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SENATE

{ REPORT
110-454 }

AMENDING THE HOMELAND SECURITY ACT
OF 2002 TO PROVIDE FOR A ONE-YEAR
EXTENSION OF OTHER TRANSACTION AU-
THORITY

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 3328

AMENDING THE HOMELAND SECURITY ACT OF 2002 TO PROVIDE
FOR A ONE-YEAR EXTENSION OF OTHER TRANSACTION AU-
THORITY



SEPTEMBER 11, 2008.—Ordered to be printed

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AMENDING THE HOMELAND SECURITY ACT OF 2002 TO PROVIDE FOR A ONE-YEAR EXTENSION OF OTHER TRANSACTION AUTHORITY

SEPTEMBER 11, 2008.—Ordered to be printed

Mr. LIEBERMAN, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 3328]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 3328) to amend the Homeland Security Act of 2002 to provide for a one-year extension of other transaction authority, having considered the same, reports favorably thereon and recommends that the bill do pass.

I. PURPOSE AND SUMMARY

S. 3328 extends the Department of Homeland Security's (DHS or the Department) ability to use Other Transaction Authority (OTA) by 1-year to September 30, 2009. An "Other Transaction" (OT) is an alternative procurement approach not based on the Federal Acquisition Regulation (FAR) and specifically authorized by Congress to accelerate prototyping of breakthrough technologies. Agencies with OTA are freer to negotiate provisions that are mutually acceptable to all parties, such as intellectual property provisions and indemnity provisions, because most laws and standards applicable to standard federal procurements, grants, and cooperative agreements, such as the Truth in Negotiations Act, Competition in Contracting Act, or Cost Accounting Standards are not applicable to contracts entered pursuant to OTA. This encourages nontraditional government contractors to offer to develop technologies that would otherwise be unavailable to the government. Primarily, DHS uses OTA to contract with cutting-edge, non-traditional government contractors to foster development of programs and technologies critical to homeland security needs.

To ensure proper use and oversight, S. 3328 requires DHS to produce guidance, increase training, and report on OTA usage during this interim 1-year extension period. The annual report would include, among other requirements, the extent to which use of OTA has contributed to a broadening of the technology and industrial base that supports national security, the rationale for using OTA, including an explanation of why grants or FAR-based contracts were not used, the extent of competition, and the amount expended for each project.

II. BACKGROUND AND NEED FOR THE LEGISLATION

The Departments of Defense (DoD), Energy, and Transportation have used OTA, as have the FAA and NASA. Section 831 of the Homeland Security Act of 2002 (P.L. 107–296) provided DHS its initial 5-year grant of OTA, modeled after DoD’s OTA statute. The FY 2008 DHS Appropriations Act (P.L. 110–161, Div. E, Title V, 572) extended the Department’s authority for an additional year through September 30th, 2008. OTA is used primarily by the Science and Technology (S&T) Directorate to contract with non-traditional government contractors with innovative solutions to further its mission of developing basic, applied, and advanced research and development on critical homeland security technologies.

III. LEGISLATIVE HISTORY

On July 24, 2008, S. 3328 was introduced by Senator Collins and referred to the Senate Committee on Homeland Security and Governmental Affairs. The bill’s original co-sponsor was Senator Lieberman. On July 30, 2008, S. 3328 was reported favorably by the Committee by voice vote without amendment. Members present for the vote on the bill were Senators Lieberman, Akaka, Carper, Pryor, Landrieu, Tester, Collins, Stevens, and Voinovich.

IV. SECTION-BY-SECTION ANALYSIS

Section 1. One-year extension of other transaction authority

Section 1 amends Section 831 of the Homeland Security Act of 2002 (6 U.S.C. 391(a)) to provide for a one-year extension of other transaction authority through September 30, 2009. This extension is conditioned upon the Secretary’s issuance of policy guidance by September 30, 2008, detailing the appropriate use of OTA and provision of mandatory training to each employee who has the authority to handle OTA.

Section 1 also expands the annual OTA report required under Section 831(a)(1) of the Homeland Security Act of 2002 (Public Law 107–296) by requiring that the report also include—

- (i) The technology areas in which research projects were conducted under other transactions;
- (ii) The extent of the cost-sharing among Federal and non-Federal sources;
- (iii) The extent to which use of the other transactions I) has contributed to a broadening of the technology and industrial base available for meeting the needs of the Department of Homeland Security; and II) has fostered within the technology

and industrial base new relationships and practices that support the national security of the United States;

(iv) The total amount of payments, if any, that were received by the Federal Government during the fiscal year covered by the report;

(v) The rationale for using other transaction authority, including why grants or Federal Acquisition Regulation-based contracts were not used, the extent of competition, and the amount expended for each such project.

