluate the relative performance of using an OT agreement versus a traditional contracting method.⁶¹ Therefore, it was impossible to determine if using OT agreements resulted in any reductions in cost or improvements in performance over what could have been achieved by using traditional procurement methods.⁶² While the GAO indicated that tracking nontraditional defense contractor participation in OT-PPs could be a useful metric, the GAO recommended that the Secretary of Defense establish additional meaningful metrics that directly reflect the benefits of using OT-PP agreements⁶³

In response to the 2000 GAO report, DoD contracted with RAND's National Defense Research Institute for a study to assess the use of OT-PPs and whether the expected benefits from relaxing the process controls justify the possible costs that might be incurred.⁶⁴ The RAND study concluded that the OT process provided broad benefits including access to commercial developments in cutting edge technologies, innovative business relationships, and flexibility to manage risks.⁶⁵ However, RAND was unable to quantify the benefits of using OT-PPs versus traditional contracting methods in an "analytically rigorous manner"⁶⁶ because the DoD failed to identify any performance metrics other than nontraditional defense contractor participation.⁶⁷

The RAND report stated that nontraditional defense contractor participation was "misleading" as a performance metric because it didn't measure the effects of "OT on program outcomes and [achieving] OT's broader policy goals."⁶⁸ The RAND study and a DoD working group composed of officials from across DoD, considered other types of metrics that could be used to assess the effectiveness of Section 845 agreements.⁶⁹ However, the two efforts identified several difficulties in developing metrics that could be used to assess the effectiveness of Section 845 agreements, as follows:

- Traditional metrics—such as cost growth, schedule slips, and performance shortfalls—are inappropriate for Section 845 projects that are inherently risky.
- A "path not taken" cannot be measured; that is, when a Section 845 agreement is used rather than a procurement contract, a statistical comparison between the two acquisition approaches cannot be made.

⁵⁶ See NDAA 1992 and 1993, *supra* note 29.

⁵⁷ See NDAA 1997, *supra* note 12.

⁵⁸ See GAO/NSIAD-00-33, *supra* note 8. This included fifty-six projects by the Army, Air Force, and Navy in FY 1997 and FY 1998 along with thirty-four projects by DARPA from FY 1994 to FY 1998, four projects by the National Imagery and Mapping Agency in FY 1997 and FY 1998, and two projects by the Air Force in FY 1999. *Id.*

⁵⁹ *Id.* at 14.

⁶⁰ *Id.* at 17.

⁶¹ *Id.* at 29 (stating sixty of the cases reported that they did not establish metrics and three programs did not respond to the GAO's inquiries).

⁶² *Id.* at 30. The GAO noted that in one program a metric was whether the contractor was able to reduce materials cost from \$60 per pound to around \$35 to \$40 per pound; however, there was no indication if the success of achieving this goal was due to the use of the OTA agreement. *Id.*

⁶³ *Id.* at 32.

⁶⁴ See RAND 2002 OT STUDY, *supra* note 13, at vii.

⁶⁵ *Id.* at 31.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 9. The broader policy goals of OT programs as interpreted from the RAND reports opening paragraph are "streamlining the [acquisition] process by reducing the burden caused by regulations and oversight procedures and adopting commercial practices and products." *Id.* at 1.

⁶⁹ See U.S. GEN. ACCOUNTING OFFICE, GAO-03-150, DEFENSE ACQUISITIONS: DOD HAS IMPLEMENTED SECTION 845 RECOMMENDATIONS BUT REPORTING CAN BE ENHANCED 7 (2002) [hereinafter GAO-03-150].

