



PUBLIC
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Exploring Other Transactions

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Topics

1. Introduction to OTAs
2. Key Terms and Compliance Obligations
 - Intellectual Property
 - Costs and Accounting
 - Payment
 - Property
 - Third-Party Agreements
 - Termination
 - Disputes
 - Compliance Obligations
3. Practical Considerations

Request from Prior Session: DOE and FAA

- DOE OTA Authorities:
 - 42 U.S.C. § 7256(a) – General secretary-level authority (broad)
 - 42 U.S.C. § 7256(g) – DoD-based secretary-level authority (purpose and competition limits)
 - 42 U.S.C. § 16538 – Advanced Research Projects Agency-Energy (broad)
 - 10 C.F.R. Part 603 – technology investment agreement regulations
- FAA/TSA OTA Authority:
 - 49 U.S.C. § 106(l) – general administrator-level authority (broad)
 - 49 U.S.C. § 114(m) – general administrator-level authority (linked to FAA)

Statement of Work

- Importance of establishing framework
 - Deliverables
 - Performance standards
 - Responsibility for reperformance or replacement
 - Payments
 - Optional tasks
 - Regulatory responsibilities
 - Background data and inventions
 - Parallel private work
- Flexibility during negotiations
- Common oversights

Intellectual Property: Inventions

- Bayh-Dole Act and related regulations do not apply
- In theory, any framework is permissible for recipient inventions
- In practice, agencies often insist on frameworks similar to the Bayh-Dole Act:
 - Non-exclusive license for U.S. Government purposes
 - Reporting and patent filing obligations (somewhat flexible)
 - March-in rights (somewhat flexible)
 - Domestic manufacturing tied to exclusive licensing (flexible)
- Agencies may be willing to redefine “subject inventions”
- Agencies may not be able to transfer all rights in U.S. Government employee inventions, but could issue an exclusive license
- Some agencies are beginning to focus on continued access to background technology

Inventions: Examples

- “**Subject Invention:** Any invention of the contractor conceived or first actually reduced to practice in the performance of work under this Agreement.”
- “In the event the Government chooses to exercise its March-in Rights, as defined in Article [X], the Recipient agrees, upon written request from the Government, to deliver Data necessary to achieve practical application of the Subject Invention within sixty (60) calendar days from the date of the written request. The Government shall retain Government Purpose Rights to this delivered Data for only a reasonable time period required to achieve practical application of the Subject Invention.”

Intellectual Property: Data and Copyright

- Standard data rights frameworks do not apply
- Agencies may reference standard rights during negotiations
 - Unlimited rights
 - Government purpose rights
 - Limited or restricted rights
- Marking is generally required
- Ability to assert copyright
- Government works of authorship

Data Rights: Examples

- “**Government Purpose Rights:** The rights to use, duplicate, or disclose Data, in whole or in part and in any manner, for Government purposes only, and to have or permit others to do so for **Government purposes only**. The Government shall not disclose Data that is subject to Government Purpose Rights outside the Government, or authorize others to do so, unless:
 - (i) the recipient of such data is **subject to a use and non-disclosure agreement (NDA)** consistent with the terms included in Attachment [X] *[DFARS 227.7103-7]*; or
 - (ii) such disclosure is made to a **Covered Government Support Contractor** *[DFARS 252.227-7025]*.”
- “To the extent the Performer will provide Data or related services **subject to a commercial license** in support of this Agreement, the following applies: [list exceptions]”

Intellectual Property: Data Rights Assertions

- Often not technically required
- Recommended to clarify pre-existing and out-of-scope technology

Covered Item	Government Rights	Basis for Assertion	Party Making Assertion
Technical data or “pertaining to” item	Government Purpose or “Category B”	Mixed or private funding	Awardee, Subawardee, or Third-Party Licensor
Computer software and documentation	Restricted (not limited)	Private funding	”
OMIT/FFF?	Unlimited?	Agreement requirement?	”

Intellectual Property: Confidentiality and Non-Use

- Freedom of Information Act (FOIA) continues to apply
 - Proprietary information developed outside the scope of an agreement would generally be protected from disclosure
 - Contractual limitations on disclosure may limit agency obligations under FOIA
 - Information generated by U.S. Government employees or incorporated into an OTA could be subject to disclosure
 - Disclosure through public database could be possible for some agencies
 - Disclosure of consortia agreements may be less likely
- Federal employee Trade Secrets Act and Defend Trade Secrets Act do not independently offer protection

