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GUIDE TO RESEARCH OTHER TRANSACTIONS

UNDER 10 U.S.C. 4021

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Section 1 – General Information

A. Purpose and Scope

This Guide is issued by the Office of the Under Secretary of Defense for Research and Engineering (OUSD(R&E)), the organization responsible for promulgation of policy and guidance for Research Other Transactions (OTs) awarded using the authority of 10 U.S.C. 4021. This Guide provides advice, guidance and best practices on planning, publicizing, soliciting, evaluating, negotiating, awarding and administering Research OTs. DoD's OT authority allows for three types of OTs by law – Research, Prototype, and Production. A larger discussion regarding the nuances of all types of OTs with additional guidance and lessons learned as to their use can be found in the Other Transactions Guide issued in December 2018 by the Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD(A&S)) (https://usaf.dps.mil/sites/AFCC/KnowledgeCenter/Pages/Other-Transactions.aspx). Readers interested in learning more about OTs may wish to consult both documents. The use of OTs and many of the issues that will need to be considered are common across all types of OTs. Reading both documents will help users assess the appropriate type of OT to utilize and focus on the common considerations inherent in using these flexible authorities. This Research OT Guide will specifically focus on topics applicable to Research OTs awarded under 10 U.S.C. 4021.

While this document includes references to the controlling statutory, regulatory and policy provisions for Research OTs, this document itself is not a formal policy document. *Activities seeking to award Research OTs should consult with legal*

counsel for interpretation of statutory, regulatory, and policy requirements. If a strategy, practice, or procedure is in the best interest of the Government and is not prohibited by law or Executive Order, the Government team may assume it is permitted.

B. Types of Other Transactions

The OT authorities available to the Department of Defense (DoD) were created to give the Department the flexibility it needs to adopt and incorporate commercial business practices into its award instruments and thereby attract a wider, more diverse group of performers to the defense research and industrial base. When appropriately leveraged, OTs provide the Government with the opportunities it needs to partner with both traditional defense contractors and non-traditional performers who are spearheading the creation of cutting edge, state-of-the-art technology solutions.

OTs can help DoD:

- Foster new relationships and adopt new business practices when dealing with traditional and non-traditional performers, especially those performers who would not ordinarily pursue DoD projects or challenges because they are not willing to accept a traditional Government award vehicle;
- Broaden the defense research and industrial base by allowing the Department to offer more flexible and innovative award options;
- Support and encourage technology solutions that have dual-use applications; and
- Leverage commercial research investments in technology development and partner with industry to ensure DoD requirements are incorporated into future research and technological solutions.

While OTs can be structured in a variety of ways, there are two different DoD OT statutory authorities that can result in three different types of OT award: Research, Prototype, and Production.

- Research OTs are authorized under 10 U.S.C. 4021 and are used for basic, applied, and advanced research projects. This was the original OT authority given to DoD more than 30 years ago and was generally intended to spur dual-use research and development (R&D) projects. The use of this authority allows DoD to take advantage of commercial economies of scale without burdening companies with traditional

government regulatory overhead. This flexibility is especially important when trying to attract performers who will not or do not do business with the Government but can also provide advantages to traditional defense contractors who are looking to diversify into the commercial sector or partner with non-traditional contractors.

- Prototype OTs are authorized under 10 U.S.C. 4022, which extended the original research authority above to allow DoD to acquire prototype projects or capabilities. Both dual-use and defense-specific projects commonly use the prototype authority, and this statute allows for the same flexibility in the contracting process as with Research OTs.
- Production OTs are authorized under 10 U.S.C. 4022(f) and allows a project that was competitively awarded as an OT for Prototypes to segue into the production phase without the need for additional competition. Specific requirements must be satisfied before the transition to production can occur.

This Guide will focus on Research OTs and the special considerations that apply when using this authority. Regardless of which type of OT is chosen, the statutes make it clear what any OT will not be. OTs are not FAR-based procurement contracts, grants, cooperative agreements, or cooperative research and development agreements and will not be subject to the statutory, regulatory and policy requirements that apply to the award of those instruments. OTs will, however, often be subject to statutes, regulations and policies that are unrelated to the acquisition process.

C. Appropriate use of Research OTs

Research OTs are used for basic, applied, and advanced research projects[1] that are focused on validating research results and advancements, rather than for the delivery or acquisition of the resultant technologies. The goal of these awards is to foster the best technologies for future defense needs with the most capable performers. These performers often have had little, if any, experience working with the Federal Government or DoD either by chance or design. The business and contracting flexibilities of this authority allows DoD to reduce bureaucratic barriers with the private sector that may occur through the use of more traditional award vehicles and create new relationships with commercial sector performers that will allow DoD to more easily access cutting edge technology.

[1] See the DoD Financial Management Regulation, vol 2B, chapter 5 for a detailed description of basic vs applied vs advanced research. See also 2 CFR 1108 definitions of basic, applied, and advanced research.

While the Research OT authority applies to all of DoD, only the Secretary of Defense, the Secretary of each military department and the Defense Advanced Research Projects Agency were given authority to award these arrangements by statute. The remainder of the Department must have the authority delegated to them. If your office is in a Military Department, you should look to the Secretary of your Military Department for specific delegations to see if your command or organization has been given the authority. For those outside of a Military Department reporting chain, the memorandum in Appendix C from the USD(R&E) has delegated the authority to use 10 U.S.C. 4021 to the majority of DoD organizations.

