



PUBLIC
CONTRACTING
INSTITUTE

Exploring Other Transactions

Tyler Evans

tyevans@step toe.com

October 10, 2024

Topics

1. Introduction to OTAs
2. Key Terms and Compliance Obligations
3. Practical Considerations
 - Compliance Obligations (Continued)
 - Prototype Completion/Follow-On and Business Units
 - Anti-Deficiency Act
 - Force Majeure, Third-Party Contractors, and Assignment
 - Demonstrations
 - Termination and Disputes
 - Consortia
 - Property, Overlapping Agreements, and Data Rights
 - Transparency and Publication

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]*

Prototype Completion / Follow-On Production

Issue: A contractor or agency believes that a sole-source follow-on production contract can be awarded

- Current Policy-Based Triggers:
 - met the key technical goals of a project;
 - satisfied success metrics incorporated into the Prototype OT;
 - accomplished a particularly favorable or unexpected result that justifies the transition to production
- Requires prior competition
- Can occur prior to completion
- Policy requires written determination
- “Production” vs. “sustain or otherwise implement” vs. “continued or expanded use”
- “Participant” vs. “participants”

Business Units

Issue: A contractor needs non-traditional status while holding or about to receive a procurement contract or subcontract that is subject to full coverage under the Cost Accounting Standards (“CAS”)

- Establish Separate Business Unit – can avoid CAS coverage, but needs sufficient resources and management to be considered separate for CAS and non-traditional contractor purposes
- Non-DoD or DHS Contracts – accepting a CAS-covered procurement contract from agencies other than DoD and, potentially, DHS can allow a contractor to retain non-traditional status
- Interaffiliate Transactions – can extend CAS coverage if not careful
- Subcontracts – can be used to satisfy nontraditional status requirements with participation by a nontraditional contractor to a significant extent (DoD has recently been limiting measurement by focusing on value of subcontract and percentage of performance)
- Entity vs. Business Unit – recent DoD statements adopting limited view of status

Anti-Deficiency Act

Issue: An agency wants to limit its liability to avoid violating the Anti-Deficiency Act

- Limitation of Cost / Funds (FAR 52.232-20 and 52.232-22) – the Government “is not obligated to **reimburse** the Contractor for costs incurred” in excess of current ceiling
- OTA – the Government’s “**liability**” or “**liability to make payment**” vs. “**liability for performance**” is limited to funds obligated to agreement
- Court of Federal Claims –
 - *Gen Motors Corp. v. United States*, 66 Fed. Cl. 153, 160 (2005) (“The Limitation of Cost and Limitation of Funds clauses were designed to provide the government with various protections in connection with cost-overruns in connection with a specific contract.”)
 - *Raymond Constructors of Afr., Ltd. v. United States*, 188 Ct. Cl. 147, 166 (1969)
 - *Solar Turbines, Inc. v. United States*, 23 Cl. Ct. 142 (1991)
- Cibinic, Knight, & Nash – “The clauses relate only to payment for allowable costs under the contract. Thus, they do not apply to any and all government liabilities under the contract”
- Judgment Fund – covers liabilities other than payments for performance (reimbursement is not required for OTAs)

Force Majeure (Excusable Events)

Issue: An agency wants to include a force majeure or “excusable events” clause to limit its own liability in the event of war, natural disaster, pandemic, or other unforeseeable event

- FAR-Based Language –

Except for defaults of subcontractors at any tier, the **Contractor** shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its **sovereign or contractual capacity**, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.

- Mismatch between party subject to clause and excusable events based on government action

Third-Party Contractors

Issue: An agency wants government purpose rights in new data to permit use with third-party contractors

- Trade Secrets – protects trade secrets unlike unlimited rights
- OTAs – lack default protection for competitive use in commercial context
 - *DFARS 227.7103-7* – form agreement with third-party beneficiary language
 - *DFARS 252.227-7025* – same for support contractors
- GPR+ – limiting permissible use to particular field or project may be necessary to recognize private investment when improvements can be used without access to background intellectual property or data (e.g., a new chemical formula or use for a particular agency or program)

Assignment

Issue: A contractor needs the right to assign an OTA for a particular purpose (e.g., pending corporate transaction)

- Non-Procurement Contracts (e.g., grants and CRADAs) – not always treated as if subject to Anti-Assignment Act
- Historical context – originated in public contracts provisions governing purchases and referencing orders for services and supplies; continues to be associated with U.S. Code provisions governing procurement contracts
- Court of Federal Claims – *Liberty Ammunition I*, 101 Fed. Cl. 581 (2011) (evaluated confidentiality agreement as if subject to the Act)
- Specific Waivers – specific waivers of the Act may be enforceable for mutually agreeable assignees like affiliates
- Commitment to Novate – commitments to engage in a novation process for assignments are likely a safer option

Demonstrations

Issue: An OTA is used for demonstration of a product or technology that has largely already been developed