- Too many variables and too few Section 845 agreements would limit the results of a quantitative analysis.
- Few Section 845 projects have been completed, limiting the results to date.⁷⁰

Because of these difficulties, the DoD adopted nontraditional defense contractor participation as the sole quantitative performance metric for OT-PPs in the January 2001 “Other Transactions” Guide for Prototype Projects.⁷¹ In October 2002, the GAO accepted DoD’s sole metric of nontraditional defense contractor participation as satisfying its April 2000 recommendations; however, it still criticized DoD for “not regularly assessing or reporting on the benefits derived from completed Section 845 projects.”⁷² The GAO stated “[i]n the absence of regular assessments of the benefits derived from completed projects, DOD and the Congress lack vital information on the results the government is deriving from this flexible procurement strategy.”⁷³ Six years later, the DoD continues to lack information on the performance of OT-PPs.

In 2003, Congress reauthorized DoD’s use of OT authority until 30 September 2008.⁷⁴ Subsequently, in January 2008, Congress extended OT authority to DoD through 30 September 2013.⁷⁵ Interestingly, the NDAA for FY 2004 removed the requirement for DoD to submit annual reports to Congress on OT transactions after FY 2006.⁷⁶ The removal of the congressional reporting requirement after FY 2006 is curious considering that some members of Congress criticized the use of OT authority in some instances.⁷⁷ In 2005, Senator John McCain, then Chairman of the Subcommittee on Airland, Senate Armed Services Committee, criticized the Army for its continued use of OT authority on the Army’s multibillion dollar Future Combat System program:

Since [the passage of the National Defense Authorization Act for 1994, which extended OT authority to prototype projects], DOD officials and industry have repeatedly requested that we extend “Other Transaction Authority” to production contracts. Congress has consistently refused to do so, because we have taken the view that with hundreds of millions or even billions of dollars at stake, the taxpayer needs the protections built into the traditional procurement system. While we recognize that there may be [a] need to continue doing business with nontraditional contractors in the production phase of a program, we have preferred to address this issue through targeted waivers that are limited to those companies who need them.

Now, the Army has put forward a program that uses “Other Transaction Authority” for a \$20 billion contract, a figure much greater than the Congress intended and [it is] unprecedented.⁷⁸

Senator McCain later met with the Secretary of the Army who concurred with Senator McCain’s concerns and agreed to convert the Army’s Future Combat System (FCS) program’s OT “to a FAR based contract, with provisions typically used to protect taxpayer’s interests and help prevent fraud, waste and abuse specifically included.”⁷⁹ In light of this experience on the FCS program, it might be wise for DoD to consider reinstating the annual OT reporting requirement with more than just nontraditional contractor participation as a performance metric.

The Project on Government Oversight⁸⁰ also criticized the government’s use of OT on the FCS and in missile defense programs and even proposed that the government should prohibit any contractor who has accepted a FAR contract from

⁷⁰ *Id.*

⁷¹ See OT GUIDE, *supra* note 9, at 17 (requiring that agencies identify all prime awardees as either Non-profit, Traditional contractor, or Nontraditional defense contractor).

⁷² See GAO-03-150, *supra* note 69, at 2.

⁷³ *Id.* at 10.

⁷⁴ See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No 108-136, § 847(a), 117 Stat. 1392, 1554 (2003) [hereinafter NDAA 2004].

⁷⁵ See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No 110-181 § 823(a), 122 Stat. 3, 226.

⁷⁶ NDAA 2004, *supra* note 74, § 847(a).

⁷⁷ See L. ELAINE HALCHIN, CONG. RESEARCH SERV. REPORT, OTHER TRANSACTION (OT) AUTHORITY, RL34760 (2008),

⁷⁸ *Id.* at CRS-36. (quoting *Army Transformation and the Future Combat System: Hearing Before the Subcomm. on Airland of the S. Comm. On Armed Services*, 109th Cong. (2005) (opening statement of Sen. John McCain) [hereinafter Sen McCain opening statement], available at http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord_id=8E05F19E-3521-4789-BC59-379C19F8CC29).

⁷⁹ *Id.* at CRS-37 (quoting Sen. McCain opening statement).

