

# “OTHER TRANSACTIONS” ARE GOVERNMENT CONTRACTS, AND WHY IT MATTERS

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## TABLE OF CONTENTS

I. Introduction and Context .....	486
II. Premise: Other Transactions Are Contracts with the Government....	493
III. Implications .....	496
A. Sovereign Immunity, the Tucker Act, and the Federal Circuit.....	497
B. Authority to Use Other Transactions and Bind the Government	501
1. Authority to Award Other Transactions (i.e., Bid Protests) .....	502
2. Limits on Agency Authority to Bind the Government .....	505
a. Executive Authority to Spend .....	505
b. Officials’ Authority to Bind the Government.....	506
C. Interpretation of Contract Terms.....	511
IV. Conclusion.....	514

Readers of this Journal are likely aware of the burgeoning interest in Other Transactions and Other Transactions Authority (OTA). Some believe that agencies endowed with OTA are free from the traditional rules of procurement contracting when forming Other Transactions. With the freedom of OTA, the theory goes, agencies can contract with the most innovative commercial firms, which might otherwise decline the boilerplate terms and compliance burdens associated with procurement contracting. This article is a reminder that the authority to create an Other Transaction is, at bottom, the authority to create a government contract. It first explains why Other Transactions qualify as contracts and then begins exploring the implications of the contractual nature of Other Transactions. Any private party entering into an Other Transaction should be aware of the significance of contracting with the United States. OTA might clear away many burdensome procurement statutes and regulations, but principles of sovereign immunity and separation of powers, along with the pervasive precedents of the United States Court of

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Appeals for the Federal Circuit, will continue to ensure that doing business with the federal government, even by “Other Transaction,” is never quite the same as doing business in the commercial market.

## I. INTRODUCTION AND CONTEXT

The United States government is looking beyond its cohort of traditional contractors and seeks to build relationships with groundbreaking commercial firms in order to maintain technological and battlefield superiority.<sup>1</sup> These relationships are unlikely to be built entirely through traditional procurement contracts, because the most innovative commercial firms often are not dependent on federal funds for revenue and will not accept the boilerplate terms and compliance obligations associated with federal procurement.<sup>2</sup> As alternatives to traditional procurement, the U.S. government has recently encouraged use of various non-traditional methods to stimulate and obtain access to commercial innovation, including prize contests,<sup>3</sup> public-private partnerships,<sup>4</sup> and—the subject of this article—Other Transactions Authority.

1. “The defense industrial base has changed, and to maintain technological advantage, DoD increasingly must leverage the commercial marketplace.” ADVISORY PANEL ON STREAMLINING & CODIFYING ACQUISITION REGULATIONS, SECTION 809 PANEL INTERIM REPORT 4 (2017).

2. See Susan B. Cassidy, Jennifer Putsch & Stephanie H. Barclay, *Another Option in a Tightening Budget: A Primer on Department of Defense “Other Transactions” Agreements*, 48 PROCUREMENT LAWYER 3, 3 (2013) (“[M]any commercial companies remain hesitant to enter the federal market because of what they perceive as rigid and significant compliance obligations and the potential adverse impacts on intellectual property rights for any R&D work performed with government funds.”); Nancy O. Dix, Ferdinand A. Lavalley & Kimberly C. Welch, *Fear and Loathing of Federal Contracting: Are Commercial Companies Really Afraid to Do Business with the Federal Government? Should They Be?*, 33 PUB. CONT. L.J. 6, 9 (2003); see also Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 634–35 (2001) (“The laws, regulations, and policies controlling the award and performance of government contracts present a dense thicket reflective of a large, complex bureaucracy. . . . Some firms perceive this regulatory maze as a barrier to entry, and critics suggest that those same barriers historically insulated a codded class of less-than-competitive suppliers that had adapted to the non-commercial rules of the game.”); Steven Kelman, *Buying Commercial: An Introduction and Framework*, 27 PUB. CONT. L.J. 249, 250–51 (1998) (“Unfortunately, a variety of special standards, government-unique certifications, terms and conditions, and record-keeping and reporting requirements imposed by statute and regulation discouraged many successful commercial companies from offering their products to [g]overnment.”); William E. Kovacic, *Regulatory Controls As Barriers to Entry in Government Procurement*, 25 POL’Y SCI. 29, 36 (1992) (“The sheer volume and complexity of public contracting controls create compliance scale economies for firms with large volumes of government contracts. . . . Thus, for a variety of reasons, smaller commercial firms with promising ideas may be deterred from making the infrastructure investment needed to comply with the government’s regulatory commands.”).

3. See Steven L. Schooner & Nathaniel E. Castellano, *Eyes on the Prize, Head in the Sand: Filling the Due Process Vacuum in Federally Administered Prize Contests*, 24 FED. CIR. B.J. 391 (2015); Michael J. Burnstein & Fiona E. Murray, *Innovation Prizes in Practice and Theory*, 29 HARV. J.L. & TECH. 401 (2016).

4. See Lt. Col. Daniel E. Schoeni, *Whither Innovation? Why Open Systems Architecture May Deliver on the False Promise of Public-Private Partnerships*, 70 ADMIN. L. REV. 409 (2018); Lt. Col. Daniel E. Schoeni, *Three Competing Options for Acquiring Innovation*, AIR & SPACE POWER J. 85 (2018).

OTA is the authority to enter into an Other Transaction.<sup>5</sup> Despite its recent popularity, OTA is not new.<sup>6</sup> The term "Other Transaction" and the first grant of OTA were crafted by Paul Dembling, drafter of the National Aeronautics and Space Act of 1958 (the "Space Act") and former General Counsel of the National Aeronautics and Space Administration (NASA).<sup>7</sup> To ensure NASA would have all the authority needed in the "Space Race" against the Soviet Union, Dembling drafted the Space Act to afford NASA broad power "to enter into and perform such contracts, leases, cooperative agreements, or *other transactions* as may be necessary in the conduct of its work and on such terms as it may deem appropriate."<sup>8</sup> Explaining his intent, Dembling later revealed that "other transactions" was a "catchall phrase" intended to provide NASA freedom from traditional procurement regulations and flexibility to structure agreements in line with commercial business practices:

I tried to cover everything else that was [raised by others when discussing NASA's needs]. When somebody said, well, suppose we have this kind of a transaction or that kind of a transaction, I figured, it may not be covered under contracts, leases, and cooperative agreements. I couldn't think of any other terminology to use, so I used "other transactions as may be determined or necessary in the conduct of its work." So it was a sort of catchall phrase that I tried to use . . . . [A]n "other transaction" is not a procurement contract, cooperative agreement, or grant, and, therefore is *not subject to the laws, regulations, and other requirements applicable to such contracts, agreements, and grants. It is this flexibility which provides authority to structure agreements in accordance with standard business practices.*<sup>9</sup>

In the sixty years since Congress granted OTA to NASA through the Space Act, Congress has granted OTA to other agencies as well, including the Department of Energy (DOE), the Department of Health and Human Services (HHS), the Department of Homeland Security (DHS), the Transportation Security Administration (TSA), the Department of Transportation (DOT), and the Department of Defense (DoD).<sup>10</sup>

5. Various commenters, guidance, and forums have utilized different terminology. Some abbreviate Other Transactions as "OT," while others use OTA as an acronym for "Other Transaction Agreement." See, e.g., *Other Transactions Guide for Prototype Projects*, DEP'T OF DEF. (Jan. 2017), (referring to "Other Transactions" as "OTs") [hereinafter "DPAP Prototype OTA Guide 2017"], [https://www.acq.osd.mil/dpap/cpic/cp/docs/OTA\\_Guide%20\(17%20Jan%202017\)%20DPAP%20signature%20FINAL.pdf](https://www.acq.osd.mil/dpap/cpic/cp/docs/OTA_Guide%20(17%20Jan%202017)%20DPAP%20signature%20FINAL.pdf); Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD (A&S)) *Prototype OTA Guide 2018*, <https://aaf.dau.mil/ot-guide> [hereinafter *OUSD Prototype OTA Guide 2018*]; Oracle Am., Inc., B-416061, 2018 CPD ¶ 180, at 1 (Comp. Gen. May 31, 2018) (abbreviating "other transaction agreement" as "OTA" and "follow-on production OTA" as "P-OTA").

6. See, e.g., Surya Gablin Gunasekara, "Other Transactions" Authority: *NASA's Dynamic Acquisition Instrument for the Commercialization of Manned Spaceflight or Cold War Relic?*, 40 PUB. CONT. L.J. 893, 895 (2011).

7. See David S. Schuman, *Space Act Agreements: A Practitioner's Guide*, 34 J. SPACE L. 277, 277-78, 289 (2008); Paul G. Dembling, *The National Aeronautics and Space Act of 1958: Revisited*, 34 J. SPACE L. 203, 208-11 (2008).

8. 42 U.S.C. § 2473(c)(5) (emphasis added).

9. Schuman, *supra* note 7, at 289 (quoting Telephone Interview with Paul G. Dembling (July 25, 2002) (transcript on file with Mr. Schuman)).

10. For more detailed discussion of these authorities, see Armani Vadiée & Todd M. Garland, *The Federal Government's "Other Transaction" Authority*, 18-5 BRIEFING PAPERS 1 (Apr. 2018).

DoD now has two distinct types of OTA, currently codified at 10 U.S.C. §§ 2371 and 2371b. The first, § 2371, covers Other Transactions for “basic, applied, and advanced research,”<sup>11</sup> and the second, § 2371b, covers Other Transactions for prototype projects.<sup>12</sup> Providing a method for DoD to facilitate transition from a prototype project to a production contract, § 2371b allows that, if DoD awards an Other Transaction for a prototype project using “competitive procedures,” then DoD may also issue a follow-on production contract or transaction without the use of further “competitive procedures.”<sup>13</sup>

One of the primary attributes of OTA is that traditional procurement statutes and regulations—such as the Competition in Contracting Act (CICA), the Federal Acquisition Regulation (FAR), and the Cost Accounting Standards (CAS)—do not apply, and OTA provides freedom to negotiate intellectual property rights outside the constructs of the Bayh-Dole Act.<sup>14</sup> Clearing away onerous procurement laws may enable the government to attract today’s leading innovators as business partners.<sup>15</sup> Eliminating the FAR’s strict requirement for full and open competition may also allow agencies, at least in theory, to reduce acquisition lead time.<sup>16</sup>

11. 10 U.S.C. § 2371.

12. 10 U.S.C. § 2371b.

13. See 10 U.S.C. § 2371b(f).

14. For useful analysis by former DARPA General Counsel Richard Dunn of which laws do and do not apply to OTA, see *Other Transaction Agreements: What Applies?* 32 NASH & CIBINIC REP. NL ¶ 22, at 1 (May 2018). For a thorough discussion of the treatment of intellectual property rights in NASA and DoD Other Transactions, see Daniel J. Kelly, *IP Rights Under NASA and DoD “Other Transaction” Agreements—Inventions and Patents*, 18–9 BRIEFING PAPERS 3 (Aug. 2018). See also Cassidy, Putsch, & Barclay, *Another Option in a Tightening Budget*, *supra* note 2 at 4–5; Richard N. Kuyath, *The Untapped Potential of the Department of Defense’s “Other Transactions” Authority*, 24 PUB. CONT. L.J. 521, 537 (1995).

