

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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January 28, 2002
CODSIA Case No. 1-02

Ms. Teresa Brooks
Office of the Director
Defense Procurement
PDUSD(A&T)/DP(CPA)
3060 Defense Pentagon
Washington, D.C. 20301-3060

Re: Transactions Other Than Contracts, Grants, or Cooperative Agreements for Prototype Projects—Proposed Rule

The undersigned members of the Council of Defense and Space Industries Associations (CODSIA) wish to provide you our comments on the proposed rule on transactions other than contracts, grants, or cooperative agreements for prototype projects as published in the November 21, 2001, *Federal Register* (66 Fed. Reg. 58422).

Formed in 1964 by industry associations with common interest in the defense and space fields, CODSIA is currently composed of seven associations representing over 4,000 member companies across the nation. Participation in CODSIA projects is strictly voluntary; a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

Before commenting on the proposed rule, perhaps it would be beneficial to provide an overview on the creation and subsequent development of other transactions. This would establish a good baseline for assessing the benefit and value-added of the proposed rule.

The National Defense Authorization Act of 1989 authorized DARPA to use other transactions for a trial period of two years. The FY 1991 National Defense Authorization Act made this authority permanent and expanded it to all services. The purpose of the legislation was to provide incentives for non-traditional defense contractors to enter the defense market and to provide a streamlined approach for prototyping activities by allowing waivers from FAR requirements. The FY 1994 National Defense Authorization Act expanded the authority to use other transactions for technology demonstrations and removed the requirement for cost sharing.

The DOD and the defense industry have implemented numerous other transactions and cooperative agreements resulting in significant technological breakthroughs at reduced costs to the Government. The joint Government/contractor funding, freedom from FAR requirements, and the inherent flexibility contained within the agreements to cooperatively realign the requirements as the program progresses allows the technology to be developed at a much quicker pace and for lower costs than could be accomplished under a traditional contract.

In short, Congress wished to establish an alternative type of negotiation instrument to streamline the process and get new or enhanced weapons to our warfighters in the most expeditious way possible. This would include gaining access to high technology from those firms which traditionally, because of burdensome Government rules and regulations, elected to not perform Government work. This has been a success story.

We are therefore surprised with the contents of this proposed rule. In general, the undersigned CODSIA members find the changes in the proposed rule to be inconsistent with the intent of other transactions.

Adoption of this proposed rule will be a giant step backward and will make the difference between other transactions and other negotiation instruments virtually indistinguishable. As a result, the Government will lose access to commercial companies' state of the art technologies.

Of particular concern is the expansion of audit oversight. The *Background and Purpose* section states the proposed rule is being promulgated to:

... identif[y] conditions for appropriate use of the authority and defined a nontraditional Defense contractor [as required from the 2001 Department of Defense Authorization Bill]. In addition, the Department has developed audit policy applicable to transactions for prototype projects. These additional requirements are addressed in this proposed rule.

The value of expanded audit policy and oversight contained in this proposed rule is questionable. Again the entire purpose of other transactions was to move away from the traditional Government oversight activities and adopt those processes and procedures used by commercial companies. As stated in the revised Section 3.2 Background of the proposed rule:

“Other Transactions” are generally not subject to the federal laws and regulations limited in applicability to contracts, grants or cooperative agreements. As such, they are not required to comply with the Federal Acquisition Regulation (FAR) and its supplements.

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Then-Undersecretary of Defense for Acquisition and Technology, Dr. Paul Kaminski, issued a policy memorandum on December 14, 1996, which encouraged the use of other transactions and listed 19 procurement statutes that were considered inapplicable to "other transactions." This list included 10 U.S.C. § 2313, which mandates that contracts provide for agency and GAO access to contractors' facilities to audit contractor and subcontractor records.

Audits should be limited solely to the verification of costs incurred in those cases where cost matching is required.

Furthermore, agreements should maximize the use of commercial practices and not bog down the contractor or its suppliers in detailed audits that only add to the cost of the product through an increase in a contractor's staff to support the audit. This is specifically the kind of requirement that discourages non-traditional and commercial entities from doing business with the Government.

Finally, as Government personnel are clearly integral to the performance of other transactions, oversight is already hands-on and constant. Consequently, audits should only apply if there is some reason to believe that an impropriety has occurred.

The objective of other transactions has been to provide highly technological state of the art weapons and systems to our warfighters. We have been successful in meeting this objective. However, this proposed rule, particularly the expanded audit provisions, conflicts with this objective and the intent of Congress. Accordingly, CODSIA members recommend that the proposed rule be significantly revised to incorporate strictly those provisions required from Section 803 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001.

We have enclosed more specific comments and we would welcome the opportunity to meet with you to discuss our comments in greater detail.

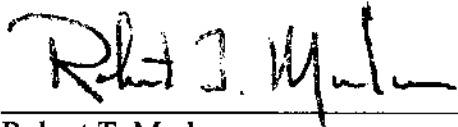
Sincerely,

(SEE ATTACHED CODSIA SIGNATORIES)

Ms. Teresa Brooks

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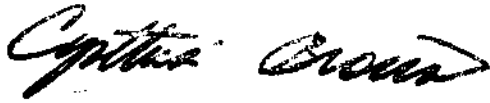
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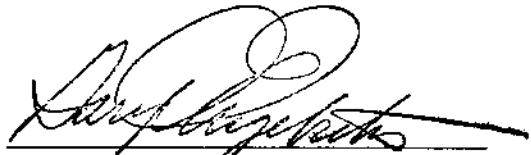
Robert T. Marlow
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Lorraine M. Lavet
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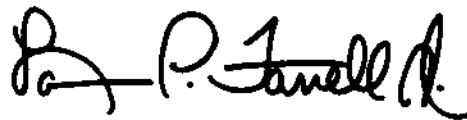
Cynthia Brown
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Gary D. Engebretson
President
Contract Services Association



Dan C. Heinemeier
President, GEIA
Electronic Industries Alliance



Lt. Gen. Lawrence P. Farrell, Jr., USAF (Ret.)
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Alan Chvotkin
Senior Vice President
Professional Services Council

Attachment

**Attachment to CODSIA Response to Transactions Other Than Contracts, Grants,
or Cooperative Agreements for Prototype Projects Proposed Rule**

1. The \$300,000 flowdown threshold for general audit access is much too low and should be raised or to be consistent with the Comptroller General audit access threshold of \$5 million.

2. Section 3.4, Definitions, defines a business unit, a key participant, and a segment. However, the rest of the proposed rule uses additional terms that are confusing because the reader is not sure when these other terms, e.g., “subordinate element of the party or entities”, “awardee”, are referring to a business unit, a key participant, or a segment. Defined terms should be consistently applied throughout the proposed rule.

3. The last sentence in Section 3.5(b)(2) indicates that “As a matter of policy, these same restrictions apply any time cost sharing may be recognized when using OTA.” This could be interpreted to extend these restrictions to all other transactions (OTs) even though it is contained in a proposed rule that only applies to OTs for prototypes. This should be deleted from this proposed rule. This sentence also includes a reference to “restrictions.” Does this include more than that restriction included in 3.5(b)(2) where this comment is made? If it is intended to apply to multiple items, the comment should not be buried within a single subsection.

4. Section 3.7(f)(2) states that if the agreement gives the agreements officer or other DOD component official access to records, then “in accordance with statute” the GAO and DODIG must get the same access. Which provision of the statute expands audit access beyond that of the GAO?