⁸⁰ The Project on Government Oversight is an independent nonprofit organization “that investigates and exposes corruption and other misconduct in order to achieve a more effective, accountable, open, and honest federal government.” Project On Government Oversight, <http://www.pogo.org/> (last visited July 1, 2009).

receiving an OT.⁸¹ Considering that the majority of OT projects are awarded to traditional defense contractors⁸² such a drastic legislative response could have a significant negative impact on future OT-PPs. Meaningful performance metrics that prove the value of OT agreements versus traditional contracting methods would go a long way towards proving the appropriateness of using OTs for future DoD procurements.

IV. Recommendations for Effective Performance Metrics for Other Transactions

Nontraditional defense contractor participation is one of the intended goals and expected benefits of OT authority; however, it was never the sole purpose of granting DoD OT authority.⁸³ Nontraditional defense participation by itself does not automatically lead to an advancement of technology for DoD. The DoD benefits from nontraditional defense contractor participation in OT-PPs when cutting edge technologies are introduced that traditional DoD contractors do not possess.⁸⁴ However, DoD fails to measure if OT-PPs are achieving this result.⁸⁵ Another expected benefit of OT-PPs was to reduce DoD procurement costs by reducing the amount of contractor compliance costs that were identified in the Coopers Study.⁸⁶ In addition, DoD's sole performance metric of nontraditional contractor participation fails to reveal any data on procurement cost savings.⁸⁷ Therefore, focus on nontraditional defense contractor participation as a performance metric for OT-PPs is misplaced. It is not an effective metric to determine if DoD is procuring prototypes at a lower cost, in less time, or with better performance characteristics than if DoD had used traditional contracting methods.

The DoD's OT Guide encourages OT programs to "establish and track any other metrics that measure the value or benefits directly attributed to the use of OT authority."⁸⁸ However, a 2003 GAO report concluded that with the exception of tracking nontraditional defense contractor participation in OT-PPs, regular assessments on the effectiveness of completed OT-PPs has been relatively absent.⁸⁹ A primary reason for the difficulty in measuring the performance of an OT-PPs identified in the 2002 RAND study was that one cannot measure the "path not taken" to compare the progress of an OT-PP versus the progress of an identical program performed using traditional contracting methods.⁹⁰

However, the GAO identified one U.S. Air Force (USAF) agreements officer who believed that, if required, he could have come up with useful metrics to measure the relative performance of OT-PPs versus traditional contracting methods.⁹¹ According to the USAF agreements officer, using an OT-PP agreement reduced the negotiation and approval times typically encountered under traditional procurement methods and the

use of more flexible data rights encouraged technical innovation on the part of contractor. While [the USAF agreements officer did] not establish metrics for his program, he believed that he could have measured (1) negotiation times compared to that required for a standard contract and (2) indirect cost savings directly attributable to the agreement's reduced administrative requirements. On another project, [GAO] officials noted that while time spent on administering agreements [was] considerably less than the time administering a standard contract, their management system [did] not track administration time by instrument type.⁹²

⁸¹ Project on Government Oversight, Future Combat System to be Restructured (Apr. 5, 2005), <http://www.pogo.org/pogo-files/alerts/national-security/ns-fcs-20050405.html>.

⁸² See Hanson, *supra* note 21, at 48. Only 6.9% of the \$5.7 billion awarded in other transaction and cooperative agreements from FY 1997 to FY year 2003 were awarded directly to "non traditional" prime contractors. *Id.* Eighty-seven awards were made to "non traditional" prime contractors but 153 awards were made to major DoD contractors with no non traditional contractor participation. *Id.*

⁸³ See discussion *supra* Part II.

⁸⁴ See NASA Hearing, *supra* note 46, at 183 (referencing Mr. Dunn's comments about how OT authority prevents the DoD from suffering "lost opportunity costs" and enables the DoD to "access to leading edge technology").

⁸⁵ See discussion *supra* Part III.

⁸⁶ See COOPERS STUDY, *supra* note 10.

⁸⁷ See RAND 2002 OT STUDY, *supra* note 13, at 9.

