



Homeland
Security

October 17, 2007

The Honorable Bennie G. Thompson
Chairman
U.S. House of Representatives
Committee on Homeland Security
176 Ford House Office Building
Washington, D.C. 20515

Dear Chairman Thompson:

As you may be aware, the Department of Homeland Security's (DHS) statutory authority to enter into Other Transaction Agreements (OTA) for research and development (R&D) and prototype projects is set to expire on January 25, 2008.¹ On September 20, DHS representatives met with committee staff to brief them on the importance of the OTA authority. Within DHS, the Science and Technology Directorate (S&T) has been, and is, the primary user of the OTA authority with approximately 10 to 18 percent of the S&T budget being obligated using these agreements. The OTA authority gives S&T the requisite flexibility to enter into commercial-like agreements with non-traditional government contractors who have critical innovative solutions to homeland security challenges and who would otherwise not enter into a procurement contract with DHS to provide these solutions.

At the request of the Committee staffers at this briefing, I am writing to provide you an update on how DHS has implemented the three GAO recommendations from GAO Report Number 05-136, entitled, "Homeland Security Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority" (enclosed). DHS formally responded to these recommendations on May 26, 2005 (a copy of DHS's May 26, 2005 response is enclosed for your reference). Since 2005, DHS has continued to improve its business processes concerning the use of the OTA authority and uses it very judiciously.

GAO Recommendation 1: *Establish guidance on when it is appropriate to include audit provisions in other transactions agreements.*

DHS Management Directive (MD) 0771 "Other Transaction Authority" was issued on July 8, 2005 and includes the exact language regarding audit provisions which should be

¹ DHS's other transaction authority is in Section 831 of the Homeland Security Act of 2002 (P.L. 107-296) and codified in Title 6 of the United States Code Subchapter VIII Part D Section 391. DHS's other transaction authority is modeled after DoD's authority under Section 2371 of Title 10, United States Code and Section 845 of Public Law 103-160, November 30, 1993.

DHS Management Directive (MD) 0771 "Other Transaction Authority" was issued on July 8, 2005 and includes the exact language regarding audit provisions which should be included in other transaction agreements. The language (appearing in Enclosure 2 of the referenced MD) is as follows:

"Comptroller General Access to Records: To the extent that the total Government payments under this Agreement exceed \$5,000,000, the Comptroller General, at its discretion, shall have access to and the right to examine records of any party to the agreement or any entity that participates in the performance of this Agreement that directly pertain to and involve transactions relating to, the Agreement for a period of three (3) years after final payment is made. This requirement shall not apply with respect to any party to this Agreement or any entity that participates in the performance of the Agreement, or any subordinate element of such party or entity, that has not entered into any other agreement (contract, grant, cooperative agreement, or "other transaction") that provides for audit access by a Government entity in the year prior to the date of this Agreement. This paragraph only applies to any record that is created or maintained in the ordinary course of business or pursuant to a provision of law. The terms of this paragraph shall be included in all sub-agreements to the Agreement."

This DHS MD is applicable to all DHS Components. DHS Components include all entities that directly report to the Office of the Secretary, including the Secretary and the Deputy Secretary and their staffs. The authority to award Other Transactions is delegated through the Under Secretary for Management to the Chief Procurement Officer, and further delegated to the Component Head of the Contracting Activity.

Recommendation 2: Develop a training program for DHS staff in the use of other transactions to help ensure the appropriate use of the authority.

Recognizing the specialized nature and inherent complexities in establishing and effectively administering Other Transaction Agreements (OTA) for research and development and prototype requirements, the DHS Office of Procurement Operations (OPO) established specialized, recurring OTA training for DHS contracting officers who are given special warrants to enter into OTAs. During Fiscal Year 2006, two three-day OTA training sessions were conducted, and during Fiscal Year 2007 another two three-day sessions were conducted. A former DARPA contracting officer who was primarily responsible for DARPA's use of its OTA authority normally conducts this training. OPO plans to continue this training in Fiscal Year 2008. This comprehensive OTA training provides specific guidance on Federal Acquisition Regulation Based Research and Development contracting, with a particular emphasis on the Science and Technology Contracting process, contract types suitable for S&T contracts, solicitation methods including Broad Agency Announcements, and addresses such topics as Intellectual Property, OTAs for Prototype Projects, Assistance OTAs, the acquisition of property, and foreign access to technology.

For example, all OPO Contracting Officers assigned to DHS S&T and granted OTA warrants are required to complete this specialized OTA certification and training. In Fiscal Year 2007, OPO certified 10 Contracting Officers with Unlimited Other Transaction Authority (OTA) contracting warrants to support DHS S&T.

Additionally, the DHS Head of the Contracting Activity (HCA), which has been delegated to the Director of OPO, established procedures for conducting internal reviews and audits of all procurement documentation to ensure compliance with applicable Federal and Agency regulatory guidelines. The review and approval process for OTAs has been integrated into OPO standard business processes. In accordance with OPO standard business procedures, all OTAs valued at \$500,000 or greater are reviewed by DHS Office of General Counsel, Science and Technology Division, and OPO Division Directors. OTAs with an estimated value greater than \$10 million are subject to additional review by the OPO Policy, Oversight and Customer Support Division, and OTAs with an estimated value of \$25 million or greater are reviewed by the OPO Acquisition Review Board, chaired by the DHS Head of the Contracting Activity, and comprised of OPO Division Directors, and representatives from the Office of the General Counsel, Science and Technology Division.

Recommendation 3: *Capture knowledge obtained during the acquisition process for use in planning and implementing future other transactions projects.*

In July 2005, DHS OPO solicited support services from a leading industry expert on the appropriate use and implementation of OTAs. This expertise was used by DHS to develop policies and procedures for implementing the OT authority within DHS, and to maximize the lessons learned from the application of OT authority by the defense agencies, the military services and other federal agencies. OPO continues to enlist services of these industry experts to provide specialized OTA training for the DHS procurement workforce. OPO personnel refer to the OTA Lessons Learned and training material when formulating OTAs and conducting OTA Policy reviews.

I appreciate your support of the Department of Homeland Security and your Committee's time and interest in DHS' use of the OTA Authority which, if not extended, will expire on January 25, 2008.

If I can be of any further assistance, please contact the Office of Legislative Affairs at (202) 447-5890.

Sincerely, & very respectfully,



Jay M. Cohen
Under Secretary for Science and Technology

OTA is a VERY important tool for DHS S&T in making the nation safer. Please help.

Enclosures:

- A. OTA Authority Extension Legislative Proposal (Cleared by OMB).
- B. Copy of GAO-05-136 December 2004 Report, "Homeland Security: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority."
- C. Copy of May 26, 2005 DHS Response to the three GAO recommendations contained in GAO-05-136.
- D. Copy of DHS Management Directive 0771 "Other Transaction Authority."
- E. DHS S&T Other Transaction Agreement award actions as percentage of S&T award budget.