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FEATURE COMMENT: New Life And A New Number For Research Other Transactions

A new day has arrived for research other transactions (OTs). Section 2371 of title 10, U.S. Code was originally enacted in 1989. The very first Department of Defense OT agreement executed in April 1990 was a § 2371 agreement. Agreements executed under the authority were the centerpiece of the highly successful Technology Reinvestment Project as well as other dual-use and military-specific projects. Due to the Defense Advanced Research Projects Agency's (DARPA) successful use of research OTs, Congress extended the authority to the rest of DOD in 1993. It also enacted prototype OT authority (relevant to weapons or weapon systems) to be conducted "under the authority" of § 2371.

After more than a decade of successful use of § 2371, agreements under its authority seemed to fade away. Today the authority is little used and many organizations that could use the authority have not even requested delegations of authority to make use of it. Section 2371 provides authority for research and development projects primarily, though not exclusively, dual-use in nature. Dual-use means the project may have both Government and commercial applications. Hence injection of private sector funding as well as Government funding is base-lined but not an absolute requirement.

Recent amendments to § 2371 show that Congress wants to see a revitalization of the use of § 2371, now renumbered as § 4002. This article will describe the recent statutory changes as well as

earlier amendments, some of which were misunderstood, and outline possible reasons why use of § 2371 went into decline.

The National Defense Authorization Act (NDAA) 2022 amendment (§ 821) states:

Modification of other transaction authority for research projects

In general section 2371, title 10 United States Code, is amended—

in subsection (e) -

by striking paragraph (2);

in paragraph (1), in the matter preceding subparagraph (A), by striking (1); and

by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively; and

by amending subsection (h) to read as follows:

(h) Guidance: The Secretary of Defense shall issue guidance to carry out this section.

To summarize what the amendment does:

(1) it eliminates the requirement for a determination that a standard contract, grant or cooperative agreement is not feasible or appropriate, and (2) changes the requirement for "regulations" to "guidance." A subsection (b) not quoted above makes a conforming amendment to § 2371b (now § 4003).

For readers of this article who have also studied other foundational articles on OTs, it should be clear that congressional action and this amendment were not entirely necessary if § 2371 and its background were well understood. Unfortunately, some DOD lawyers, contracting officials, and technical managers are so wedded to business as usual that they seem unable to understand or they simply reject the implications of OTs and a study of their legislative history. The "feasible and appropriate" standard was basically no inhibition on the use of § 2371 OTs. See Dunn, Feature Comment, "Appropriate Contractual Instruments For R&D," 59 GC ¶ 202. DOD issued Technology Investment Agreement (TIA) regulations (32 CFR pt. 37). Those regu-

lations promulgated to govern § 2371 (called a “mini-FAR” by some) were misguided, but when properly understood, they apply to few § 2371 OTs (only those used for *assistance*). They were widely misunderstood to apply to all § 2371 agreements.

If unnecessary in a technical sense, the recent amendments are highly welcome given the extent to which § 2371 OTs have been underutilized in recent years. Other aspects of § 2371 that may not be obvious are worth recounting here. A couple of amendments made by the Federal Acquisition Streamlining Act of 1994 that were not intended to limit the scope of § 2371 may inadvertently have done so. The original version of the statute (§ 251, P.L. 101-189) applied to “advanced research projects,” in other words, the kind of things DARPA did and does. The amendment changed this to “basic, applied and advanced research” on the basis that it may not have been generally understood that “advanced research projects” as practiced by DARPA included basic and applied research. This has led to the misunderstanding that § 2371 projects are limited by the definitions of those terms found in financial management regulations. Also dropped out without an intent to change meaning was the laundry list of the types of partners eligible to participate in § 2371 projects, namely: “any person, any agency or instrumentality of the United States, any unit of State or local government, any educational institution, and any other entity.” Person of course encompasses both an individual physical person as well as a legal *person* such as a corporation. Also interesting is “any agency...of the United States” of which there are a number of examples in § 2371 multi-party agreements.

As the OT dual-use authority, § 2371 may have been ahead of its time. Today the dual-use approach is gaining traction once again. However, a misperception has arisen that the primary purpose of prototype authority (§ 2371b) is outreach to non-traditional contractors, i.e., those that might engage in dual-use projects. That type of outreach, while encouraged by a 2000 amendment enacting subsection (d) of § 2371b, was paired with the legislative intent of encouraging business innovations and efficiencies on the part of traditional defense contractors—something that has been almost entirely ignored.

The rationale for saying the “feasible and appropriate standard” was no inhibition to using § 2371 is elucidated in the Appropriate Instruments article cited above. It is also plain from 10 USCA

§ 2358(b)(5), which lays out §§ 2371 and 2371b as authorized means for conducting research in addition to contracts, cooperative agreements and grants. Subsection (a) of 2371 expressly states that its authority “is in addition to any authority provided by section 2358 of this title to use contracts, cooperative agreements and grants.”