⁸⁸ OT GUIDE, *supra* note 9, at 17.

⁸⁹ See GAO-03-150, *supra* note 69, at 10.

⁹⁰ RAND 2002 OT STUDY, *supra* note 13, at 9.

⁹¹ See GAO/NSIAD-00-33, *supra* note 8, at 30.

⁹² *Id.*

These are just two examples of how the DoD can measure the relative performance of OT-PPs versus traditional contracting methods.

The DoD is not alone in failing to identify useful performance metrics for OT-PPs. The Department of Homeland Security (DHS) received authority to enter into other transactions in 2002⁹³ and the DHS believes that some of the OTA agreements have resulted in time and cost savings as compared to traditional FAR based contracts.⁹⁴ However, the GAO criticized the DHS for not formally collecting or sharing information about “whether other transactions have been successful in supporting projects or what factors led to success or failure.”⁹⁵ While the DHS hired a consultant to develop a “lessons learned” document based on DoD’s experience, DHS did not develop a system for “capturing knowledge from its own projects, which may limit its ability to learn from experience and adapt approaches going forward.”⁹⁶

A recently completed 2007 RAND study entitled *Measuring the Statutory and Regulatory Constraints on Department of Defense Acquisition: an Empirical Analysis* (2007 RAND Study) might prove very useful as a model for future studies that could examine the effectiveness of OT-PPs versus traditional contracting methods.⁹⁷ Similar to the Coopers Study, the 2007 RAND Study tried to capture the actual cost of compliance with burdensome government statutes and regulations on DoD procurement.⁹⁸ However, unlike the Coopers Study, the 2007 RAND Study focused on costs from the government’s perspective at the program office level.⁹⁹ The study collected empirical data from seven different DoD procurement programs in various stages of lifecycle development for a twelve month period in 2004 to 2005. The 2007 RAND Study focused on identifying the amount of time program office members spent on complying with burdensome statutory and regulatory costs divided among the following five cost areas: Clinger Cohen Act,¹⁰⁰ the Core Law and 50-50 rule,¹⁰¹ program status reporting, programming planning and budgeting, and testing. The results of the study were surprising in that the “amount of time spent by program office on compliance with activities associated with the five statutory and regulatory areas was less than five percent of the total time available to all staff in the program office.”¹⁰² The 2007 RAND Study predicted the amount of time would be much higher.¹⁰³

At first glance, the 2007 RAND Study seems to indicate that the compliance costs for government procurements is much lower than anticipated.¹⁰⁴ However, the 2007 RAND Study results should be interpreted narrowly since the Study only measured the compliance costs from the government program office perspective for a select few regulations.¹⁰⁵ The 2007 RAND Study did not include costs that accrue at the contractor level, which is what OT-PPs are designed to address.¹⁰⁶ Additionally, the 2007 RAND Study did not include costs that accrue due to contracting issues (e.g., FAR, Defense Finance Acquisition Regulation Supplement (DFARS), Competition in Contracting Act (CICA), Truth in Negotiations Act (TINA), Buy American Act, technical data (Bayh-Dole Act), or logistics and support.¹⁰⁷ The contractor costs that were not measured

⁹³ Homeland Security Act of 2002, Pub. L. No 107-296, 116 Stat. 2135.

⁹⁴ U.S. GOV. ACCOUNTABILITY OFFICE, GAO/NSIAD-08-417T, DEPARTMENT OF HOMELAND SECURITY: STATUS AND ACCOUNTABILITY CHALLENGES ASSOCIATED WITH THE USE OF SPECIAL DHS ACQUISITION AUTHORITY 7 (2008).

⁹⁵ U.S. GOV. ACCOUNTABILITY OFFICE, GAO-08-1088, DEPARTMENT OF HOMELAND SECURITY: IMPROVEMENTS COULD FURTHER ENHANCE ABILITY TO ACQUIRE INNOVATIVE TECHNOLOGIES USING OTHER TRANSACTION AUTHORITY 12 (2008).