15. See, e.g., David S. Block & James G. McEwen, “Other Transactions” with Uncle Sam: *A Solution to the High-Tech Government Contracting Crises*, 10 TEX. INTELL. PROP. L.J. 195, 211 (2001) (“An expanded reading of the “Other Transactions” may hold the key to more efficient [g]overnment contracting in the intellectual property sector. . . . In essence, Other Transactions allows the [g]overnment, and more specifically the Department of Defense, to adopt commercial practices that would otherwise not have been easily permitted under traditional contracting rules.”); Cassidy, Putsch & Barclay, *Another Option in a Tightening Budget*, *supra* note 2, at 3 (describing OTA as “especially appealing to commercial companies that are often discouraged by the numerous rules and regulations that contractors face when they work for or with the US government”); Kuyath, *supra* note 14, at 523–24 (“[OTA] offers tremendous potential for reducing DoD’s R&D costs and for allowing leading-edge, high-technology commercial companies to participate in DoD-funded R&D programs in situations where they otherwise would not do so.”).

16. See OUSD Prototype OTA Guide 2018, *supra* note 5, at *Common OT Myths and Facts* (“Myth 10: OTs will always be faster to award than other contractual instruments. FALSE. The OT award process will not always be faster than the traditional procurement processes and sometimes can be as long or longer. The speed of award is tied to many factors, many of which are internal to the organization. For example, some agencies will award an OT but conduct the source selection process as if it were subject to FAR Part 15. In that case, awarding the OT could take nearly as long as a procurement contract. Likewise, if the OT award must go through the same approval chain as a procurement contract, it could take as long. Also, because all of the terms and conditions in an OT are negotiable, drafting the agreement and negotiating it between the [g]overnment and the performer can take a long time. The OT award process can be faster if the [g]overnment team embraces the flexibility of the authority, is prepared, and the process remains as streamlined as possible.”).

But wholesale abandonment of procurement regulations leaves a significant void, because those regulations provide the standard clauses that procurement professionals have studied, used, and litigated for decades.<sup>17</sup> Other Transactions are free not just from CAS and the FAR, but essentially *all* of the standard clauses that agencies rely on to allocate risk and resolve disputes.<sup>18</sup> Clauses covering disputes, delays, changes, equitable adjustments, terminations, etc., provide consistency in contract administration that should not be taken for granted.<sup>19</sup> In an Other Transaction, however, the allocation of these risks is up for negotiation.<sup>20</sup>

Given their broad nature, statutory grants of OTA provide very little direction.<sup>21</sup> For better or worse, DoD has yet to provide meaningful regulation to govern its use of Other Transactions, perhaps with the exception of detailed regulations governing certain Technology Investment Agreements (TIAs) that are issued as Other Transactions.<sup>22</sup> Instead of binding regulation to accompany

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17. Uniformity through use of standard clauses is a bedrock of the federal procurement systems. See, e.g., Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement. L.R. 103, 109 (2002); see also 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, 266-67 (2005).

18. See DPAP Prototype OTA Guide 2017, *supra* note 5, at 24-25 (suggesting that parties negotiating prototype OTs should consider adding clauses to address changes, termination, and disputes, as appropriate for each agreement); see also Ralph C. Nash, *Postscript: Validating Intellectual Property Rights*, 32 NASH & CIBINIC REP. ¶ 48 (Oct. 2018) ("[N]ow that we are embarking on extensive use of OTAs to speed up the procurement process and encourage private entities to perform research and development for the [g]overnment, agency and contractor officials should worry about the ability of their folks to draft contract terms from scratch. This task is a lot different than using standard terms and conditions that have been subject to widespread scrutiny before they are promulgated. It takes extensive knowledge of the subject matter covered by each newly drafted clause and of the language pertaining to that subject matter.").

19. See, e.g., Schooner, *Desiderata*, *supra* note 17, at 109.

20. See DPAP Prototype OTA Guide 2017, *supra* note 5, at 24-25 (suggesting that prototype OTs should consider adding clauses to address changes, termination, and disputes, as appropriate for each agreement); OUSD Prototype OTA Guide 2018, *supra* note 5, *Publicizing, Soliciting, and Evaluating*, at "Selection and Negotiation of Terms" (same); see also Armani Vadiée & Todd M. Garland, *The Federal Government's "Other Transaction" Authority*, 18-5 BRIEFING PAPERS 1 (Apr. 2018).

21. Signaling Congress' intent that DoD broadly interpret its prototype OTA, § 867 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018 creates a priority for prototype OTAs in "the execution of science and technology and prototyping programs." National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 § 867, 131 Stat. 1283, 1495. The accompanying Senate Report confirms that the "statutory authority for other transactions . . . is written in an intentionally broad manner" and urges that DoD "should interpret these authorities accordingly, recognizing that [DoD] has authority to use OTAs with the most flexible possible interpretation . . ." S. REP. NO. 115-125, at 190 (2017); see also Ralph C. Nash, Jr., *Other Transactions: A Preferred Technique?*, 32 NASH & CIBINIC REP. NL ¶ 8 (Feb. 2018).

22. See 32 C.F.R. § 3 (sparse regulatory provisions for DoD's prototype OTA). While the DPAP and OUSD Prototype OTA Guidance and regulations may seem vacuous, they are at least more than the apparently non-existent regulations and guidance for DoD's research OTA. See Ralph C. Nash, Jr., *Postscript: Rules for "Other Transactions"*, 16 No. 12 N&CR ¶ 61 (2002) ("We understand that it is difficult to write regulations or a guidance document when a statute confers so much discretion, but it certainly seems that a single document could set out the rules. The prototype guide does a reasonable job in setting out the rules of the game. Why isn't there a similar guide for research other transactions? It can't be that difficult."). The exception is the relatively detailed regulations applicable to a small subset of agreements created under DoD's "research" OTA, referred to as "technology investment agreements" (TIAs), which are governed by the

its increased use of Other Transactions, DoD has opted for informal guidance to using OTA. Most notably, in January 2017 the DoD Director of Defense Procurement and Acquisition Policy (DPAP) issued updated guidance for using prototype OTA.<sup>23</sup> December 2018 guidance published by the Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD (A&S)) superseded the DPAP guidance.<sup>24</sup> While the OUSD OTA Guide often uses the mandatory term “shall,” it affirmatively states that, although “this document includes references to the controlling statutory and policy provisions for DoD OT authority, the document itself is not a formal policy document.”<sup>25</sup>

This absence of statutory and regulatory rules leaves Other Transactions in a barren legal landscape, enlarged by the common inclination to define Other Transactions in terms of what they are not, without being clear about what they are. The most prevalent way of defining “Other Transactions” is the refrain: Other Transactions are not procurement contracts, grants, or cooperative agreements.<sup>26</sup> This article focuses on what Other Transactions are: Other Transactions are contracts with the U.S. federal government.<sup>27</sup>

The contractual nature of Other Transactions is important, because contracting with the federal government is different than contracting among private parties in ways that might not be fully appreciated by the commercial firms and non-traditional contractors that OTA often serves to attract.<sup>28</sup> The principal distinctions spring from the federal government’s sovereign immunity, Congress’ “power of the purse,” and the federal common law of contracts, all of which effectively ensure that doing business with the federal

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provisions of 32 C.F.R. § 37. See Ralph C. Nash, Jr., *Other Transactions: A Preferred Technique?*, 32 NASH & CIBINIC REP. ¶ 8 (Feb. 2018); Daniel J. Kelly, *IP Rights Under NASA and DoD “Other Transaction” Agreements—Inventions and Patents*, 18-9 BRIEFING PAPERS 11 (Aug. 2018) (discussing TIAs in relation to OTA, noting that: “Within DoD, there is confusion as to whether DOD is bound to use the TIA in entering into [Other Transactions for research]”).

23. Professor Nash analyzed the DPAP guide in *Using “Other Transactions to Obtain Prototypes: Broader Authority*, 31 NASH & CIBINIC REP. NL ¶ 19 (Apr. 2017). Retired DARPA General Counsel Richard Dunn sharply criticized the DPAP Guide in *Practitioner’s Comment: DoD Guide for Other Transactions for Prototypes—Fundamentally Flawed*, 59 NO. 3, GOV’T CONTRACTOR ¶ 19 (Jan. 2017). See also Locke Bell & Anna Sturgis, *DoD’s Prototype OTA Guide Offers Insights into DoD’s Experiment in Regulation-Free Acquisition*, 59 GOV’T CONTRACTOR, no. 20 ¶ 155 (May 2017).

24. The OUSD (A&S) guidance is available at <https://aaf.dau.mil/ot-guide> [<https://perma.cc/4DVM-APSX>].

25. See *id.*

26. See, e.g., *Oracle Am., Inc.*, 2018 CPD ¶ 180, at n.1 (“Other transactions’ are legally-binding instruments, other than contracts, grants, or cooperative agreements, that generally are not subject to federal laws and regulations applicable to procurement contracts.”); DPAP Prototype OTA Guide 2017, *supra* note 5, at i (“OTs are defined in this Guide by mainly what the legal instrument is not. This construction gives DoD greater flexibility than otherwise possible or permitted under the statutes and regulations that apply to other legal instruments.”).

27. Other commentators have recognized the contractual nature of Other Transactions. See RALPH C. NASH, JR., KAREN R. O’BRIEN-DEBAKEY & STEVEN L. SCHOONER, *THE GOVERNMENT CONTRACTS REFERENCE BOOK* 365 (4th ed. 2014) (defining “Other Transaction” as: “A form of contract . . . not a procurement contract, grant, or cooperative agreement. . . .”); Richard L. Dunn, *Other Transaction Agreements: What Applies?* 32 NASH & CIBINIC REP. NL ¶ 22, at 1 (May 2018) (“The key is to understand that within their domain (research and development, prototyping, and follow-on production) OTs are just contracts.”).

28. See *infra* Part III.

government through any means—including Other Transactions—will never be quite the same as doing business in the commercial sector.<sup>29</sup> There are three primary categories of issues that parties to an Other Transaction should understand.

First, while judicial review is presumably available under the Tucker Act where the government breaches its contractual obligations under an Other Transaction, sovereign immunity limits the forum and remedies available to the private party in the event of a government breach, as well as the theories of liability that a plaintiff may pursue.<sup>30</sup> Litigation of breach of contract claims filed by private parties arising from Other Transactions likely will be limited to the Court of Federal Claims and the Federal Circuit, where principles of federal common law will govern.<sup>31</sup> Notably, however, a relatively recent line of Federal Circuit precedent creates the risk that certain Other Transactions may not be subject to judicial review under the Tucker Act, potentially leaving the private party without meaningful legal recourse if the agreement is not drafted carefully.<sup>32</sup>

Second, failure to work within various limits on agency authority may disrupt the parties’ expectations during the formation and administration of Other Transactions.<sup>33</sup> Although important jurisdictional questions remain to be answered, it is clear that non-compliance with preconditions to an agency’s OTA, or arbitrary and otherwise unlawful behavior in connection with the award of an Other Transaction might be bases for protesting an agency’s use of OTA. Beyond the risk of bid protest, legal limits on the authority of any federal agency and its representatives to contractually bind the United States mean that a private firm’s failure to appreciate nuanced issues of federal fiscal law, or limits to a government representative’s authority, could result in an Other Transaction (or modification thereto) being rendered voidable, if not void.<sup>34</sup> This risk is magnified by uncertainty regarding which government officials have authority to create, modify, and administer Other Transactions. Further complexity derives from Federal Circuit precedent that restricts the circumstances in which government officials have implied actual authority to create and modify government contracts.<sup>35</sup>

Third, parties should understand that the federal common law of contracts dictates methods of interpretation different from the principles that usually apply to private contracts.<sup>36</sup> The Federal Circuit adheres to the “plain meaning” rule, often declining to consider extrinsic evidence to determine the parties’ intent.<sup>37</sup> The Federal Circuit and its predecessor have also traditionally

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29. See *infra* Part III.