Costs and Accounting

- Standard cost principles and accounting requirements do not automatically apply
- Relationship between OTAs and independent research and development
 - OTA costs under 10 U.S.C. § 2371 (now 10 U.S.C. § 4021) or “equivalent” authority can qualify as independent research and development
 - Credits
- Price reasonableness and cost justifications can still be required in evaluation
- Agencies are sometimes willing to permit compliance with Generally Accepted Accounting Principles or non-U.S. equivalents
- Comptroller General access to records is generally required if U.S. Government cost share exceeds \$5 million
- Agency access rights are often negotiable, but agencies may insist on receiving the same level of access as the Comptroller General

Accounting: Examples

- “The Recipient has and agrees to maintain an established accounting system that complies with GAAP standards or a non-U.S. equivalent and the requirements of this Agreement.”
- “To be reasonable, a cost must be generally recognized as an ordinary or necessary part of the business; follow sound business practices; follow what a prudent business person would accept; comply with federal, state, and local laws; and be consistent with the Recipient’s or its subcontractors’ established practices.”
- “The Government will review proposed subcontractor indirect rates as part of the subcontractor approval process. Approved subcontractor indirect rates will not be subject to audit or adjustment based on a subcontractor’s actually incurred costs during performance.”
- “The Recipient shall maintain adequate records to account for all funding under this Agreement.”

Milestone Payments and Cost Sharing

Milestone Payments

1. Fixed price with bilateral adjustments
2. Interim cost reimbursement with milestone-based ceiling
3. Interim cost reimbursement with agreement-based ceiling
4. Cost reimbursement with carry forward adjustment

Cost Sharing

1. Cost share based on budget estimates
2. Recipient responsible for excess over ceiling
3. Recipient responsible for discrete activities or cost elements
4. Cost share based on invoice percentages
5. Recipient parallel activities considered without being part of agreement

Payment: Examples

- “Payment shall be made **in the amounts** set forth in Attachment [X], provided the Government has verified the **accomplishment of the milestones**. . . . Milestones **shall be revised** during the course of the program to reflect current and revised projected **expenditures**.”
- “Recipient may invoice for **incurred costs** in performing the milestones up to the **maximum payment amount identified for each milestone** in Attachment [X].”
- “Recipient may invoice for **incurred costs** on a **monthly basis**.”
- “**Government funds** shall be maintained in an **interest-bearing account** prior to disbursement.”
- “Recipient is **not obligated to incur costs in excess of the amount of funds obligated** to the Agreement by the Government.”

Tangible Property

- Agencies typically do not want responsibility for tangible property
 - FAR Part 45 does not apply to OTAs
 - December 2018 DoD OTA Guide focuses on deliverables
 - Agencies may rely on provisions similar to the Uniform Guidance for Grants and Cooperative Agreements (2 C.F.R. Part 200)
- Potential “contractor-acquired property” issues:
 - Disposal
 - Maintenance and use
 - Risk of loss
 - Insurance

Third-Party Agreements

- Subcontracting approvals, notices, and competition
- Cost-reimbursement agreements:
 - Affiliate transactions
 - Paid-cost rule
 - Cost principles and accounting (e.g., GAAP or IAS?)
- Flow-down obligations and consolidation of intellectual property
- Transfers of technology to foreign persons or firms

Third-Party Agreements: Examples

- “The Recipient shall **include this Article**, suitably modified, in all subcontracts or lower tier agreements.”
- “The Recipient shall ensure that its subagreements regardless of tier **entered into after the Effective Date** are **consistent** with this Article.”
- “The Recipient shall award any subcontract via **competitive** bids to the **maximum extent practicable**.”
- “The Recipient may invoice for subcontractor costs that have been **incurred** even if the Performer has yet to make payment on a subcontractor invoice.”
- “**Foreign Firm or Institution:** A firm or institution organized or existing under the laws of a country other than the United States, its territories, or possessions, **other than Affiliates of, and licensees** of, Performer or its Affiliates.”

