August 4, 2000

Office of the Director, Defense Procurement  
Attn: Ms. Teresa Brooks  
PDUSD(A&T)/DP(DSPS)  
3060 Defense Pentagon  
Washington, DC 20301-3060


Dear Ms. Brooks:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The interim rule is intended to implement Section 801 of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. No. 106-65), which required that an "other transaction" agreement for a prototype project involving payments in a total amount in excess of $5,000,000 include a clause providing the Comptroller General with access to records. This is the first statutory requirement mandating conditions for an other transaction ("OT") agreement. The Federal Register preamble goes on to state that "[t]he content of this rule may also be included in a future DoD issuance."

The Section provides two comments:

1. On September 13, 1999, Dr. Jacques S. Gansler, Undersecretary of Defense (Acquisition & Technology), submitted a proposed Department of Defense ("DoD") Guide on Section 845/804 Other Transactions for Prototype Projects (hereinafter referred to as the "Guide") to the Council of Defense and Space Industry Associations ("CDSIA") for comment. Dr. Gansler’s cover letter stated that DoD was considering issuing guidance for prototype OTs in the form of a DoD Directive, which would refer to the Guide, rather than directly incorporating the Guide into the Directive in order to retain the flexibility to modify the Guide without having to modify the Directive itself. On October 29, 1999, CODSIA, as well as the Integrated Dual Use Commercial Companies ("IDCC"), provided comments to the proposed Guide. The proposed Guide was not provided to the Section for comment.

We understand that the final Guide is scheduled to be released in the near future and that it may include
changes regarding implementation of Section 801 of the Defense Authorization Act of 2000. While Section 801 is mandatory for all prototype OTs, the manner in which it may be implemented by DoD is flexible. The Section is concerned that there may be multiple and potentially inconsistent guidance being promulgated regarding the inclusion of the GAO audit rights clause in these OTs. Specifically, the interim rule, the Guide, a DoD Directive, and possibly Policy letters may all address the issue. Because the authority for prototype OTs is itself experimental and temporary, the legislation governing these agreements has frequently changed, requiring changes in the use and content of the agreements. For example, with respect to Comptroller General audit of these agreements, Section 808 of S. 2549, which would authorize DoD appropriations for Fiscal Year 2001, includes a provision that would further revise the statutory requirements for Comptroller General review, and would require further revisions to the matters addressed in the interim rule. In light of the temporary and changing nature of the authority for prototype OTs, the Section urges DoD to consolidate guidance regarding these agreements in as few places as possible in order to avoid the possibility of redundant and potentially inconsistent guidance.

2. Although the language of the interim rule appears to have been drafted to exclude coverage of commercial companies, the Section is concerned that, under certain circumstances, a strict reading of the regulation would cause the GAO audit rights clause to apply to the very parties that Congress intended to exempt. There are two scenarios in which this could occur. The first scenario would arise under the following circumstances: (1) a commercial company is a member of a consortium with traditional defense companies; (2) the consortium enters into a prototype OT with DoD; (3) the consortium's OT agreement will include the GAO audit rights clause to cover the defense companies; (4) the commercial company has now "entered into any other contract, grant, cooperative agreement or ‘other transaction’ agreement that provides for audit access by a government entity;" and (5) if the commercial company enters into another OT within a year, the commercial company would not be exempt from the GAO audit clause.

The second scenario involves an unsophisticated commercial company and an agreements officer who fails to tailor the agency’s standard agreement. Without knowledgeable legal counsel, the commercial company may unintentionally execute a prototype OT agreement that provides for audit access, eliminating its future exemption from GAO audit.

Because the Section believes that Congress intended commercial companies and commercial sectors of defense companies to be truly exempt from the GAO audit rights clause, we propose that Section 3.4(f)(2) be revised as follows, in the event that DoD elects to promulgate the interim rule:

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Excepted from the Comptroller General Access requirement is any party to this agreement or any entity that participates in the performance of the agreement, or any subordinate element of such party or entity, that has not entered into any other contract, grant, cooperative agreement, or "other transaction" agreement that provides for audit access by a government entity in the year prior to the date of the agreement. Also excepted from the Comptroller General Access requirement is any entity that participates in the performance of the agreement, or any subordinate element of such party or entity that has entered into only other transaction agreements or commercial item contracts governed by Part 12 of the Federal Acquisition Regulation, and no other type of U.S. Government contracts, grants, or cooperative agreements.
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This revision would provide commercial companies the certainty that a specific type of agreement -- the prototype OT -- will not subject the company to any federal government audit. In doing so, the revision should assist in the stated goal of Congress to encourage more commercial companies to engage in research and development for the federal government.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,
Gregory A. Smith
Chair, Section of Public Contract Law

cc: Norman R. Thorpe
Mary Ellen Coster Williams
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Council Members
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Richard P. Rector