30. See *infra* Part III.A.

31. See *infra* Part III.A.

32. See *infra* Part III.A.

33. See *infra* Part III.B.

34. See *infra* Part III.B.

35. See *infra* Part III.B.

36. See *infra* Part III.C.

37. See *infra* Part III.C.

declined to apply the doctrine of *contra preferentum* to interpret ambiguous clauses against the government drafter where the ambiguity is patent and the private party failed to seek clarification prior to contract formation.<sup>38</sup> It is not yet clear whether or how this so-called “patent ambiguity doctrine” might apply to Other Transactions; but, until courts provide clarity, parties to an Other Transaction should appreciate the uncertainty regarding which party bears the risk of ambiguous terms and conditions.<sup>39</sup> Similarly, the Federal Circuit and its predecessor have applied the *Christian* doctrine to incorporate by operation of law certain mandatory contract clauses.<sup>40</sup> While it is not yet clear whether this doctrine might apply to Other Transactions, it should at least be safe to conclude that just because the *Christian* doctrine requires that a FAR clause be incorporated into a procurement contract (such as the Termination for Convenience clause) the same clause should not necessarily be incorporated into an Other Transaction, unless some statute or regulation reflecting important public policy makes that clause mandatory for the Other Transaction at issue.<sup>41</sup>

While many of the questions discussed in the following sections lack definitive answers, it is at least clear that the law applicable to Other Transactions is quite different than the law applicable to commercial contracts. Before proceeding, it is important to keep in mind three limitations to the scope of this article. First, this article addresses Other Transactions entered between private parties and federal agencies, not so-called “consortia” agreements. Second, the article does not address the risks that private parties to an Other Transaction may face due to the federal government’s arsenal of tools designed to combat fraud, waste, and abuse in public spending, such as the False Claims Act, Anti-Kickback Act, or suspension and debarment.<sup>42</sup> Third, this article does not attempt to describe the means by which the government might seek redress for any alleged breach of an Other Transaction by a private party, other than to suggest that the answer in any case likely will relate to the terms of the Other Transaction’s dispute resolution provisions.<sup>43</sup> The author

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38. See *infra* Part III.C.

39. See *infra* Part III.C. .

40. See *infra* Part III.C.

41. See *infra* Part III.C.

42. For an analysis of how the False Claims Act imposes standards of care divergent from those applicable to commercial contracts, see William E. Kovacic, *The Civil False Claims Act As a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 204 (1998). There appears to be some disagreement as to whether the Anti-Kickback Act applies to any or all Other Transactions, depending in part on the source of OTA involved. See Richard L. Dunn, *Other Transaction Agreements: What Applies?*, 32 NASH & CIBINIC REP. NL ¶ 22, at 3 (May 2018). For analysis of the distinctions between the suspension and debarment regime applicable to procurement activities and the suspension and debarment regime created by the Non-Procurement Common Rule, see Robert F. Meunier & Trevor B.A. Nelson, *Is It Time for a Single Federal Suspension And Debarment Rule?*, 46 PUB. CONT. L.J. 553 (2017); see also Samantha Block, *Defying Debarment: Judicial Review of Agency Suspension and Debarment Actions*, 86 GEO. WASH. L. REV. 1316 (2018).

43. For an introduction to the issues involved when the Federal Government acts as a plaintiff in civil litigation, see GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 8, at 587 (2016).



wholeheartedly encourages others to research and analyze these important issues, but does not attempt to resolve them here.

## II. PREMISE: OTHER TRANSACTIONS ARE CONTRACTS WITH THE GOVERNMENT

As the title suggests, the premise of this article is that Other Transactions are contracts with the federal government. This should not be surprising. Indeed, in the only published Court of Federal Claims decision the author is aware of addressing an alleged breach of contract involving an Other Transaction, the conclusion that the parties created a contract was apparently so obvious that the issue did not warrant discussion in the opinion.<sup>44</sup> The 2018 OUSD OTA Guide expressly advises in its “Myths and Facts” section that Other Transactions are legally enforceable contracts:

Myth 3: Since an OT is termed an “agreement,” it is not a contract.

FALSE. When most people in the [g]overnment hear the term “contract,” they automatically think “Federal Acquisition Regulation (FAR)-based procurement contract” awarded under the traditional acquisition process and subject to all of the federal acquisition statutes and regulations. OT agreements are not procurement contracts, but they are legally valid contracts. They have all six legal elements for a contract (offer, acceptance, consideration, authority, legal purpose, and meeting of the minds) and will be signed by someone who has the authority to bind the federal government (i.e. an Agreements Officer (AO)). The terms and conditions can be enforced by and against either party. The organizations within DoD routinely using OTs have called them agreements to ensure that there would be no confusion between these arrangements and FAR based procurement contracts.<sup>45</sup>

That Other Transactions are contracts is consistent with Federal Circuit precedent that: “[A]ny agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the [g]overnment, specifically: mutual intent to contract including offer and acceptance, consideration, and a [g]overnment representative with actual authority to bind the [g]overnment.”<sup>46</sup> The Federal Circuit also has indicated that the existence of a contract is not dependent on the parties’ use of the term “contract.”<sup>47</sup> There is plentiful precedent from the Federal Circuit and Court of Federal Claims finding enforceable contracts between a private party and

44. See *Spectre Corp. v. United States*, 132 Fed. Cl. 626, 628 (2017) (Smith, J.).

45. OUSD Prototype OTA Guide 2018, *supra* note 5, *Myths & Facts*, at “Myth 3.”

46. *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990).

47. See *Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (“The government also argues that the resource sharing agreements are not contracts because they are not labeled ‘contracts’ in the regulatory scheme. However, the failure of Congress to use the word ‘contract’ does not preclude the holding that a binding contract was formed.”).

the government in non-procurement settings, including grants, cooperative agreements, prize contests, and other resource sharing agreements.<sup>48</sup>

The Supreme Court's decision in *Kingdomware Technologies Inc. v. United States*<sup>49</sup> lends further support, as the Court explained that the essence of a contract is an agreement between two or more parties that imposes legally enforceable obligations.<sup>50</sup> In *Kingdomware*, the Supreme Court found that an "order" issued by the Department of Veterans Affairs against the Federal Supply Schedule was a contract with the government because it "creates contractual obligations for each party and is a 'contract' within the ordinary meaning of that term," quoting Black's Law Dictionary to define "contract" as an "agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."<sup>51</sup> There should be no dispute that if an agency enters into an Other Transaction whereby (1) a private entity agrees to undertake some performance, whether it be to perform research or create a prototype, and (2) the government in return agrees either to pay the private party for its performance or provide some other form of consideration—access to data or facilities, cost sharing, etc.—then that Other Transaction creates a set of mutually binding obligations that satisfies the ordinary meaning of the term "contract."<sup>52</sup>

To the extent there is confusion with respect to the contractual nature of Other Transactions, it may be attributed to various statutory grants of OTA that are drafted to distinguish Other Transactions from *procurement* contracts. Some of these statutory OTA provisions generate confusion by using the general term "contract" instead of the more specific term "procurement contract," creating the appearance that Other Transactions are being distinguished from all types of "contracts." For example, the statute that grants TSA OTA authorizes TSA "to enter into and perform such *contracts*, leases, cooperative agreements, or other transactions as may be necessary."<sup>53</sup> Likewise, DoD's R&D OTA provides that "each military department may enter into transactions (other than *contracts*, cooperative agreements, and grants)."<sup>54</sup>

If taken at face value, these provisions could be read to suggest that Other Transactions are, by statute, not contracts. But, the statutory OTA provisions distinguishing between "contracts" and "Other Transactions" are properly

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48. See, e.g., *id.* (finding "resource sharing agreements" to be contracts); *San Juan City Coll. v. United States*, 391 F.3d 1357, 1361 (Fed. Cir. 2004) ("The fact that this contract covers government financial grants does not warrant a different standard" (internal quotation omitted).); *Rick's Mushroom Service, Inc. v. United States*, 521 F.3d 1338, 1344 (Fed. Cir. 2008) (describing cooperative agreement at issue as an express contract, albeit one that did not provide for money damages); *Frankel v. United States*, 118 Fed. Cl. 332, 335–36 (2014), *aff'd*, 842 F.3d 1246 (Fed. Cir. 2016) (federally administered prize contest is a contract); *Thermalon Indus., Ltd. v. United States*, 34 Fed. Cl. 411, 415 (1995) (National Science Foundation research grant is a binding contract).

49. 136 S. Ct 1969, 1978 (2016).

50. *Id.*

51. *Id.* (quoting BLACK'S LAW DICTIONARY 389 (10th ed. 2014)).

52. See *id.*

53. 49 U.S.C. § 106(l)(6) (emphasis added).

54. 10 U.S.C. § 2371a (emphasis added).

read as distinctions between “procurement contracts” and “Other Transactions.” As explained by former Defense Advanced Research Projects Agency (DARPA) General Counsel Richard Dunn: “In the litany of terms contract, grant, or cooperative agreement appearing together, contract almost always means procurement contract.”<sup>55</sup> Thus, the statutory OTA provisions simply reaffirm that Other Transactions are not procurement contracts. The OTA provisions do not purport to disclaim that Other Transactions satisfy the common law standards for creating mutually binding contractual liability. To read such statutes as distinguishing Other Transactions from any type of contractual arrangement would be contrary to the statutes’ plain meaning and clear congressional intent.

The Federal Grants and Cooperative Agreements Act (FGCAA) further supports reading the term “contract” in a statutory OTA provision to mean “procurement contract.”<sup>56</sup> The FGCAA is intended to “promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements.”<sup>57</sup> While the FGCAA carefully uses the term “procurement contract” instead of “contract,” other statutes use the general term “contract” instead of the more precise term “procurement contract,” even when citing directly to the FGCAA. For example, DoD’s statutory authorization to engage in R&D distinguishes between (1) using a “contract, cooperative agreement, or grant in accordance with [the FGCAA],” and (2) using “transactions (other than contracts, cooperative agreements, and grants).”<sup>58</sup> By citing to the FGCAA when discussing contracts, cooperative agreements, and grants, Congress clearly intended the term “contract” to mean “procurement contract,” because the FGCAA does not speak to general contracts. The FGCAA speaks to three specific kinds of contractual agreements: procurement contracts, cooperative agreements, and grants.<sup>59</sup> In light of the FGCAA, there is no reason to assume that Congress intended the term “contract” to mean anything other than “procurement contract” when describing Other Transactions in other statutory provisions.

Furthermore, interpreting statutory OTA provisions to mean that Other Transactions are not legally enforceable contracts would contravene fundamental rules of statutory interpretation. First, because grants and cooperative agreements are types of contractual agreements,<sup>60</sup> then unless Congress’ use of the term “contract” is interpreted to mean “procurement contract,” the common statutory distinction among “contracts, grants, and cooperative agreements” would be meaningless, in contravention of the canon that disfavors interpretations that leave any word in a statute redundant or meaning-

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55. Richard L. Dunn, *Other Transaction Agreements: What Applies?*, 32 NASH & CIBINIC REP. NL ¶ 22, at 1 (May 2018).

56. 31 U.S.C. § 6301.

57. *Id.*

58. 10 U.S.C. § 2358.

59. 31 U.S.C. § 6301.

60. See *supra* note 48.

less.<sup>61</sup> Second, because Other Transactions satisfy the common law definition of contract, reading an OTA provision to mean that an Other Transaction is not a contract would alter the common law, contravening the canon of statutory interpretation that disfavors implied deviations from the common law.<sup>62</sup> Third, and most importantly, interpreting OTA provisions to mean that Other Transactions are not legally binding contracts would run afoul of the principal rule of statutory interpretation that a “fair reading of legislation demands a fair understanding of the legislative plan.”<sup>63</sup> Statutory grants of OTA are intended to give agencies flexibility to do business with the private sector. It is hard to imagine anything more damaging to the prospect that Other Transactions will allow agencies to successfully engage with the commercial sector than to interpret OTA to mean that the parties to an Other Transaction are left without any legally binding contractual rights. Such a result would be anathema to commercial practice, where contracts are, of course, legally binding. It would also be devastating to the inherent public interest of ensuring that companies who agree to provide goods and services to the United States in return for taxpayer dollars are held accountable to those promises.