A further statutory imperative to engage in dual-use research and development is found in 10 USCA § 2501. Subsection (b) states:

Civil-Military Integration Policy.—The Secretary of Defense shall ensure that the United States attains the national technology and industrial base objectives set forth in subsection (a) through acquisition policy reforms that have the following objectives:

(1) Relying, to the maximum extent practicable, upon the commercial national technology and industrial base that is required to meet the national security needs of the United States.

(2) Reducing the reliance of the Department of Defense on technology and industrial base sectors that are economically dependent on Department of Defense business.

(3) Reducing Federal Government barriers to the use of commercial products, processes, and standards.

A dual-use approach implies that technology or products being developed may have commercial potential as well as meet Government needs. Why should the Government pay for full freight for such developments? Section 2371 was used to attract private investment in technologies of interest to the Government that also have commercial potential. This might be cost-sharing with the developer or third-party financing. Making dual-use the default approach to DOD science and technology projects not only honors the civil-military integration policy of § 2501 quoted above but has the potential to reduce costs to the Government of individual projects and thus increase the overall impact of DOD funding expended on science and technology developments.

Doing cost-sharing under part 16 of the Federal Acquisition Regulation requires cost-reimbursement contracting. This essentially makes the commercial partner into a traditional defense contractor ultimately reducing the partner’s business efficiency and ability to compete in the commercial marketplace. Research OTs have no requirement to enter cost-reimbursement arrangements to cost-share. The tilt in

favor of a cost-reimbursement structure to cost-share is one of the many misguided policies embedded in the TIA regulations (32 CFR pt. 37).

What about the TIA regulations? Section 821 does away with the statutory requirement for regulations. The misguided TIA regulations should have been rewritten in the spirit of OTs many years ago. Interestingly, the TIA regulations never use the term “Other Transactions.” The author of the regulation ignored the terminology and unique aspects of OTs and conformed the regulations as much as possible to the DOD Grants and Agreements Regulatory System (32 CFR pt. 21 et seq.). Now Congress has repealed the requirement for regulations, essentially making TIA regulations a dead letter. Instead, Congress calls for guidance. That guidance already exists. The DOD Other Transactions Guide (Nov. 2018) applies in part to research OTs as well as prototype OTs (§ I.C.2, p.7).

One thing that has not changed is § 2371’s subsection (g). Education and training are essential for program and technical managers as well as supporting contracting and financial management personnel in order to give full effect to the potential of OTs. Practitioners of innovative contracting and other business innovations need to understand both the why and how of the authorities Congress has provided to the military departments and other elements of DOD.

The Numbers Game—As if to keep us on our toes, Congress has engaged in a numbers game. The NDAA 2022 that amends §§ 2371 and 2371b was signed into law Dec. 27, 2021. Four days later, a provision of the NDAA 2021 (§ 1801) took effect that created a new Chapter 302 to title 10, U.S. Code and redesignated §§ 2371, 2371b and 2373 as §§ 4002, 4003 and 4004, respectively. This is a good time for organizations to review and renew their delegations of authority.

DOD organizations with a research and development mission from science and technology to more mature development and demonstration should have access to the full array of innovative contracting techniques including §§ 4002 and 4003 OT authority, procurement for experimental purposes (§ 4004) and prize authority (§ 4065). Organizations currently lacking such authority in their organizational charters or

by special delegation should request a delegation of authority. To fully utilize these authorities, education and training are essential. Unfortunately, many of the typical sources of DOD workforce training lack the essential knowledge or spirit to effectively provide OT education.

For those prepared to use them, research OTs open a new world of possibilities. Research OTs can be used to establish a buyer-seller relationship, but they transcend the limitations of a buyer-seller relationship and traditional procurement contracts. Their flexibility permits a variety of relationships and agreement structures to address mutually beneficial goals of the participants. They can be used to engage innovative companies and venture capital financing, accommodating them on their own terms. They allow traditional contractors to experiment with new business approaches. They permit multi-party agreements without a traditional prime-subcontractor structure. Agreements may be fully or partially funded by the Government, unfunded, or funds may flow to the Government for further research. They can be used as the first phase of Small Business Innovation Research projects seamlessly transitioning to second phase prototype or demonstration and potentially to commercialization. They can be used in ways yet to be imagined that fit the needs of the project and the parties.



This Feature Comment was written by Richard L. Dunn. Mr. Dunn was the first general counsel of DARPA. He was instrumental in the creation of DOD’s other transactions authority. He is the founder of the Strategic Institute for Innovation in Government Contracting, strategicinstitute.org. Currently, Mr. Dunn acts as a consultant providing advice and engaging in research and analysis related to the deployment and implementation of technology in the military and civil sectors through partnering and other innovative means; he conducts research in national security operations, technology and their interactions; and he analyzes laws, policies and practices that impact the effective implementation of technology. He can be reached at richardldunn@verizon.net.