

## The Statutes:

### **10 U.S.C. 2371 (Research and Development Other Transactions)**

#### **(a) ADDITIONAL FORMS OF TRANSACTIONS AUTHORIZED.—**

The Secretary of Defense and the Secretary of each military department may enter into transactions (other than contracts, cooperative agreements, and grants) under the authority of this subsection in carrying out basic, applied, and advanced research projects. The authority under this subsection is in addition to the authority provided in section 2358 of this title to use contracts, cooperative agreements, and grants in carrying out such projects.

#### **(b) EXERCISE OF AUTHORITY BY SECRETARY OF DEFENSE.—**

In any exercise of the authority in subsection (a), the Secretary of Defense shall act through the Defense Advanced Research Projects Agency or any other element of the Department of Defense that the Secretary may designate.

#### **(c) ADVANCE PAYMENTS.—**

The authority provided under subsection (a) may be exercised without regard to section 3324 of title 31.

#### **(d) RECOVERY OF FUNDS.—**

(1) A cooperative agreement for performance of basic, applied, or advanced research authorized by section 2358 of this title and a transaction authorized by subsection (a) may include a clause that requires a person or other entity to make payments to the Department of Defense or any other department or agency of the Federal Government as a condition for receiving support under the agreement or other transaction.

(2) The amount of any payment received by the Federal Government pursuant to a requirement imposed under paragraph (1) may be credited, to the extent authorized by the Secretary of Defense, to the appropriate account established under subsection (f). Amounts so credited shall be merged with other funds in the account and shall be available for the same purposes and the same period for which other funds in such account are available.

#### **(e) CONDITIONS.—**

(1) The Secretary of Defense shall ensure that—

(A) to the maximum extent practicable, no cooperative agreement containing a clause under subsection (d) and no transaction entered into under subsection (a) provides for research that duplicates research being conducted under existing programs carried out by the Department of Defense; and

(B) to the extent that the Secretary determines practicable, the funds provided by the Government under a cooperative agreement containing a clause under subsection (d) or a transaction authorized by subsection (a) do not exceed the total amount provided by other parties to the cooperative agreement or other transaction.

(2) A cooperative agreement containing a clause under subsection (d) or a transaction authorized by subsection (a) may be used for a research project when the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate.

#### **(f) SUPPORT ACCOUNTS.—**

There is hereby established on the books of the Treasury separate accounts for each of the military departments and the Defense Advanced Research Projects Agency for support of research projects and development projects provided for in cooperative agreements containing a clause under subsection (d)

and research projects provided for in transactions entered into under subsection (a). Funds in those accounts shall be available for the payment of such support.

**(g) Education and Training.**— The Secretary of Defense shall--

(1) ensure that management, technical, and contracting personnel of the Department of Defense involved in the award and administration of transactions under this section or other innovative forms of contracting are afforded opportunities for adequate education and training; and

(2) establish minimum levels and requirements for continuous and experiential learning for such personnel, including levels and requirement for acquisition certification programs.

**(h) REGULATIONS.**—

The Secretary of Defense shall prescribe regulations to carry out this section.

**(i) PROTECTION OF CERTAIN INFORMATION FROM DISCLOSURE.**—

(1) Disclosure of information described in paragraph (2) is not required, and may not be compelled, under section 552 of title 5 for five years after the date on which the information is received by the Department of Defense.

(2)(A) Paragraph (1) applies to information described in subparagraph (B) that is in the records of the Department of Defense if the information was submitted to the Department in a competitive or noncompetitive process having the potential for resulting in an award, to the party submitting the information, of a cooperative agreement for performance of basic, applied, or advanced research authorized by section 2358 of this title or another transaction authorized by subsection (a).

(B) The information referred to in subparagraph (A) is the following:

(i) A proposal, proposal abstract, and supporting documents.

(ii) A business plan submitted on a confidential basis.

(iii) Technical information submitted on a confidential basis.