At bottom, Congress’ casual use of the term “contract” in OTA provisions and various procurement-related statutes should not be taken as an assertion that Other Transactions are not binding contracts that impose legally enforceable mutual obligations on both parties. While a narrow reading of certain OTA provisions could be read to suggest that Other Transactions are something other than contracts, that reading is untenable in light of the larger statutory context and congressional intent. Nevertheless, given the burgeoning popularity of OTA, Congress would be well advised to more clearly distinguish between “contracts” and “procurement contracts” in the future.

### III. IMPLICATIONS

The Supreme Court proclaimed long ago that once the government “comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals here.”<sup>64</sup> Despite that rhetoric, stark differences exist between the law of contracts among private

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61. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174–79 (2012).

62. See *id.* at 318–19.

63. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (“Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.”); see also *Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (“Only by such full reference to the context of the whole can the court find the plain meaning of a part. . . . ‘Slicing a statute into phrases while ignoring their contexts—the surrounding words, the setting of the enactment, the function a phrase serves in the statutory structure—is a formula for disaster’” (internal citations omitted)).

64. *Cooke v. United States*, 91 U.S. 389, 398 (1875); *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607–08 (2000) (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) (plurality opinion) (internal quotation marks omitted)).

parties and the law of contracts with the federal government.<sup>65</sup> Indeed, the Supreme Court has also explained: “It is too late in the day to urge that the [g]overnment is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures.”<sup>66</sup>

As explained in the sections that follow, the differences between the law applicable to government contracts and the law applicable to contracts between private parties are driven largely by (1) the federal government’s sovereign immunity and its limited waiver of that immunity for breach of contract cases under the Tucker Act;<sup>67</sup> (2) Congress’ power of the purse, and the limited authority of Executive agencies and government officials to bind the government and utilize OTA;<sup>68</sup> and (3) the federal common law of contracts, developed by the Federal Circuit and its predecessor, which is similar to but distinct from the law that applies to contracts between private parties.<sup>69</sup> These unique aspects of the law of government contracting will be important to consider when negotiating an Other Transaction or resolving any dispute that arises therefrom.<sup>70</sup>

### *A. Sovereign Immunity, the Tucker Act, and the Federal Circuit*

Perhaps the most extraordinary distinction between the U.S. federal government and a private entity is the United States’ sovereign immunity: The federal government is immune from legal action unless, until, and only to the extent that Congress waives the United States’ immunity.<sup>71</sup> Through the Tucker Act,<sup>72</sup> Congress initially waived sovereign immunity for claims seeking money damages (i.e. not injunctive relief) based on the alleged breach of an express or implied contract, among other claims seeking payment pursuant to “money-mandating” provisions of statute, regulation, or the U.S.

65. See generally Joshua L. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64, GEO. WASH. L. REV. 633, 637–38 (1996) (recognizing and attempting to reconcile conflicting principles).

66. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383 (1947).

67. See *infra* Part III.A.

68. See *infra* Part III.B.

69. See *infra* Part III.B.

70. See *infra* Part III.C.

71. SISK, *supra* note 44, § 2.3(b)(5), at 85 (2016). The origins and desirability of sovereign immunity in American jurisprudence are controversial subjects. *Id.* § 2.2–2.3. Compare Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 384 (1970) (“[S]trongest support for sovereign immunity is provided by that four-horse team so often encountered—historical accident, habit, a natural tendency to favor the familiar, and inertia.”), with Harold J. Krent, *Reconceptualizing Sovereign Immunity and the Uses of History*, 45 VAND. L. REV. 1529, 1530 (1992) (“Much of sovereign immunity . . . derives not from the infallibility of the state but from a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule.”). Nevertheless, sovereign immunity has been recognized by the Supreme Court for quite a while, and is in no danger of falling out of favor any time soon. See SISK, *supra* note 44, § 2.3(b).

72. 28 U.S.C. § 1491(a)(1).

Constitution.<sup>73</sup> Tucker Act claims for more than \$10,000 must be filed in what is now called the United States Court of Federal Claims, and the Court of Federal Claims' judgments may be appealed to the United States Court of Appeals for the Federal Circuit.<sup>74</sup>

Note that breach of contract claims arising from procurement contracts are covered by the dispute resolution procedures of the Contract Disputes Act of 1978 (CDA),<sup>75</sup> which may result in initial proceedings at either the Boards of Contract Appeals or the Court of Federal Claims, and then may be appealed to the Federal Circuit.<sup>76</sup> The CDA applies only to procurement contracts.<sup>77</sup> Because Other Transactions are not procurement contracts, breach of contract litigation arising from an Other Transaction presumably will not be subject to the CDA, or its many procedural requirements.<sup>78</sup>

There should be no serious dispute that an alleged breach of the terms of an Other Transaction falls within the Court of Federal Claims' jurisdiction provided by Tucker Act § 1491(a)(1)—unless Congress provides for a different remedial scheme in any given statutory grant of OTA.<sup>79</sup> To the extent an Other Transaction creates a binding contract imposing on the government legally enforceable obligations, the Court of Federal Claims should have jurisdiction over an alleged breach of those contractual obligations,<sup>80</sup> although the extent of the review available may be limited by a dispute resolution provision in the contract.<sup>81</sup> In almost all cases, the breach of contractual obligations should trigger the standard presumption in breach of contract cases that money damages are the adequate and available remedy.<sup>82</sup> Where a party seeks money damages based on an alleged breach of express or implied contract

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73. See, e.g., Nathaniel E. Castellano, *After Arbaugh: Neither Claim Submission, Certification, Nor Timely Appeal Are Jurisdictional Prerequisites to Contract Disputes Act Litigation*, 47 PUB. CONT. L.J. 35, 50 (2017); see also William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 387–88 (1968).

74. See, e.g., Castellano, *supra* note 73, at 51.

75. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101–09 (2012)).

76. See generally Castellano, *supra* note 73, at 58.

77. *Pasteur v. United States*, 814 F.2d 624, 627 (Fed. Cir. 1978).

78. See OUSD Prototype OTA Guide 2018, *supra* note 5, *Publicizing, Soliciting, and Evaluating at "Selection and Negotiation of Terms"* ("Although OTs are not subject to the Contract Disputes Act, an OT dispute can potentially be the subject of a claim in the Court of Federal Claims.").

79. See *id.*; see also SISK, *supra* note 44, § 4.4(c); *Alpine PCS, Inc. v. United States*, 878 F.3d 1086, 1092 (Fed. Cir. 2018) (citing *United States v. Bormes*, 568 U.S. 6, 12–13 (2012)) (discussing displacement of Tucker Act jurisdiction by separate, comprehensive regulatory scheme).

80. "A breach of contract is a failure to perform a contractual duty when it is due." *Trauma Serv. Grp.*, 104 F.3d at 1325 (citing *Winstar Corp. v. United States*, 64 F.3d 1531, 1545 (Fed. Cir. 1995), *aff'd*, 518 U.S. 839 (1996)); RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (AM. LAW INST. 1981).

81. *Transpace Carriers, Inc. v. United States*, 22 Cl. Ct. 80, 81–82 (1990).

82. See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996) (plurality opinion) ("[D]amages are always the default remedy for breach of contract."); see also *LaBatte v. United States*, 899 F.3d 1373, 1378–79 (Fed. Cir. 2018); *Rocky Mountain Helium, LLC v. United States*, 841 F.3d 1320, 1327 (Fed. Cir. 2016) (citing *Sanders v. United States*, 252 F.3d 1329, 1334 (Fed. Cir. 2001)); *San Juan City Coll. v. United States*, 391 F.3d 1357, 1361 (Fed. Cir. 2004) (internal quotation omitted).

(including an Other Transaction), there should be no question that the claim falls within the waiver of immunity at Tucker Act § 1491(a).<sup>83</sup>

The prior paragraph repeats the word “should” to account for uncertainty introduced by the Federal Circuit’s decision in *Rick’s Mushroom Service Inc. v. United States*.<sup>84</sup> *Rick’s Mushroom* casts doubt on whether the Court of Federal Claims and the Federal Circuit will construe non-procurement contracts (such as cooperative agreements and Other Transactions) to provide the money damages necessary to satisfy the “money mandating” requirement for Tucker Act jurisdiction.<sup>85</sup> Subsequent Federal Circuit decisions confirm that *Rick’s Mushroom* does not alter the general presumption that breach of a government contract will provide a remedy of money damages<sup>86</sup> and limit the *Rick’s Mushroom* decision to the unique cost sharing arrangement at issue in that case.<sup>87</sup> Nevertheless, following *Rick’s Mushroom*, the Federal Circuit continues to adhere to the premise that the existence of a contract does not *always* provide Tucker Act jurisdiction, and therefore a court may in some cases “require a demonstration that the agreements could fairly be interpreted as contemplating monetary damages in the event of breach.”<sup>88</sup> Parties to an Other Transaction might be able to insulate themselves from jurisdictional problems caused by *Rick’s Mushroom* by providing explicitly for entitlement to money damages in any negotiated Other Transaction.<sup>89</sup> That being said, such express language hardly seems necessary where the government has agreed to pay money for goods or services received under any Other Transaction.

Assuming *Rick’s Mushroom* does not preclude jurisdiction over any given breach of contract claim arising from an Other Transaction, then any such breach of contract claims should fall within the jurisdiction of the Court of Federal Claims under § 1491(a)(1). As a consequence, the federal district courts would lack jurisdiction over breach of contract disputes arising from an Other Transaction (assuming the claim seeks more than \$10,000 in damages).<sup>90</sup> As a

83. While the government often raises the unenforceability of a contract as a jurisdictional challenge, such arguments are often actually challenges to the merits of a breach of contract case, and allegation of the breach of an express or implied contract is generally sufficient to satisfy jurisdiction. See, e.g., *Trauma Serv. Grp.*, 104 F.3d at 1325.

84. 521 F.3d 1338, 1343–44 (Fed. Cir. 2008).

85. See *id.* For critical analysis, see 3 KAREN L. MANOS, GOVERNMENT CONTRACT COSTS & PRICING 52–53, §90:6 (2d ed. 2009 & Supp. 2018); Ralph C. Nash, *Does the Implied Warranty of Specifications Attach to Cooperative Agreements?: A Surprising Answer*, 22 NASH & CIBINIC REP. ¶ 71 (2008).

86. See, e.g., *LaBatte*, 899 F.3d at 1378–79; *Rocky Mountain Helium*, 841 F.3d at 1327; *Higbie v. United States*, 778 F.3d 990, 993 (Fed. Cir. 2015); *Holmes v. United States*, 657 F.3d 1303, 1314–15 (Fed. Cir. 2011).

87. See, e.g., *Holmes*, 657 F.3d at 1315; *Higbie*, 778 F.3d at 999 (Taranto, J., dissenting).

88. *Higbie*, 778 F.3d at 993 (Fed. Cir. 2015); *Holmes*, 657 F.3d at 1314–15.

89. See Ralph C. Nash, Jr., *Other Transactions: A Preferred Technique?*, 32 NASH & CIBINIC REP. NL ¶ 8 (Feb. 2018) (“It is quite clear to us that an OTA is a contract in terms of the Tucker Act with the result that there should be court jurisdiction for breach without the need to cite a money-mandating provision. However, we had the same belief with regard to cooperative agreements before *Rick’s Mushroom Service* (and we were wrong).”).