Termination

- Scope of terminations for convenience
- Standards for breach
 - Risk of inflexible performance language or result-based deliverables
 - Reperformance obligations and cost
- Payment
 - Undelivered work; delivered work
 - Settlement costs
- Post-termination rights and responsibilities
 - Audits and records
 - Transfer of property or data deliverables

Termination: Examples

- “For purposes of this Agreement, termination costs shall be those costs identified in **Federal Acquisition Regulation 31.205-42**. The Government and the Recipient will **negotiate in good faith** a reasonable and timely adjustment of all outstanding issues between the Parties as a result of termination, including **disposition of tangible property**. Failure of the Parties to agree to a reasonable adjustment will be resolved pursuant to Article [X], Disputes.”
- “If the Government terminate the Agreement, the Recipient shall be entitled to a **pro-rata payment for partial completion** of a funded milestone as determined by a good faith assessment of the Recipient’s progress on the milestone.”
- “The Government has no obligation to pay the Recipient **beyond the last completed and paid milestone** if the Recipient decides to terminate.”

Dispute Provisions

- Agreement terms should address necessary contractual elements, including the authority of the employee entering into an agreement on behalf of the U.S. Government
- Dispute procedures help, but terms should clarify scope of any applicable administrative exhaustion requirements
- Self-help rights
- Clarify available remedies; agree on remedies in advance
- Intellectual property
 - If possible, agreement terms should reference express “authorization and consent”
 - Consider special references to intellectual property and confidentiality
- Consider impact of “first-party” and “third-party” limitations on liability

Disputes: Examples

- “The Government’s **liability to make payments** to the Recipient is limited to only those funds obligated under Article [X].”
- “Whenever disputes, disagreements, or misunderstandings arise, the Parties **shall attempt to resolve** the issue(s) involved by discussion and mutual agreement as soon as practicable. In no event shall a dispute, disagreement or misunderstanding, which was known, or should have been known, more than six (6) months prior to the notification made under this clause constitute the basis for relief.

...

In the absence of a joint decision, upon written request, the dispute shall be further reviewed **by the Secretary or his or her designee or jointly with a Senior Executive appointed by the Recipient**. Following the review, the Secretary or designee **will resolve the issue(s)** and notify the Parties in writing.”

- “As contemplated by 28 U.S.C. § 2516(a), this Agreement provides for the payment of **prejudgment interest** from the date on which a claim accrues.”

Inapplicable Requirements

1. Full and open competition
2. Requirement-setting and solicitation criteria
3. Permissible “kinds of contracts”
4. Certified cost or pricing data requirements
5. Agency audit rights
6. Rights in technical data
7. Allowable costs, including restrictions on reimbursing “restructuring costs”
8. Cost Accounting Standards
9. Contract Disputes Act
10. Byrd Amendment (Lobbying)
11. Basic whistleblower protections

Likely Inapplicable Requirements

1. Service Contract Act
(potential for DoL Disagreement)
2. Walsh-Healey Act
3. Anti-Kickback Act
(may apply to acquisition)
4. Buy American Act
5. Equal employment opportunity requirements
6. E-Verify requirements
7. National Labor Relations Act notice requirements
8. Privacy Act
9. Small business subcontracting
10. Drug Free Workplace Act
(may apply by policy)
11. Human trafficking requirements
12. Confidentiality agreement restrictions
13. Investigator conflict of interest requirements
14. Limitations on pass-through charges and restrictions on subcontractor sales
15. Procurement Integrity Act
(depending on authority)

Potentially Applicable Requirements

1. Anti-Assignment Act
2. Cargo Preference Act of 1954
3. Fly America Act (*potentially only based on contractual term*)
4. Subcontract reporting requirements
5. System for Award Management and unique identifier requirements
6. Prohibition on doing business with suspended or debarred entities (*with a potential exception for DOD prototype OTAs*)
7. Section 508 requirements
8. Title VI of the Civil Rights Act of 1964 (*potentially only if deemed financial assistance*)

Compliance Obligations: Examples

- “This Agreement **is subject to the compliance requirements of Title VI** of the Civil Rights Act of 1964 as amended (42 U.S.C. § 2000d) relating to nondiscrimination in Federally assisted programs. The Recipient’s execution of this Agreement is **written assurance that Performer will comply** with this requirement.”
- “All transfers and/or assignment will be conducted in a manner that is consistent with the **Assignment of Claims Act** (31 U.S. Code § 3727) and the prohibition on transfer of contract and certain allowable assignments (41 U.S.C.A. § 6305).”
- “The Recipient shall **claim duty-free entry** for supplies that it imports and intends to deliver to the Government under this Agreement as end items or components of end items.” *[See Subchapter VIII of Chapter 98 of the Harmonized Tariff Schedule]*

Questions?