These reporting elements resemble those for Department of Defense OTA under 10 U.S.C. 2371(h) except for subparagraph (v), which requires an explanation, for each OTA transaction, why standard FAR-based procurement contracts or financial assistance instruments such as grants or cooperative agreements were not appropriate. This reflects the Committee's belief that OTA serves a limited purpose and should only be used when these other well-established instruments are not appropriate.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. The Congressional Budget Office states that S. 3328 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments. The enactment of this legislation will not have significant regulatory impact.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

AUGUST 12, 2008.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3328, a bill to amend the Homeland Security Act of 2002 to provide for a one-year extension of other transaction authority.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 3328—A bill to amend the Homeland Security Act of 2002 to provide for a one-year extension of other transaction authority

Current law permits the Department of Homeland Security (DHS) to waive the requirements of the Federal Acquisition Regulation (procedures that guide federal procurement actions) for certain research and development projects. DHS allocated about \$400 million for such projects over the 2004–2007 period, enabling the department to increase its use of small contractors for research and development activities. This authority (known as “other transaction authority”) is scheduled to expire on September 30, 2008; S. 3328 would extend it for one year.

Based on information from DHS about the department's research and development plans, CBO estimates that implementing S. 3328 would not significantly affect DHS spending for those activities. Enacting the bill would not affect direct spending or revenues.

S. 3328 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Mark Grabowicz. This estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 3328 as reported are shown as follows (existing law proposed to be omitted is enclosed in [brackets], new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

HOMELAND SECURITY ACT OF 2002

Pub. L. 107-296, Title VIII, 831, Nov. 25, 2002; as amended by Pub. L. 110-161, Div. E, Title V, 572, Dec. 26, 2007.

6 U.S.C. 391

SEC. 831. RESEARCH AND DEVELOPMENT PROJECTS.

(a) *AUTHORITY.—If the Secretary issues policy guidance by September 30, 2008, detailing the appropriate use of other transaction authority and provides mandatory other transaction training to each employee who has the authority to handle procurements under other transaction authority, the Secretary may, before September 30, 2009, carry out a program* [Until September 30, 2008, the Secretary may carry out a pilot program] under which the Secretary may exercise the following authorities:

(1) *IN GENERAL.—When the Secretary carries out basic, applied, and advanced research and development projects, including the expenditure of funds for such projects, the Secretary may exercise the same authority (subject to the same limitations and conditions) with respect to such research and projects as the Secretary of Defense may exercise under section 2371 of title 10, United States Code (except for subsections (b) and (f)), after making a determination that the use of a contract, grant, or cooperative agreement for such project is not feasible or appropriate. The annual report required under subsection (b)(1)* [subsection (b)] of this section, as applied to the Secretary by this paragraph, shall be submitted to the President of the Senate and the Speaker of the House of Representatives.

(2) * * *

(b) *REPORTS.—*

(1) *IN GENERAL.—*[(b) REPORT.—] Not later than 2 years after the effective date of this Act, and annually thereafter, the Comptroller General shall report to the Committee on Government Reform of the House of Representatives and the Committee on Governmental Affairs of the Senate on—

(A) [(1)] whether use of the authorities described in subsection (a) attracts nontraditional Government contractors and results in the acquisition of needed technologies; and

(B) **[(2)]** if such authorities were to be made permanent, whether additional safeguards are needed with respect to the use of such authorities.

(2) *ANNUAL REPORT ON EXERCISE OF OTHER TRANSACTION AUTHORITY—*

(A) *IN GENERAL.*—*The Secretary shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives an annual report on the exercise of other transaction authority under subsection (a).*

(B) *CONTENT.*—*The report required under subparagraph*

(A) *shall include the following:*

(i) *The technology areas in which research projects were conducted under other transactions.*

(ii) *The extent of the cost-sharing among Federal and non-Federal sources.*

(iii) *The extent to which use of the other transactions—*

(I) has contributed to a broadening of the technology and industrial base available for meeting the needs of the Department of Homeland Security; and

(II) has fostered within the technology and industrial base new relationships and practices that support the national security of the United States.

(iv) *The total amount of payments, if any, that were received by the Federal Government during the fiscal year covered by the report.*

(v) *The rationale for using other transaction authority, including why grants or Federal Acquisition Regulation-based contracts were not used, the extent of competition, and the amount expended for each such project.*