90. Federal district courts and the Court of Federal Claims technically have concurrent jurisdiction over monetary claims seeking less than \$10,000 pursuant to the so-called “Little Tucker

relatively consistent line of Federal Circuit precedent explains, if the essence of a claim against the government is for breach of contract, the claimant is limited to seeking money damages at the Court of Federal Claims under the Tucker Act, with a right to appeal to the Federal Circuit.<sup>91</sup> Because the Supreme Court rarely reviews the Federal Circuit's government contract decisions, the Federal Circuit is the *de facto* court of last resort for government contract claims.<sup>92</sup>

Notwithstanding its important role in shaping government contract law, the Federal Circuit is, for all practical purposes, a patent court with a docket dominated by patent disputes.<sup>93</sup> Neither the Circuit judges nor their law clerks handle enough government contracts appeals to maintain sufficient context for the fundamental issues presented, much less the nuances of the practical reality of doing business with the federal government.<sup>94</sup> Nevertheless, it is the Federal Circuit's precedent that will dictate the formation, interpretation, administration, and litigation of Other Transactions.

In addition to being subject to the Federal Circuit's jurisdiction and precedent, parties litigating at the Court of Federal Claims under § 1491(a) have no right to a jury trial, even for government contract counterclaims (which may include, among other things, allegations of fraud).<sup>95</sup> Further, equitable relief, namely specific performance, is not available.<sup>96</sup> Unlike most statutes of limitations,

Act." 28 U.S.C. § 1346; see also Schooner & Castellano, *Eyes On the Prize, Head in the Sand*, *supra* note 3, at 409 & n.108. Because a private party will rarely find it worthwhile to litigate in federal district court to obtain monetary damages of less than \$10,000, this article does not treat it as a legitimate consideration for litigation of Other Transaction-related disputes.

91. See, e.g., Christopher Village, L.P. v. United States, 360 F.3d 1319, 1328 (Fed. Cir. 2004); Consol. Edison Co. of New York v. U.S. Dep't of Energy, 247 F.3d 1378, 1385 (Fed. Cir. 2001).

92. See, e.g., Castellano, *supra* note 73, at 42 & n.34; Richard C. Johnson, *Beyond Judicial Activism: Federal Circuit Decisions Legislating New Contract Requirements*, 42 PUB. CONT. L.J. 71, n.13 (2012) ("Moreover, because appeals on certiorari from the CAFC to the Supreme Court are as rare as hens' teeth, the CAFC has in effect become the court of last appeal in government contracts cases."); Ruth C. Burg, *The Role of the Court of Appeals for the Federal Circuit in Government Contracts Disputes: A Historic View from the Bench*, 42 PUB. CONT. L.J. 173, 189 (2012) ("The Federal Circuit has exclusive jurisdiction to decide appeals relating to the contracts of the United States Government and, because Supreme Court review is rare, is effectively 'the court of last resort' for government agencies and their contractors.")

93. The Hon. Jimmie V. Reyna & Nathaniel E. Castellano, *Successful Advocacy in Government Contracts Appeals Before the Federal Circuit: Context Is Key*, 46 PUB. CONT. L.J. 209, 209 (2016); Ralph C. Nash, Jr., *The Twenty-Eighth Annual Gilbert A. Cuneo Lecture in Government Contract Law*, 213 MIL. L. REV. 190, 193 (2012).

94. Reyna & Castellano, *supra* note 93, at 209–10. (The statistics "suggest that there are not enough government contracts cases appealed to the Federal Circuit for the judges, much less their clerks, to develop and maintain a high level of working knowledge in all aspects of the law of government contracting"); Nash, Jr., *supra* note 93, at 194 ("So they're really interested in patent law, and that means a couple of things. Number one, it means from the operation of the court that there are no judges on the Federal Circuit who have any background experience in government contracting. Zero. And they will openly tell you that. Number two, they don't hire law clerks who have any experience in government contracts. So the court is basically devoid of any experience in our area."); see also Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions*, 60 AM. U.L. REV. 1067, 1071 (2011).

95. See SISK, *supra* note 44, § 4.2(g); Matthew H. Solomson, *When the Government's Best Defense Is a Good Offense: Litigating Fraud and Other Counterclaim Cases Before the U.S. Court of Federal Claims*, 11–12 BRIEFING PAPERS 3 (Nov. 2001).

96. See SISK, *supra* note 44, § 4.8(b)(4).



including that of the CDA, which are presumed subject to equitable tolling, the Tucker Act’s six year statute of limitations<sup>97</sup> is jurisdictional and cannot be tolled.<sup>98</sup> Plaintiffs also are limited in the available legal theories that may be asserted for relief against the government. Unlike the law of private contracts where various theories such as estoppel and restitution are available to mitigate unequitable outcomes, those theories are generally not available to a private party litigating against the federal government.<sup>99</sup> It is questionable whether equitable estoppel may be raised against the government at all,<sup>100</sup> and the Federal Circuit has indicated that any such claim requires a showing of government misconduct, which is not required of commercial parties.<sup>101</sup>

In sum, while the government may be held liable for breach of its contractual obligations under an Other Transaction, its limited waiver of sovereign immunity, coupled with relatively strict Federal Circuit precedent, guarantees that enforcing those contract rights in court, if necessary, will be quite different than enforcing contract rights in a commercial setting.

### *B. Authority to Use Other Transactions and Bind the Government*

Another distinction between contracting among private parties and contracting with the federal government is that of authority. As a sovereign, the United States has inherent authority to contract,<sup>102</sup> but there are limits to that authority. Similarly, even where an agency has OTA, any given statutory grant of OTA may be subject to preconditions. There are two separate issues to keep in mind when considering an agency’s authority to use Other Transactions and bind the government contractually.

The first involves the risk of a bid protest that prevents (or delays) the agency from awarding an Other Transaction. If an agency attempts to award an Other Transaction in a way that contravenes one of the preconditions to its OTA, that could result in a successful bid protest challenging the agency’s authority to award an Other Transactions instead of a procurement contract.<sup>103</sup> If an agency acts arbitrarily or contrary to law when selecting a firm to receive an Other Transaction, such conduct might be subject to protest as well.<sup>104</sup>

97. 28 U.S.C. § 2501.

98. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134–36 (2008); *see also* Castellano, *supra* note 73, at 45–47 & n.66.

99. *Lee v. States*, 895 F.3d 1363, 1373–74 (Fed. Cir. 2018); *City of El Centro v. United States*, 922 F.2d 816, 823 (Fed. Cir. 1990); *Byrne Org., Inc. v. United States*, 287 F.2d 582, 587 (Ct. Cl. 1961).

100. *See, e.g., Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 420–24 (1990); *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1581–83 (Fed. Cir. 1993).

101. *See Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000). Compare Karen L. Manos, *Estoppel Against the Government: What Does “Affirmative Misconduct” Have to Do with It?*, 1 COSTS, PRICING & ACCOUNTING REP. 1, 1–5 (July 2006), with Steven W. Feldman, *Affirmative Misconduct As an Element of Estoppel Against the Government: A Different Point of View*, 2 COSTS, PRICING & ACCOUNTING REP. 1, 4–6 (Jan. 2007).

102. *See United States v. Tingey*, 30 U.S. 115, 122 (1831).

103. *See infra* Part III.B.1.

104. *See infra* Part III.B.1

The second carries greater consequence, potentially resulting in an Other Transaction, or modification thereto, being rendered voidable, if not void.<sup>105</sup> Even if an agency complies with all statutory limits to its OTA, there are powerful constitutional, statutory, and common law limits to the Executive's authority to bind the United States, and even greater limits to the authority of any given government officer or employee to bind the United States.<sup>106</sup> These limits to authority carry significant legal and practical implications for companies negotiating, performing, or resolving disputes relating to Other Transactions.<sup>107</sup>

### 1. Authority to Award Other Transactions (i.e., Bid Protests)

The risk of an agency exceeding its statutory authority to award an Other Transaction depends on the statutory OTA provisions at issue, and any governing regulations. Congress' statutory grants of OTA thus far have included varying preconditions to their use. For example, NASA and TSA have broad statutory OTA without any obvious preconditions.<sup>108</sup> DoD, on the other hand, has two separate types of OTA, each of which contains relatively detailed requirements in comparison to the broad OTA that Congress provided to NASA and TSA.<sup>109</sup> DoD's prototype OTA is particularly laden with statutory preconditions.<sup>110</sup>

Beyond any preconditions stated in an OTA statute, another potential statutory limit to an agency's authority to utilize an Other Transaction is the FGCAA, discussed above. The FGCAA dictates, in mandatory terms, when agencies are to use procurement contracts, grants, and cooperative agreements.<sup>111</sup> The FGCAA requires that an agency "shall" use a procurement contract when "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States [g]overnment."<sup>112</sup> As the Supreme Court reiterated in *Kingdomware*, the term "shall" usually means "must," i.e., creates a mandatory obligation.<sup>113</sup> Because an Other Transaction is not a procurement contract, it arguably follows that, where the FGCAA requires the use of a procurement contract for a certain transaction, the Agency cannot utilize its OTA for that same transaction.

As demonstrated in the U.S. Government Accountability Office's (GAO) *Oracle America* decision, protesters may use these statutory preconditions and

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105. See *infra* Part III.B.2.

106. See *infra* Part III.B.2.

107. See *infra* Part III.B.2.

108. See 49 U.S.C. § 106(l)(6); 51 U.S.C. § 20113(e).

109. See 10 U.S.C. § 2371; 10 U.S.C. § 2371b. For a breakdown of the different preconditions, see OUSD Prototype OTA Guide 2018, *supra* note 5, *Planning* at "Understanding the Statutory and Regulatory Requirements."

110. See 10 U.S.C. § 2371b.

111. 31 U.S.C. § 6303.

112. *Id.*

113. See *Kingdomware Technologies Inc. v. United States*, 136 S. Ct 1969, 1977 (2016).

limits to challenge an agency’s use of OTA in lieu of procurement.<sup>114</sup> In *Oracle America*, GAO considered a protest that DoD’s award of a follow-on production contract from a prototype OTA exceeded DoD’s statutory authority.<sup>115</sup> GAO held that the U.S. Transportation Command’s (TRANSCOM) award of a sole source, follow-on production contract exceeded TRANSCOM’s statutory authority because TRANSCOM: (1) failed to provide for a follow on production contract in its initial prototype OTA instrument, and (2) issued its sole-source follow-on production order before the prototype was complete.<sup>116</sup>

Presumably, the same result might be obtained through a protest at the Court of Federal Claims under Tucker Act § 1491(b).<sup>117</sup> This follows from the Federal Circuit’s decisions in *CMS Contract Management Services* and *Hymas*, where the Circuit reviewed agency decisions to use a cooperative agreement instead of a procurement contract.<sup>118</sup> These decisions indicate that § 1491(b) may provide a route for competitors to challenge agency use of OTA in lieu of traditional procurement contracts.<sup>119</sup> One potential theory might be that the agency has improperly used an Other Transaction in lieu of a procurement contract, whether by exceeding a precondition of the relevant OTA, or by using an Other Transaction where the FGCAA mandates use of a procurement contract.<sup>120</sup>

Two important distinctions with respect to bid protests bear emphasis.

First, the prior discussion is limited to bid protests alleging that an agency improperly used its OTA to issue a contract that should have been subject to procurement procedures. As explained, GAO has confirmed that these protests fall within GAO protest jurisdiction, and they also might be viable at the Court of Federal Claims pursuant to Tucker Act § 1491(b). Once it is confirmed that an agency has properly elected to issue an Other Transaction instead of a procurement contract, GAO will dismiss for lack of jurisdiction a protest alleging that the agency made a flawed decision about which offeror to award the Other Transaction.<sup>121</sup> Because the Court of Federal Claims’ § 1491(b) jurisdiction is limited to protests “in connection with a procure-

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114. See *Oracle Am., Inc.*, 2018 CPD ¶ 180, at 14.; see also Annejanette H. Pickens & Daniel J. Alvarado, *Other Transaction Agreements: An Analysis of the Oracle Decision and Its Potential Impact on the Use of OTAs*, 54 *PROCUREMENT LAW* 1, 18-21 (Fall 2018).