**Summary:** The intent behind the enactment of section 2371 was to spur dual-use research and development. The idea was to create an attractive way for companies to do business with DOD while retaining the characteristics of innovative commercial companies; gaining for DOD access to cutting edge technology, taking advantage of economies of scale without burdening the companies with government regulatory overhead which would make them non-competitive in the commercial (non-defense) sector. Defense firms were also encouraged to engage in section 2371 arrangements especially if they sought to adopt commercial practices or standards, diversify into the commercial sector or partner with commercial firms. Given the emphasis on dual-use, joint funding (cost sharing) of projects was base-lined if *practicable* but not mandated. Competition is not mandated, but is typically used in awarding agreements. The mode of competition can be adapted to whatever technology domain or industry segment is most relevant to a project.

**10 U.S.C. 2371b (Prototyping Other Transactions) replaced section 845, P.L. 103-160**

**(a) AUTHORITY.—**

(1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of this title, carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.

(2) The authority of this section—

(A) may be exercised for a transaction (for a prototype project) that is expected to cost the Department of Defense in excess of \$100,000,000 but not in excess of \$500,000,000 (including all options) only upon a written determination by the senior procurement executive for the agency as designated for the purpose of section 1702(c) of title 41, or, for the Defense Advanced Research Projects Agency or the Missile Defense Agency, the director of the agency that—

(i) the requirements of subsection (d) will be met; and

(ii) the use of the authority of this section is essential to promoting the success of the prototype project; and

(B) may be exercised for a transaction (for a prototype project) that is expected to cost the Department of Defense in excess of \$500,000,000 (including all options) only if—

(i) the Under Secretary of Defense for Acquisition, Technology, and Logistics determines in writing that—

(I) the requirements of subsection (d) will be met; and

(II) the use of the authority of this section is essential to meet critical national security objectives; and

(ii) the congressional defense committees are notified in writing at least 30 days before such authority is exercised.

(3) The authority of a senior procurement executive or director of the Defense Advanced Research Projects Agency or Missile Defense Agency under paragraph (2)(A), and the authority of the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (2)(B), may not be delegated.

**(b) EXERCISE OF AUTHORITY.—**

(1) Subsections (e)(1)(B) and (e)(2) of such section 2371 shall not apply to projects carried out under subsection (a).

(2) To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out projects under subsection (a).

**(c) COMPTROLLER GENERAL ACCESS TO INFORMATION.—**

(1) Each agreement entered into by an official referred to in subsection (a) to carry out a project under that subsection that provides for payments in a total amount in excess of \$5,000,000 shall include a clause that provides for the Comptroller General, in the discretion of the Comptroller General, to examine the records of any party to the agreement or any entity that participates in the performance of the agreement.

(2) The requirement in paragraph (1) shall not apply with respect to a party or entity, or a subordinate element of a party or entity, that has not entered into any other agreement that provides for audit access by a Government entity in the year prior to the date of the agreement.

**(3)**

**(A)**The right provided to the Comptroller General in a clause of an agreement under paragraph (1) is limited as provided in subparagraph (B) in the case of a party to the agreement, an entity that participates in the performance of the agreement, or a subordinate element of that party or entity if the only agreements or other transactions that the party, entity, or subordinate element entered into with Government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under this section or section 2371 of this title.

**(B)**The only records of a party, other entity, or subordinate element referred to in subparagraph (A) that the Comptroller General may examine in the exercise of the right referred to in that subparagraph are records of the same type as the records that the Government has had the right to examine under the audit access clauses of the previous agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

**(4)** The head of the contracting activity that is carrying out the agreement may waive the applicability of the requirement in paragraph (1) to the agreement if the head of the contracting activity determines that it would not be in the public interest to apply the requirement to the agreement. The waiver shall be effective with respect to the agreement only if the head of the contracting activity transmits a notification of the waiver to Congress and the Comptroller General before entering into the agreement. The notification shall include the rationale for the determination.

**(5)** The Comptroller General may not examine records pursuant to a clause included in an agreement under paragraph (1) more than three years after the final payment is made by the United States under the agreement.

**(d) APPROPRIATE USE OF AUTHORITY.—**

**(1)** The Secretary of Defense shall ensure that no official of an agency enters into a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section unless one of the following conditions is met:

**(A)** There is at least one nontraditional defense contractor or non-profit research institution participating to a significant extent in the prototype project.

**(B)** All significant participants in the transaction other than the Federal Government are small businesses (including small businesses participating in a program described under section 9 of the Small Business Act (15 U.S.C. 638) or nontraditional defense contractors.