⁹⁶ *Id.* at 13.

⁹⁷ JEFFREY A. DREZNER ET AL., RAND NATIONAL DEFENSE RESEARCH INSTITUTE, MG-569-OSD, MEASURING THE STATUTORY AND REGULATORY CONSTRAINTS ON DOD ACQUISITION: AN EMPIRICAL ANALYSIS (2007) [hereinafter RAND MEASURING REGULATORY CONSTRAINTS: EMPIRICAL ANALYSIS], available at <http://www.rand.org/pubs/monographs/MG569/>; see also RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN, *supra* note 5.

⁹⁸ See RAND MEASURING REGULATORY CONSTRAINTS: RESEARCH DESIGN, *supra* note 5, at x.

⁹⁹ *Id.* at ix.

¹⁰⁰ *Id.* at 31. The Clinger-Cohen Act (National Defense Authorization Act for Fiscal Year 1996, Div E, Pub. L. No. 104-106, 110 Stat. 186), officially known as the Information Technology Reform Act, incorporated stringent processes into the way federal agencies acquire Information Technology systems. *Id.*

¹⁰¹ *Id.* at 32. The Core Law (10 U.S.C. § 2464 (2006)) and 50-50 Rule (10 U.S.C. § 2466) require that public depots perform 50% of the DoD wide maintenance workload. *Id.*

¹⁰² RAND MEASURING REGULATORY CONSTRAINTS: EMPIRICAL ANALYSIS, *supra* note 97, at 17.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

by the 2007 RAND Study could be significant especially since the Coopers Study predicted that contractor costs for accounting and finance related activities were 3.4%, contracting and purchasing 2.2%, TINA 1.7%, Logistics, Materials Management and Property Administration 1.7%.¹⁰⁸ Recognizing the narrow scope of their 2007 RAND Study, RAND concluded that “to better understand the full costs of regulatory compliance, costs at these other levels should be explored using a similarly empirical approach.”¹⁰⁹

While the results of the 2007 RAND Study should be interpreted narrowly, the soundness and thoroughness of the empirical approach to collecting data offers a potential solution to overcoming the difficulty in measuring “the path not taken” for OT-PP programs identified in the RAND 2002 OT Study.¹¹⁰ In the 2007 RAND Study, RAND enrolled a total of 316 government personnel from seven different programs offices and collected data on a bi-weekly basis through a user friendly web based data collection tool for a total of twelve months.¹¹¹ A study using the same empirical approach could collect data from contractors engaged in traditional government procurements and then compare it with data collected from contractors engaged in similar types of OT-PPs.¹¹² The data collected from comparison studies could confirm if OT-PPs save the 18% of government compliance costs identified in the Cooper Study.¹¹³ Results from these comparison studies could be used by the President and Congress to decide if expansion into OT-PPs into other areas of DoD procurement would be valuable.

Comparison studies are not the only method to measure the effectiveness of OT-PPs versus traditional contracting methods. A primary reason OT-PPs are chosen as a procurement method over traditional methods is because DoD contractors fear that the strict provisions of the Bayh-Dole Act¹¹⁴ will undermine the companies’ intellectual property rights in a traditional procurement.¹¹⁵ For example, in a recent OT-PP conducted with JDS Uniphase Corporation¹¹⁶ for the development of high powered lasers, the annual OT report to Congress indicated that the program would not have even taken place but for the availability of OT-PPs as a contracting vehicle.

Certain rights pertaining to intellectual property rights (Bayh-Dole) were very important to JDS and, in large part, the reason they have been unwilling to do business with the DoD in the recent past. These issues required additional negotiation and flexibility in the provisions ultimately agreed upon between the parties. This flexibility and tailoring was possible only with the use of an other transaction.¹¹⁷

Requiring the DoD to inform Congress that “but for” the OT-PP, the DoD would not have developed a certain technology, would also be a useful measure of performance for OT-PPs.