115. See *Oracle Am., Inc.*, 2018 CPD ¶ 180 at 14.

116. See *id.*

117. OUSD recognizes that Other Transaction awards may, on occasion, be protested to the Court of Federal Claims. See OUSD Prototype OTA Guide 2018, *supra* note 5, *Common Myths & Facts, Myth #5*.

118. *CMS Contract Mgmt. Servs. v. Massachusetts Housing Finance Agency*, 745 F.3d 1379, 1384-86 (Fed. Cir. 2014); *Hymas v. United States*, 810 F.3d 1312, 1318-29 (Fed. Cir. 2016); see Ralph C. Nash, Jr., *Other Transactions: A Preferred Technique?*, 32 *NASH & CIBINIC REP. NL* ¶ 8 (Feb. 2018).

119. See *Hymas*, 810 F.3d at 1318-29.

120. See Stuart Turner & Nathaniel Castellano, *What to Expect From OTA Protests and Disputes*, LAW360 (July 17, 2018), <https://www.law360.com/articles/1059110/what-to-expect-from-ota-protests-and-disputes> [<https://perma.cc/5TGR-88VC>].

121. See *MorphoTrust USA, LLC*, B-412711, 2016 CPD ¶ 133, at 6-8 (Comp. Gen. May 16, 2016).

ment,”<sup>122</sup> and Other Transactions are not procurement contracts, it is possible that the Court of Federal Claims will, like GAO, dismiss certain protests filed under § 1491(b) challenging an Agency’s decision about which firm will receive an Other Transaction.<sup>123</sup> However, depending on the specific OTA statute at issue, and the nature of the Other Transaction being awarded, it is conceivable that an Other Transaction award may be deemed to be “in connection with a procurement” and therefore within the Court of Federal Claims’ jurisdiction.<sup>124</sup> It is also possible that bid protests challenging an Agency’s Other Transaction award decision as arbitrary, capricious, or otherwise contrary to law may be viable in federal district courts under the Administrative Procedure Act.<sup>125</sup> Certain protests relating to the award of Other Transactions also may prove successful if raised under Tucker Act § 1491(a) alleging breach of implied contract to consider bids fairly.<sup>126</sup>

Second, while the Court of Federal Claims might properly enjoin an agency from making an OTA award in certain circumstances, parties to an Other Transaction can not necessarily avoid their contractual obligations just because they identify a statutory violation in the formation of the Other Transaction. This follows from the Federal Circuit’s *en banc* holding in *American Telephone & Telegraph Co. v. United States*.<sup>127</sup> Judge Newman, writing for the majority, recognized the highly disruptive effect of retroactively invalidating a government contract, and held that: “Invalidation of a contract is not a necessary consequence when a statute or regulation has been contravened, but must be considered in light of the statutory or regulatory purpose, with recognition of the strong policy of supporting the integrity of contracts made by and

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122. 28 U.S.C. § 1491(b)(1).

123. *Hymas*, 810 F.3d at 1317 (“[T]his court has found that [1491(b)] speaks ‘exclusively’ to procurement solicitations and contracts.” (quoting *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010))).

124. As two conceivable examples, the Agency could announce that the Other Transaction will be the basis of a future procurement contract, or that the Other Transaction is intended to support or complement a procurement contract that is being separately competed.

125. This would be based on an argument that district courts’ so-called *Scanwell* jurisdiction survives for protests of non-procurement contracts. See *City of Albuquerque v. U.S. Dep’t. of Interior*, 379 F.3d 901, 906–12 (10th Cir. 2001); see also *Jordan Hess, All’s Well That Ends Well: Scanwell Jurisdiction in the Twenty-First Century*, 46 *PUB. CONT. L.J.* 409 (2017).

126. The Federal Circuit has confirmed this cause of action survived ADRA for non-procurement protests. *Res. Cons. Grp. v. United States*, 597 F.3d 1238, 1242 (Fed. Cir. 2010) (“We conclude that implied-in-fact contract jurisdiction does survive as to claims where [ADRA/1491(b)] does not provide a remedy.”). While one Federal Circuit decision, read in isolation, could be read to suggest this protest theory only exists when the government issues a formal RFP, *Motorola, Inc. v. United States*, 988 F.2d 113, 114 (Fed. Cir. 1993), the *Motorola* decision should not be read so broadly. See, e.g., *Comm’n Constr. Servs, Inc. v. United States*, 116 Fed. Cl. 233, 260 & n.13 (2013) (dismissing DoJ’s overbroad reading of *Motorola* to require formal solicitation and bid submission); *Schooner & Castellano, Eyes on the Prize, Head in the Sand*, *supra* note 3, at 418 & n.150 (explaining how implied-in-fact protest jurisdiction would be created between government and participants in federally-administered prize contests, despite absence of any formal solicitation or bid submission).

127. *Am. Tel. & Tel. Co. v. United States*, 177 F.3d 1368, 1374–75 (Fed. Cir. 1999) (*en banc*) (Newman, J.).

with the United States.”<sup>128</sup> Thus while an agency’s unauthorized or arbitrary exercise of its OTA may warrant a sustained bid protest, it does not necessarily follow that a defect in the formation of an Other Transaction will excuse either party from its contractual obligations under that Other Transaction.<sup>129</sup>

## 2. Limits on Agency Authority to Bind the Government

Beyond the protest risk associated with limits to agencies’ OTA, there are also important constitutional, statutory, and federal common law limits on the government’s authority to contract, violation of which could result in a court finding an Other Transaction voidable, if not void, and significantly disrupting the parties’ expectations during performance.

### a. Executive Authority to Spend

Pursuant to the Appropriations Clause of the United States Constitution,<sup>130</sup> Congress maintains “power of the purse,” which limits the Executive and its agents from making any contractual commitment that exceeds what Congress has appropriated.<sup>131</sup> This limit of Executive authority is codified most prominently in the Anti-Deficiency Act (ADA),<sup>132</sup> which forbids agency employees and officials “from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation.”<sup>133</sup> Long-standing Supreme Court precedent confirms that agreements made in violation of the ADA are unenforceable.<sup>134</sup> The rule can easily produce draconian results.<sup>135</sup> Thus, when negotiating an Other Transaction (or modification), the parties must be vigilant to ensure that the agreement does not create liability greater than that already appropriated by Congress.<sup>136</sup> Doing so may involve

128. *Id.*; see also *Lee v. States*, 895 F.3d 1363, 1372 (Fed. Cir. 2018).

129. See, e.g., *Am. Tel. & Tel. Co.*, 177 F.3d at 1374.

130. U.S. Const. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

131. See, e.g., *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (explaining the Appropriations clause to mean: “Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute”); *Cincinnati Soap Co v. United States*, 301 U.S. 30, 312 (1937) (“It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”).

132. 31 U.S.C. § 1341(a)(1).

133. *Hercules, Inc. v. United States*, 516 U.S. 417, 427 (1996).

134. See, e.g., *Leiter v. United States*, 271 U.S. 204, 206 (1926).

135. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (“Men must turn square corners when they deal with the Government, does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury” (internal quotation omitted)).

136. DoD Guidance recommends the same. See OUSD Prototype OTA Guide 2018, *supra* note 5, *Planning*, at “*Identifying Available Funds*” (“The determination of appropriateness of available funding and fund type are independent of the choice of the award instrument; the agency decision to use an OT does not expand, nor restrict available appropriations”); DPAP Prototype OTA Guide 2017, *supra* note 5, at 18 (recommending parties address appropriations issues before formation).

nuanced details of appropriation statutes and arcane principles of fiscal law—particularly when negotiating multi-year agreements<sup>137</sup> and indemnification provisions.<sup>138</sup>

### b. Officials' Authority to Bind the Government

A private firm is generally bound by statements and actions of its representatives with “apparent” authority to bind the firm.<sup>139</sup> Thus, representations of a contractor’s employees and agents will generally bind that contractor if the government reasonably believed that the contractor employee or agent in question was authorized to bind the contractor—i.e., that the contractor’s representative had apparent authority.<sup>140</sup>

The government, in contrast, is not bound by actions of those with apparent authority; it is only bound by those with actual authority.<sup>141</sup> Most daunting—private parties doing business with the government have full responsibility of ensuring that the government agents with whom they deal are acting within their actual authority, and the law will presume private parties know the scope of authority for each government official with whom they deal, even if that official provides erroneous advice as to his or her own actual authority.<sup>142</sup> This can result in holding invalid a contract or contract modification based on what seems to be a technicality of authority, even where all parties involved clearly believed a legally binding agreement was in place.<sup>143</sup> Thus, private parties

137. See *Leiter*, 271 U.S. at 206–07 (invalidating multi-year lease where only single-year funds were available at the time of contract formation). In traditional procurement contracting, this is often addressed by a combination of statutory authority to enter into multi-year contracts and use of standard clauses that stipulate the government’s obligation to pay is subject to the eventual availability of appropriated funds. See 2 GOV’T ACCOUNTABILITY OFF., GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 6-52 (3d ed. 2006), <https://www.gao.gov/assets/210/202819.pdf> [<https://perma.cc/8VD3-YWQU>] [hereinafter GAO Red Book].

138. See, e.g., Ralph C. Nash, *Indemnification Clauses: Litigation Breeders*, 20 NASH & CIBINIC REP. ¶ 42 (Sept. 2006); Ralph C. Nash, *Recovering in the Face of an “Illegal” Indemnification Clause: Ingenious Solutions?*, 16 NASH & CIBINIC REP. ¶ 54 (Nov. 2002).

139. See *Am. Anchor & Chain Corp. v. United States*, 331 F.2d 860, 861–63 (Ct. Cl. 1964).

140. See *id.*

141. See *id.*; *Fed. Crop. Ins. Corp.*, 331 U.S. at 383–384; *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865, 867 (Fed. Cir. 1987).

142. See *Fed. Crop Ins. Corp.*, 332 U.S. at 384 (“Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of his authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agency himself may have been unaware of the limitations upon his authority.”); *Trauma Serv. Grp.*, 104 F.3d at 1325 (“[A]nyone entering into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who purport to act for the Government, and this risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority.”); see also *Cooke v. United States*, 91 U.S. 389, 401–02 (1875); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Wilber Nat. Bank of Oneonta v. United States*, 294 U.S. 120, 123–24 (1935); cf., *Johnson Mgmt. Grp. CFC v. Martinez*, 308 F.3d 1245, 1259 (Fed. Cir. 2002) (Newman, J., concurring in part, dissenting in part) (“My concern is with the court’s holding that a government agency’s error of law is the sole burden of the contractor, and that the government bears neither the responsibility for its error nor the obligation to correct it to a mutually acceptable alternative.”).

143. See, e.g., *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339 (Fed. Cir. 2007).

doing business with the government—even through an Other Transaction—must be sure to ascertain the scope of the authority of any government representative with whom they deal.<sup>144</sup>

The most immediate concern for private parties negotiating an Other Transaction is to independently confirm that their government counterpart has been delegated sufficient authority to enter into the transaction. As a general rule, private parties cannot rely on the official’s assertions of his or her own authority, and any such assertions will not serve to estop the government from denying the formation of a valid contract.<sup>145</sup> The uncertain legal landscape that Other Transactions exist in makes it difficult to determine which officials hold the authority to create or modify Other Transactions.