**(C)** At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government.

**(D)** The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

**(2)**

**(A)** Except as provided in subparagraph (B), the amounts counted for the purposes of this subsection as being provided, or to be provided, by a party to a transaction with respect to a prototype project that is entered into under this section other than the Federal Government do not include costs that were incurred before the date on which the transaction becomes effective.

**(B)** Costs that were incurred for a prototype project by a party after the beginning of negotiations resulting in a transaction (other than a contract, grant, or cooperative agreement) with respect to the project before the date on which the transaction becomes effective may be counted for purposes of this subsection as being provided, or

to be provided, by the party to the transaction if and to the extent that the official responsible for entering into the transaction determines in writing that—

- (i) the party incurred the costs in anticipation of entering into the transaction; and
- (ii) it was appropriate for the party to incur the costs before the transaction became effective in order to ensure the successful implementation of the transaction.

**(e) DEFINITIONS.—**In this section:

- (1) The term “nontraditional defense contractor” has the meaning given the term under section 2302(9) of this title.
- (2) The term “small business” means a small business concern as defined under section 3 of the Small Business Act (15 U.S.C. 632).

**(f) FOLLOW-ON PRODUCTION CONTRACTS OR TRANSACTIONS.—**

- (1) A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction. A transaction includes all individual prototype subprojects awarded under a transaction to a consortium of United States industry and academic institutions.
- (2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of section 2304 of this title, if—
  - (A) competitive procedures were used for the selection of parties for participation in the transaction; and
  - (B) the participants in the transaction successfully completed the prototype project provided for in the transaction.
- (3) Contracts and transactions entered into pursuant to this subsection may be awarded using the authority in subsection (a), under the authority of chapter 137 of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

**(g) AUTHORITY TO PROVIDE PROTOTYPES AND FOLLOW-ON PRODUCTION ITEMS AS GOVERNMENT-FURNISHED EQUIPMENT.—**

An agreement entered into pursuant to the authority of subsection (a) or a follow-on contract or transaction entered into pursuant to the authority of subsection (f) may provide for prototypes or follow-on production items to be provided to another contractor as Government-furnished equipment.

**(h) APPLICABILITY OF PROCUREMENT ETHICS REQUIREMENTS.—**

An agreement entered into under the authority of this section shall be treated as a Federal agency procurement for the purposes of chapter 21 of title 41.

**Summary:** Section 2371b is closely related to section 2371. The statute states it is “under the authority of” section 2371. As originally enacted, section 2371b (“845”) was exempted from the cost sharing feature of 2371. This was because, unlike section 2371, it was aimed specifically at defense contractors burdened by cost accounting standards and with little revenue available for joint funding. Both dual-use and defense specific projects are encouraged under section 2371b. Defense firms can utilize this authority to streamline acquisition processes in a variety of ways including milestone payments based on technical achievements. They can execute projects with unique business arrangements such as structuring government funded projects under independent research and development (IR&D) rules rather than charging fully burdened rates. They can create business segments without defense acquisition overhead to pursue prototype projects or recruit innovative commercial firms as sub-

contractors without imposing regulatory overhead through the flow down of otherwise mandatory contract clauses. They can also ignore practices and lore (not to be under estimated) which while associated with the regulatory system were actually not mandated by either law or binding regulation.

**10 U.S.C. 2373**

**(a) AUTHORITY.—**

The Secretary of Defense and the Secretaries of the military departments may each buy ordnance, signal, chemical activity, transportation, energy, medical, space-flight, and aeronautical supplies, including parts and accessories, and designs thereof, that the Secretary of Defense or the Secretary concerned considers necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense.

**(b) PROCEDURES.—**

Purchases under this section may be made inside or outside the United States and by contract or otherwise. Chapter 137 of this title applies only when such purchases are made in quantities greater than necessary for experimentation, technical evaluation, assessment of operational utility, or safety or to provide a residual operational capability.

**Summary:** Section 2373 permits purchase “by contract or otherwise” of certain essential technologies or supplies without being subject to the Armed Services Procurement Act and its implementing regulations, when purchased in quantities no greater than those needed for experimentation, technical evaluation, assessment of operational utility or to maintain a residual operational capability. It is non-FAR authority not using the OT terminology.