V. Conclusion

Comparing the effective performance of OT-PPs versus traditional contracting methods is challenging. As the RAND 2002 OT study indicated, it is hard to measure the “path not taken.”¹¹⁸ However, the 2007 RAND Study empirical approach to gathering data offers a possible solution to this inherent difficulty.¹¹⁹ The data collection methods could be used in both

¹⁰⁸ See COOPERS STUDY, *supra* note 10, at 52a.

¹⁰⁹ RAND MEASURING REGULATORY CONSTRAINTS: EMPIRICAL ANALYSIS, *supra* note 97, at 61.

¹¹⁰ See RAND 2002 OT STUDY, *supra* note 13, at 9.

¹¹¹ *Id.* at 11.

¹¹² It would be cost ineffective to duplicate a traditional procurement program with an OT-PP simply to measure the differences in compliance costs. However, traditional procurements could be matched with OT-PPs that are similar in program cost and technical objectives to ensure an “apples to apples” comparison.

¹¹³ See OT GUIDE, *supra* note 9, app. 1 (listing the statutory and regulatory requirements inapplicable to OT-PPs).

¹¹⁴ 35 U.S.C. §§ 200–212 (2006).

¹¹⁵ See Summerill, *supra*, note 23.

¹¹⁶ As indicated on their company website, JDS Uniphase Corporation is “[a] leading provider of optical products and test and measurement solutions for the communications industry, the JDSU technology portfolio is a key enabler for optical solutions in industries such as broadband communications, semiconductor manufacturing, document authentication, brand protection, and biotechnology.” See JDSU Enabling Broadband and optical Innovation, <http://www.jdsu.com/company.html> (last visited July 1, 2009).

¹¹⁷ U.S. DEP’T OF DEFENSE, ANNUAL REPORT ON COOPERATIVE AGREEMENTS AND OTHER TRANSACTIONS ENTERED INTO DURING FY2005 UNDER 10 USC 2371, at 82 (2006), available at <http://www.acq.osd.mil/dpap/policy/attachments/fy-05-congressional-report20060130.pdf>.

¹¹⁸ RAND 2002 OT STUDY, *supra* note 13, at 9.

¹¹⁹ RAND MEASURING REGULATORY CONSTRAINTS: EMPIRICAL ANALYSIS], *supra* note 97, at 17.

traditional procurements and OT-PPs and compared to one another to measure the contractor costs for complying with government unique requirements. This would provide the President and Congress with qualitative data to support use of OT-PPs in lieu of traditional procurements.

Relative cost savings is not the only metric that could be evaluated. The amount of time that each step of the procurement process takes is another possible metric. The USAF OT-PP agreements officer who said that he could have measured the negotiation times for an OT-PP and compared them to the time required for a standard contract is just one example.¹²⁰ Lastly, the DoD could measure the number of successful procurements that occur only because contractors are willing to do business with the DoD using an OT-PP. If the President and Congress discover that certain DoD products or services are developed only because of the flexible provisions contained in OT-PPs, they will have solid proof of the usefulness of OT-PPs as a necessary alternative to traditional contracting methods.

Congress granted DoD OT authority to eliminate the legal and regulatory cost drivers associated with the traditional DoD procurement system and to gain access to leading edge technologies.¹²¹ However, to date, there has not been a useful comparison of OT authority performance versus traditional contracting methods. Until the DoD establishes useful performance metrics for OT-PPs, the President and Congress will never know if the DoD is achieving the intended benefits of OT-PP authority. Likewise, possible expansion of OT-PPs into other areas of DoD procurement to potentially fix a “procurement process gone amuck”¹²² will never occur.

¹²⁰ See GAO/NSIAD-00-33, *supra* note 8, at 30.

¹²¹ See NASA Hearing, *supra* note 47 (Mr. Dunn’s comments).

¹²² Fiscal Summit Press Release, *supra* note 1 (quoting President Barack Obama).