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United States Senate

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The Honorable Francis J. Harvey
Secretary of the Army
101 Army Pentagon
Room 3E560
Washington, DC 20310

Dear Secretary Harvey:

On March 16, 2005, the Airland Subcommittee of the Senate Armed Services Committee ("the Subcommittee") held a hearing on the Army's Future Combat Systems (alternatively, "FCS" or "the program"). Even after the hearing, I remain concerned about a number of aspects of FCS, most notably the use of an Other Transaction Authority ("OTA") as the contract vehicle for the program.

As you may be aware, Congress intended that OTAs be used for small research or limited prototype projects, especially those in which the Defense Department seeks to engage nontraditional defense contractors that may be averse to the costs of regulation and red tape associated with government procurement under a FAR-type contract. In this case, the agreement that the Army and the Lead Systems Integrator ("LSI"), Boeing, signed to bring the program into the Systems Design and Demonstration (SDD) phase from the initial Concept and Technology Development (CTD) phase, was first valued at \$14.5 billion. In July 2004, the Army announced plans to restructure FCS fundamentally. This restructuring is expected to delay the fielding of FCS manned ground vehicles by 4 years, at a cost of an additional \$6.4 billion. Particularly under these circumstances, questions as to whether an OTA was a suitable contract vehicle to use for this program in the first instance and to what extent it should be-used going forward, must be considered.

In recognition of potential problems with using an OTA in lieu of a standard procurement contract, Congress was very careful in the extension of legal authority to the Defense Department to utilize OTAs. The conference report accompanying the National Defense Authorization Act for Fiscal Year 1999, which extended the OTA authority, cautioned that any further

extension would be contingent on the congressional defense committees concluding that OTAs had been used in a responsible and limited manner:

"[S]ection 845 authority should only be used in the exceptional cases where it can be clearly demonstrated that a normal grant or contract will not allow sufficient access to affordable technologies. The conferees are especially concerned that such authority not be used to circumvent the appropriate management controls in the standard acquisition and budgeting process."
(emphasis added)

A March 12, 2002, DoD, Office of Inspector General (OIG) report expressed similar concerns that OTAs bypass many federal statutes and regulations. In addition, the report acknowledged that historically OTAs have not attracted a significant number of nontraditional defense contractors to do business with the government - in fact, 95 percent of federal funding through OTAs was doled out to traditional defense contractors. I find this trend disturbing.

The DoD OIG report is convincing, "[OTAs] do not provide the government a number of significant protections, ensure the prudent expenditure of taxpayers dollars, or prevent fraud. Procurement statutes and the FAR provide contracting officers the tools to negotiate fair and reasonable prices, and to ensure that taxpayer dollars are expended for costs which are allowable and consistent with federal procurement policies. The Truth in Negotiations Act (TINA), Cost Accounting Standards (CAS), [the Procurement Integrity Act (PIA)], and the various audit provisions are among the tools that have provided contracting officers' visibility into contractor costs and help the government ensure that prices negotiated and eventually paid are reasonable. These provisions have served the interests of the government and the taxpayer for many decades."

Furthermore, at the March 16th hearing, the Assistant Secretary of the Army (Acquisition, Logistics and Technology) testified that although the Army included several FAR clauses as part of the OTA agreement, it did not specifically include TINA, PIA and CAS. Why these provisions were not integrated remains unexplained and is a subject of further Congressional investigation.

Since the traditional protections for the public trust do not exist for OTAs, by not including these key provisions, I am concerned that the Army has not adequately protected taxpayers' interests. In a March 16, 2005 letter to me, the Assistant Secretary of the Army (Acquisition, Logistics and Technology) corrected his statement given at an Airland hearing on the same day underscoring this point: "the OTA does not contain protections afforded to the Government under TINA in those instances when contractors fail to provide current, accurate, and complete cost and pricing data." The concerns outlined above underscore the need to revisit whether an OTA should continue to be used in this program.

Given the foregoing, please provide an estimate as to what additional costs the program would incur if the current OTA were converted to a FAR Part 15 contract, so as to require compliance with, among other provisions, the TINA, PIA, and CAS. I request that these estimates be provided to me no later than April 8, 2005.

Sincerely,

A handwritten signature in dark ink, appearing to read "John McCain", is written over a light blue rectangular background.

John McCain
Chairman, Airland Subcommittee
Senate Armed Services Committee

JM/sg

CC: The Honorable John Warner, Chairman, Senate Armed Services Committee
The Honorable Joseph Lieberman, Ranking Member, Airland Subcommittee