- Invention Risk – first actual production to practice can be likely to occur based on unique Government resources (e.g., computing capacity) or methods of testing (e.g., a weapons range or use of Department of Defense spectrum)
- Data Risk – data relating to inherent aspects of product or technology may be generated in addition to standard test data (e.g., internal geometry may be discernable from video or setup processes)
- Rights in Deliverables – only providing Government rights in deliverables can protect a contractor's interests while giving the Government access to test data necessary to evaluate a demonstration
- Rights in Improvements or Embodiments – limiting Government rights in improvements or embodiments of pre-existing proprietary technology or data represents another option, but can be difficult to manage in practice

Termination

Issue: An OTA provides one or both parties with the right to terminate without cause

- Payment – a contractor would not automatically be entitled to payment for work performed, and payment may not be intended when a contractor terminates
- Works in Progress – the Government should flag any expectation to obtain works in progress or the ability to transition work to another contractor
- Changes – Partial termination and changes clauses are not standard, and parties often address changes through bilateral modification in research and development projects

Disputes

Issue: An OTA does not address disputes or only describes escalation procedures involving the parties

- Exhaustion/Jurisdiction – omitting references to judicial remedies can create ambiguity regarding exhaustion requirements and jurisdiction
- Final Authority – referencing final decisions by high-level agency officials, which can create uncertainty about appeal rights; high-level agency officials may not want to be involved in dispute process
- Actual Authority – Government is only bound by officials acting with actual authority
- Timelines – could be interpreted to trigger waiver of claims
- Sovereign Immunity
 - Understand interest obligations
 - District court and Court of Federal Claims: Mutually exclusive jurisdiction?
 - Beware of 28 U.S.C. § 1500

Disputes

Issue: Agency sends contractor a request to remove the “proprietary” legend from certain deliverables, claiming it has government purpose rights.

- OTA – unless prohibited expressly in the agreement, additional proprietary markings are generally permissible
- Alternative – may be able to accomplish same goal with admonition that the data is considered proprietary

Consortia

Issue: Contractors want to ensure it has recourse if an agency misuses proprietary information received under a consortium award

- Privity of Contract – A side agreement or three-party agreement is likely required
- Third-Party Beneficiary – An acknowledgment that the contractor is a third-party beneficiary of the consortium agreement between the management firm and the agency is not enough without specific language regarding treatment of contractor information

Improvements to Private Property

Issue: An OTA funds improvements to private property (e.g., facilities or equipment) on a direct or reimbursable basis

- Policy – can be viewed as gift of federal funds requiring statutory authority
 - *Temporary Improvements* – typically not covered
 - *Government Benefit and Protection* – principal benefit to the Government and protection of long-term Government interest may be acceptable (e.g., continued access to facility for partial Government use)
- Statutory Restrictions – appropriations or statutory provisions may separately limit use of funds for improvements (e.g., 42 U.S.C. § 289e)
- Statutory Authority
 - *10 U.S.C. § 2353* – equipment and facilities necessary for research and development (may not apply to OTAs)
 - *Pub. L. Nos. 116-123, 116-136, 116-139 (Coronavirus Response)* – construction, alteration, or renovation of non-Federally owned facilities to improve preparedness and response

Overlapping Agreements

Issue: An OTA funds work that is supported by (i) the Government or a laboratory under a CRADA or (ii) a collaboration between contractors

- Agency Policy – sometimes prohibits funding of Government/laboratory work under another Government agreement
- Intellectual Property – CRADAs are subject to different rules on allocating intellectual property rights and offer data protections that are not available under some types of OTAs; differences in intellectual property rights may need to be reconciled
- Private Licensing in Contractor Collaboration – can more easily address commercial expectations without triggering unnecessary Government rights if data or technology were to flow through an agency
- Flow-Down Requirements – can be difficult to address without clarification of whether CRADAs or private collaboration agreements fall within the scope of work under an OTA

Contractor Considerations: IR&D and Data Rights

Issue: A contractor has a DoD procurement contract and an OTA and needs to account for OTA costs in evaluating independent research and development (“IR&D”) or data rights under the procurement contract

- FAR 31.205-18 (IR&D) – focuses on “effort sponsored by a grant or required in the performance of a contract” at least for contractor cost share; includes express exemption for contribution under OTAs as “cooperative arrangement”
- DFARS 252.227-7014 (Data Rights) – defines “developed exclusively at private expense” in part with a reference to “costs not allocated to a government contract”
- Boeing Co., ASBCA No. 60373 – presence of government funding is not relevant for DFARS provision because OTAs are not procurement contracts; different result may apply under the FAR data rights provisions

Transparency

- Proposed Stop Secret Spending Act of 2024
- Similar proposals every 1-2 years
- Reporting consortia awards and solicitations would represent significant shift
- Disclosure through public database would represent significant shift

Publication Requirements

- Reporting is generally required for agency awards, but not consortium awards
- Justifications and approvals are not required, but non-public determinations are required for >\$100 million (subject to proposed increase)
- Follow-on awards can be issued as modifications to existing OTAs

Questions?