Unlike in procurement contracting, where the FAR provides warranted contracting officers authority to create, modify, and administer procurement contracts, there is not yet any corresponding, government-wide, uniform designation of government officials authorized to create, modify, and administer Other Transactions.<sup>146</sup> The sparse DoD regulations applicable to Other Transactions for prototypes designate an “Agreements Officer” as an “individual with the authority to enter into, administer, or terminate OTs for prototype projects and make related determinations and findings.”<sup>147</sup> The DoD prototype OTA regulations further distinguish between an “Agreements Officer” and a “Contracting Officer,” the latter being defined as “a person with the authority to enter into, administer, and/or terminate contracts and make related determinations as defined in [the FAR].”<sup>148</sup> DPAP’s 2017 guidance on prototype OTA, however, defined “Agreements Officer” to provide that: “To be eligible to be an Agreements Officer, the individual must be a warranted DoD Contracting Officer.”<sup>149</sup> The guidance OUSD issued in late 2018 changes course, asserting that an Agreements Officer must be warranted, but need not necessarily be a Contracting Officer, unless required by an individual DoD component:

[An Agreements Officer (“AO”) is:] A warranted individual with authority to enter into, administer, or terminate OTs. To be appointed as an AO, the individual must possess a level of responsibility, business acumen, and judgment that enables them to operate in the relatively unstructured environment of OTs. AOs need not be Contracting Officers, unless required by the Component’s appointment process. . . . Each DoD Component with contracting authority that enters into OTs

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144. See generally Donald P. Arnavas, *Authority of Government Representatives*, 99-09 BRIEFING PAPERS 4 (Aug. 1999); Luther P. House, Jr., Thomas E. Abernathy, IV & Thomas J. Kelleher, Jr., *Resolving Government Construction Claims Without Litigation*, 93-10 BRIEFING PAPERS 1 (Sept. 1993).

145. See *supra* note 140 and accompanying text.

146. See generally FAR 1.602.

147. 32 C.F.R. § 3.4.

148. *Id.*

149. DPAP Prototype OTA Guide 2017, *supra* note 5, at iii (definitions section). The previous DARPA General Counsel criticized this decision to require an Agreements Officer to be a warranted Contracting Officer, on the basis that “as a group FAR COs are poorly trained and equipped to act as agreements officer.” *Practitioner’s Comment: DoD Guide for Other Transactions for Prototypes—Fundamentally Flawed*, 59 No. 3, Gov’t Contractor ¶ 19 (Jan. 2017).

should establish a formal process for selecting and warranting AO and for terminating their appointments.<sup>150</sup>

While the DoD regulations suggest that an Other Transaction may be formed by a DoD “Agreements Officer” that is not also a warranted contracting officer, the DPAP guidance suggested that some within DoD may believe otherwise. The OUSD guidance confirms that some DoD components may expressly require that an Agreements Officer be a Contracting Officer, and that each component may have different rules for appointing and authorizing Agreements Officers.<sup>151</sup> This potential for each DoD component to impose different procedures for designating Agreements Officers could leave private parties with untenable uncertainty as to which DoD officials have authority to bind the government to an Other Transaction for a prototype project. DoD, and every other agency with OTA, should prioritize clarity and full transparency regarding which officials are authorized to enter into Other Transactions.

Ambiguity as to which officials possess authority to enter into an Other Transaction impacts not only the contract formation process, but all of performance. It is critical for private parties to remain cognizant throughout contract performance of which individuals have authority to modify contract terms and accept deliverables. The officials authorized to contractually bind the government—e.g., warranted contracting officers, grants officers, agreements officers, etc.<sup>152</sup>—often have responsibility for many different programs, and do not have the time or expertise to maintain day-to-day involvement in the performance of the contracts for which they are responsible.<sup>153</sup> As a practical reality of contract administration, each party’s expectations and obligations often evolve throughout performance based on interactions between the contractor personnel who are doing the work and the government personnel monitoring, inspecting, or accepting their work.<sup>154</sup>

Similar issues will likely arise in the performance of Other Transactions, particularly those where performance involves research and development of sophisticated technology for which the government’s designated “agreements officer” may not have sufficient understanding. As in the performance of a procurement contract, the government’s technical representatives to an Other Transaction may make assertions that, if followed, deviate from the initial agreement and may increase the cost of performance. But, the government

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150. OUSD OTA Guide 2018, *supra* note 5, *Planning at OT Planning at “The Government Team.”*

151. OUSD OTA Guide 2018, *supra* note 5, *Planning at “Market Intelligence.”*

152. As mentioned above, the FAR designates Contracting Officers as the individuals with general responsibility for procurement contract formation and administration functions. *See generally* FAR 1.602. DoD regulations governing Other Transactions for prototypes designate the “Agreements Officer” as the corollary to a procurement Contracting Officer. *See* 32 C.F.R. § 3.4. DoD regulations define a “Grants Officer” as an “official with the authority to enter into, administer, and/or terminate grants or cooperative agreements.” *See* 32 C.F.R. § 21.660.

153. *See generally* JOHN CIBINIC, JR., JAMES F. NAGLE & RALPH C. NASH, JR., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 27–28 (5th ed. 2016).

154. *See id.*; Nash, *supra* note 93, at 198–99; Ralph C. Nash, Jr., *The Government Contract Decisions of the Federal Circuit*, 78 GEO. WASH. L. REV. 586, 597–98 (2010).



will not necessarily be bound to pay for or accept work performed pursuant to any such modification if the technical representative lacked authority to modify the initial contract requirements and the modification is not subsequently ratified by an authorized official.<sup>155</sup> Compared to procurement contracting, where a well-established cohort of contracting officers and their representatives exist, the difficulties of determining any given individual’s authority to bind the government may be exacerbated during performance of Other Transactions due to uncertainty regarding who has been delegated authority to create and administer Other Transactions.<sup>156</sup>

Parties negotiating an Other Transaction should carefully decide whether and how they attempt to contractually limit the government’s authority to modify the resulting contract. As demonstrated by the Federal Circuit’s 2007 decision in *Winter v. Cath-dr/Balti Joint Venture v. United States*,<sup>157</sup> the standard FAR and DoD Federal Acquisition Regulation Supplement (DFARS) clauses that expressly prohibit a contracting officer from delegating the authority to modify a contract will be strictly enforced, and may not align with the practical realities of contract performance.<sup>158</sup>

In *Winter*, the Circuit held that a contractor could not recover for work it was directed to perform by the Contracting Officer’s Representative (COR), even though the Contracting Officer designated the COR as the contract administrator and official responsible for providing direction during performance.<sup>159</sup> The Circuit reached this result because the contract included a standard clause<sup>160</sup> stating that only the Contracting Officer had authority to issue contract modifications and expressly precluded the Contracting Officer from delegating that authority.<sup>161</sup> Given that the Contracting Officer was precluded by the contract terms from delegating authority to modify the contract, the Federal Circuit reasoned that the theory of implied actual authority could not provide the COR with such authority.<sup>162</sup> Absent any authority to grant the equitable adjustments at issue, the Federal Circuit remanded to the Board of Contract Appeals to determine whether the Contracting Officer ratified the COR’s changes.<sup>163</sup>

If the parties to an Other Transaction choose to incorporate the clause at issue in *Winter*, or any other clause reserving for a single official non-delegable

155. See JOHN CIBINIC, JR., JAMES F. NAGLE & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 28 (5th ed. 2016).

156. *Id.* at 27–28.

157. *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339 (Fed. Cir. 2007).

158. See, e.g., Nash, *supra* note 93, at 198; *Ralph C. Nash, Jr., The Government Contract Decisions of the Federal Circuit*, 78 GEO. WASH. L. REV. 586, 597–98 (2010).

159. *Winter*, 497 F.3d at 1343–48.

160. DFARS 201.602-2. The FAR was subsequently amended to mandate similar language in all contracts. See FAR 1.602-2(d), as amended by 76 Fed. Reg. 14,543 (Mar. 16, 2011); *Ralph C. Nash, Jr., Postscript III: Contracting Officer Authority*, 28 NASH & CIBINIC REP. NL ¶ 18.

161. See *Winter*, 497 F.3d at 1343–48.

162. See *id.* at 1346; see also *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998).

163. See *Winter*, 497 F.3d at 1348.

authority to modify contract terms, the private party assumes responsibility to ensure that all contract modifications agreed to during performance are made or ratified by the official having that authority. If no such clause is incorporated into the Other Transaction, the government might be bound by its representatives that are found to have implied actual authority.

In an effort to soften the harsh results that arise when government officials purporting to act as authorized representatives of the government lack *actual* authority, the Federal Circuit adopted a theory of *implied* actual authority, attributed to its 1989 decision in *H Landau & Co. v. United States*.<sup>164</sup> Under *Landau*, some officials lacking actual authority may have implied actual authority to enter into and modify certain contracts, but only if the contracting action in question is an “integral function” of the official’s job.<sup>165</sup> While, if broadly interpreted, this theory of implied actual authority can alleviate much unfairness, its usefulness likely was limited by the Federal Circuit’s 2016 decision in *Liberty Ammunition, Inc. v. United States*.<sup>166</sup>

Judges of the Court of Federal Claims and Boards of Contract Appeals have stated varying tests for when *Landau*’s “integral function” standard is satisfied, some more lenient than others.<sup>167</sup> Yet, the Federal Circuit’s decision in *Liberty Ammunition* appears to adopt (without discussion) a rigid formulation of the test, suggesting that implied authority may only exist “where the government employee could not perform his or her assigned tasks without such authority.”<sup>168</sup> In other words, if the test announced in *Liberty Ammunition* goes unquestioned in future Federal Circuit decisions, a government employee would seem to lack implied actual authority to enter into or modify a particular type of contract, unless the employee could not perform his or her job without the authority to enter into that contract. Thus, absent any clear statutory or regulatory direction on which government representatives have actual authority to enter into and modify an Other Transaction, private parties are left with the task of determining whether the government employee they are dealing with could perform his or her job without the authority to enter into or modify the Other Transaction at issue.

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164. See *H Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989); see also Nash, *supra* note 93, at 201 (“We’ve known what the authority rules are. There’s no such thing as apparent authority blah, blah, blah. That’s what *Federal Crop Insurance* tells us. And so the boards of contract appeals and the old Court of Claims took that logic and said, okay, there’s no such thing as apparent authority, but there are implied delegations of authority. And I can remember students saying, ‘What’s the difference between implied authority and apparent authority?’ And I’d said, ‘The words.’ The words are different. *Federal Crop* stands for the proposition that you never use the word ‘apparent authority’ in a decision. It’s just implied.”).

165. *H Landau & Co.*, 886 F.2d at 324 (citing J. CIBINIC & R. NASH, FORMATION OF GOVERNMENT CONTRACTS 43 (1982)); see also *Fifth Third Bank of Western Ohio v. United States*, 402 F.3d 1221, 1235 (Fed. Cir. 2005) (affirming Court of Federal Claims finding of implied actual authority under *Landau* standard); *Winter*, 497 F.3d at 1346 (confirming that *Landau* is still good law).

166. *Liberty Ammunition, Inc. v. United States*, 835 F.3d 1388, 1402 (Fed. Cir. 2016).

167. See Ralph C. Nash, Jr., *Postscript III: Contracting Officer Authority*, 28 NASH & CIBINIC REP. NL ¶ 18, 51–52.

168. *Liberty Ammunition*, 835 F.3d at 1402.

Failure to confirm the actual authority of government representatives can be fatal to a subsequent breach of contract claim. Unlike the law of private contracts, where various theories such as estoppel and restitution are available to mitigate unequitable outcomes, those theories are generally not available to a private party litigating against the government.<sup>169</sup> While a government representative’s unauthorized actions may become binding through ratification,<sup>170</sup> ratification can be difficult to prove, as it requires demonstrating actual authority to ratify and knowledge of all relevant facts.<sup>171</sup> While breach of implied-in-fact contract is a viable theory under the Tucker Act, an implied-in-fact contract claim cannot be used to create contract obligation where a valid express contract already covers the same subject matter,<sup>172</sup> and establishing an implied-in-fact contract is also subject to demonstrating the government representative’s authority.<sup>173</sup>

Ultimately, these questions of authority carry no clear answers, particularly in the context of an Other Transaction where each agency is operating under different statutory OTA, with different (if any) regulations and internal procedures regarding delegated authority, and negotiating bespoke contract terms with non-traditional contractors who are unlikely to be familiar with the unique rules of government contracting. Informal guidance that is not published as a formal regulation only makes the analysis more complicated, as courts must determine the extent to which the parties had actual or constructive notice of the guidance, and whether such guidance constitutes a “substantive” rule that must be passed as regulation to have binding effect.<sup>174</sup> Whatever the outcome of any given case, it seems highly unlikely that the result will be governed by standard commercial business practices or legal principles familiar to the non-traditional contractors that DoD seeks to attract as business partners.

### C. Interpretation of Contract Terms

Government contract law also diverges from the law of private contracts with respect to contract interpretation.<sup>175</sup>

It is undisputed that the law to be applied in cases related to federal contracts is federal and not state law. The federal law applied in breach of contract claims is not,

169. *Byrne Org., Inc. v. United States*, 287 F.2d 582, 587 (Ct. Cl. 1961); *City of El Centro v. United States*, 922 F.2d 816, 823 (Fed. Cir. 1990).

170. See generally *CIBINIC, NAGLE & NASH, supra* note 153, at 45–58.

171. *United States v. Beebe*, 180 U.S. 343, 354 (1901); *Harbert/Lummus*, 142 F.3d at 1433–34.

172. *Lee v. United States*, 895 F.3d 1363, 1369–70 (Fed. Cir. 2018); *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc); *Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1255 (Ct. Cl. 1970).

173. See *City of El Centro*, 922 F.2d at 820.

174. See, e.g., *NI Industries, Inc. v. United States*, 841 F.2d 1104, 1107–08 (Fed. Cir. 1988) (dealing with limits of authority in informal guidance); *Texas Instruments, Inc. v. United States*, 922 F.2d 810, 815 (Fed. Cir. 1990) (same); *cf.*, *LDG Timber Enterprises, Inc. v. Glickman*, 114 F.3d 1140, 1143 (Fed. Cir. 1997).

175. See generally *Kenneth J. Allen, Government Contract Interpretation: A Comprehensive Overview*, 15–4 BRIEFING PAPERS 1–3 (Mar. 2015).

however, created by statute but rather for the most part has been developed by the Court of Appeals for the Federal Circuit and the Court of Claims, with the Claims Court, or the Boards of Contract Appeals applying the law in the first instance. This federal contract law also reflects the various contract clauses developed over time for the benefit of both the sovereign and the contractor through the practice of agencies and the bargaining leverage of contractors. It has drawn as well upon traditional private contract law for analogies and concepts. However, it is a separate and distinct body of law.<sup>176</sup>

This is manifested in three principal ways.

First, the Federal Circuit follows the “plain meaning” rule of contract interpretation, and there is no obvious reason the “plain meaning” rule would not apply to interpretation of Other Transactions as well. The traditional rule applicable to interpretation of private contracts—reflected in the Second Restatement of Contracts and most states’ common law—holds that contract interpretation serves to determine the parties’ intent by comparing contract terms with evidence surrounding the contract negotiation.<sup>177</sup> In contrast, the Federal Circuit insists on determining the “plain meaning” of the contract, by looking at the four corners of the contract, often with aid of dictionary definitions but without resort to extrinsic evidence, to determine the parties’ actual intent, unless the terms are determined to be ambiguous.<sup>178</sup> As the Federal Circuit proclaimed in *Coast Federal*, if “the provisions are clear and unambiguous they must be given their plain and ordinary meaning, and we may not resort to extrinsic evidence to interpret them.”<sup>179</sup> The net result is that when parties are negotiating an Other Transaction, they must take care that the resulting document reflects their actual intent, without need for reference to the parties’ negotiation history.

Second, government contracts are subject to an important variation to the traditional rule of *contra preferentem*, known as the patent ambiguity doctrine.<sup>180</sup> When private parties negotiate a written agreement, the rule of *contra preferentem* generally provides that ambiguous terms are interpreted against the drafter.<sup>181</sup> When interpreting a government contract, however, the patent ambiguity doctrine requires the contractor to object to any patently (as opposed to latently) ambiguous terms in the government’s requirements prior

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176. *Seaboard Lumber, Inc. v. United States*, 15 Cl. Ct. 366, 369 (1988), *aff’d*, 903 F.2d 1560 (Fed. Cir. 1990).

177. See, e.g., Allen, *supra* note 175, at 8–9.

178. This practice is generally attributed to the Federal Circuit’s often criticized decision in *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035 (Fed. Cir. 2003). See, e.g., Nash, *supra* note 93, at 196–98; Ralph C. Nash, Jr., *The Government Contract Decisions of the Federal Circuit*, 78 GEO. WASH. L. REV. 586, 588–93 (2010).

179. See generally *Coast Fed. Bank*, 323 F.3d at 1040 (“If the provisions are clear and unambiguous they must be given their plain and ordinary meaning, and we may not resort to extrinsic evidence to interpret them” (internal citation and quotation omitted)).

180. See Nathaniel Castellano, Stuart Turner, Dominique Casimir & Eric Valle, *The Federal Circuit Addresses Commercial Item Contracting: Palantir & K-Con*, BRIEFING PAPERS 8 (Nov. 2018).

181. See CIBINIC, NAGLE & NASH, *supra* note 153, at 211–24. See generally Allen, *supra* note 175, at 11–12.

to contract formation.<sup>182</sup> If the contractor knew or reasonably should have known before contract formation that the agreement contains an ambiguity, the contractor cannot remain silent only to object later to the government’s contract interpretation during a dispute.<sup>183</sup> In addition, before a contractor can benefit from *contra preferentem*, it must also demonstrate reliance on its proposed, reasonable interpretation.<sup>184</sup>

We do not yet know whether or how the patent ambiguity doctrine might apply to Other Transactions. Unless and until the Federal Circuit holds otherwise, however, prudence likely requires private parties to assume that the patent ambiguity doctrine applies to Other Transactions. This has the practical impact of requiring a private party negotiating an Other Transaction to review any agreement carefully before signing, and to object to ambiguous terms.<sup>185</sup> Otherwise, the court may deem the private party to have waived its objection to those terms in any subsequent dispute over the agreement’s meaning.<sup>186</sup> Agencies should also be cautious in this uncertain legal environment. The patent ambiguity doctrine allows agencies to draft procurement contract terms and avoid the risk associated with ambiguity in those terms. If the patent ambiguity doctrine is not applied to Other Transactions, agencies may bear more risk than they are accustomed to for ambiguous Other Transaction provisions.

Third, because many standard procurement contract clauses are required by statute and regulation under the *Christian* doctrine, the Court of Federal Claims and Federal Circuit will amend procurement contracts as a matter of law to incorporate any mandatory terms that reflect important procurement policies.<sup>187</sup> Unfortunately, determining when the *Christian* doctrine applies is challenging, making it difficult to anticipate what clauses a court will read into an agreement.<sup>188</sup> It is not yet clear whether the *Christian* doctrine will be

182. See Allen, *supra* note 175, at 11–12.

183. See *id.*

184. See *id.* at 12.

185. See *id.* at 13.

186. See *id.* at 11. For a particularly relevant application of the patent ambiguity doctrine, see *K-Con, Inc. v. Secretary of the Army*, 908 F.3d 719, 723–28 (Fed. Cir. 2018) (holding that contractor was precluded from arguing that contract was one for commercial items after finding the contract to be patently ambiguous as to whether it sought a commercial item or construction, even though the contract was solicited on a commercial item basis).

187. See, e.g., *G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 426 (Ct. Cl. 1963); see also *K-Con, Inc. v. Secretary of the Army*, 908 F.3d 719, 724–25 (Fed. Cir. 2018); *Call Henry, Inc. v. United States*, 855 F.3d 1348, 1351 at n.1 (Fed. Cir. 2017); *Gen. Eng’g & Mach. Works v. O’Keefe*, 991 F.2d 775, 779–80 (Fed. Cir. 1993); *CIBINIC, NAGLE & NASH*, *supra* note 153, at 23–24.

188. See generally Ralph C. Nash, Jr. & John Cibinic, *The “Christian Doctrine”: What Is The Rule?*, 10 *NASH & CIBINIC REP.* ¶ 48 (1996) (chronicling leading *Christian* doctrine cases and concluding: “We can’t remember an instance where we read more cases and learned less”); Brian A. Darst, *The Christian Doctrine at 50: Unraveling The Procurement System’s Gordian Knot*, *BRIEFING PAPERS 1* (Oct. 2013) (“Even today, the *Christian* doctrine remains one of the least understood principles of federal procurement law, and courts, administrative bodies, and other practitioners continue to struggle to determine the circumstances under which *Christian* will be applied as well as the scope of that application.”); Ralph C. Nash, *Construction as a Commercial Item: The Christian Doctrine Bites A Contractor*, 32 *NASH & CIBINIC REP. NL* ¶ 63, at 1–2 (2018).

applied to Other Transactions. Until the Federal Circuit provides an answer, this is yet another contract interpretation practice unique to government contracts, the potential implications of which any party considering an Other Transaction should keep in mind.

It is also not clear what clauses would warrant incorporation by operation of law into an Other Transaction under the *Christian* doctrine. At a minimum, it seems safe to conclude that even if a clause warrants incorporation by operation of law into a procurement contract, the same clause will not necessarily qualify for incorporation by operation of law into an Other Transaction. For example, while the *Christian* doctrine dictates incorporation of the Termination for Convenience clause into procurement contracts,<sup>189</sup> that clause should not be incorporated into an Other Transaction unless a statute or regulation reflecting important public policy makes such a clause mandatory for the Other Transaction at issue. Applying the *Christian* doctrine to any Other Transaction almost certainly would require considering the specific statutory grant of OTA at issue, and any regulations that may exist implementing that OTA. Some OTA may not require any *mandatory* clauses, while the exercise of other OTA, such as DoD's prototype OTA, may dictate mandatory provisions, like the requirement to include a clause giving the GAO certain audit rights.<sup>190</sup> A Technology Investment Agreement (TIA) structured as an Other Transaction may involve additional mandatory terms, as TIAs are subject to relatively detailed regulations.<sup>191</sup>

Ultimately, until more Other Transaction disputes are litigated before the Court of Federal Claims and the Federal Circuit, these questions have no simple answers.

#### IV. CONCLUSION

This article is not meant to discourage Other Transactions, but rather to identify challenges that the government and private contracting parties are bound to face under any contractual relationship—whether by procurement, Other Transaction, or otherwise. The federal government simply cannot do business like a private party, and having the federal government as a contracting partner carries important implications. No party to an Other Transaction should ignore this reality. If Other Transactions are to prove an enduring, effective method for the government to attract business from the commercial sector, all parties should be aware of the ground rules.

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189. *Christian*, 312 F.2d at 424 (incorporating termination for convenience clause).

190. See 10 U.S.C. § 2371b(c)(1); *Gen. Eng'g & Mach. Works v. O'Keefe*, 991 F.2d 775, 779–80 (Fed. Cir. 1993); *CIBINIC, NAGLE & NASH*, *supra* note 153, at 23–24.

191. See sources cited *supra* note 23 (noting relatively detailed regulatory regime applicable to TIA).