Research OTs are governed by 10 U.S.C. 4021 and the guidance contained in this Guide. *As a reminder, this Guide is not official DoD regulation or policy and the Government teams seeking to award a Research OT should look to this document as advice and guidance only.* Just because Research OTs are not subject to the DGARS or other statutory or regulatory requirements covering DoD awards, that does not mean that Research OTs are not subject to any laws or regulations. Laws and regulations of general applicability or unrelated to the award process will generally still apply to Research OTs. These can include, but are not limited to:

- Fiscal laws, regulations, and policies
- Suspension and debarment prohibitions
- Lobbying restrictions
- Criminal statutes

It is important the Government teams seeking to award a Research OT consult with their legal counsel to ensure that they are compliant with any laws, regulations or policies that may still apply to Research OTs.

From a practical perspective, the Government team should consider if a Research OT is the appropriate choice for their program or would another type of OT or a more traditional award vehicle be more appropriate. The team should first and foremost consider the ultimate goal of the program. Too many teams will choose the award vehicle first only to discover at a later stage that it was not right for their project. Some considerations to take into account include:

- Are the primary goals of this program to improve the state-of-the-art in a field of research or advance the related technology? Are any items created or built during the program primarily intended for testing or validation, not delivery?
    - If so, a Research OT is an appropriate choice. The fact that some items may be created or built during the program does not change the underlying goal of the program

- If the primary goal and focus of the program is to create prototype items for delivery, the more appropriate choice of vehicles might be a Prototype OT or other more traditional vehicle.
- Research OT may be used to foster development of the best technologies for future defense needs.

Fully considering the ultimate goal at the outset of the program and before any discussion of award vehicles or solicitation methods can help the team focus on the right approach without any bias. There are a wide variety of award methodologies available to the Government team. Pick the one that best suits the Government team's situation, not the one that is the cool tool of the day or avoids rules the Government team or organization does not want to follow.

Section 2 – Execution

D. Planning

1. The Government Team

Because OTs are flexible in nature and are individually negotiated, it is very important to ensure that the Government team has subject matter experts (SMEs) from a variety of disciplines to provide advice and input. A small, dedicated team works best in the OT environment, especially if the organization's goal is to work efficiently and award quickly. The two natural leaders of these types of efforts are the Program Manager (PM) and the Agreements Officer (AO).

The AO will be the individual with the authority to obligate Government funds, incur debts on the part of the Government, or sign award documents obligating the Government. In the traditional defense procurement world, this person is called a Contracting Officer. In the OT world, this person is called an AO. Because OTs have few applicable acquisition rules and regulations, AOs need to possess a level of responsibility, business acumen, and business judgement that will allow them to work comfortably and effectively within the unstructured OT environment. AOs will be expected to not only be open-minded enough to consider all award options to find the one best suited to the individual circumstance, but also must be able to craft unique award terms and conditions. Because traditional acquisition and assistance statutes and regulations do not apply to OTs, the AO must be able to think carefully and creatively to create terms that are flexible for the parties while ensuring the sovereign rights of the Government and any applicable laws are protected. The AO should not be someone who just turns back to the standard approaches in the traditional acquisition or

assistance regulations when faced with a difficult issue but instead will be someone who can think critically and creatively to find a new solution.

In order to act as an AO, the person must first be given an Agreements warrant. There are no DoD-wide requirements to obtain such a warrant, and each organization that is delegated the Research OT authority is expected to define for the workforce the educational and experiential requirements necessary to obtain such a warrant.

The PM will be the technical expert on the team and will be responsible not only for oversight and ensuring the success of the program, but will also play a significant role in the creation and negotiation of the award terms themselves. Unlike traditional award instruments, which are largely negotiated and awarded by the Contracting or Grants Officer alone, involvement by the PM is critical to the creation of a successful OT. Since Research OTs will be focused on basic, applied and advanced research projects, the PM's expertise will be critical to ensure the research description is properly focused and the proper protection methods are in place. This involvement is especially important in the negotiation of intellectual property. In OTs, the Government is able to freely negotiate all aspects of intellectual property rights, and the AO will generally not be a technical expert. The participation of the PM in these negotiations is critical to ensure the Government gets the necessary license rights and deliverables to protect its interests and investment.

Other Government experts should be included in the process as well. These SMEs, such as legal counsel, comptrollers, administrative support offices, and small business representatives, should be engaged in the planning stages of the program to consult and advise on their various areas. Organizations such as the Defense Contract Management Agency (DCMA), the Defense Contract Audit Agency (DCAA), and the Defense Financial Accounting Service (DFAS) should be included as early in the process as possible if the awarding agency wishes to have their involvement during the OT performance period. Agencies and offices often consider OTs as an option because of the perceived ability to select and award quickly. History has shown that such speed can only be realistically accomplished if the Government representatives work together as a team from the earliest planning stages through award.

2. **Understanding the Statutory and Regulatory Requirements**

As the team plans how it will solicit, evaluate, negotiate and award an agreement for the defined problem or area of interest, it must be sure that the appropriate OT authority is selected, and the corresponding statutory and regulatory requirements are met. There are two different OT statutes – Research OTs under 10 U.S.C. 4021 and Prototype OTs under 10 U.S.C. 4022 – which were enacted to address different needs and situations. The team must conduct a thorough analysis of the area of interest or requirement and desired outcome before selecting the appropriate authority. This Guide addresses those scenarios when a Research OT is the optimal choice. If a Prototype OT better suits the scenario, the organization should consult the OUSD(A&S) Other Transactions Guide.

In order to award a Research OT, the AO should ensure that the following statutory requirements are met:

- The focus of the program or project is basic, applied or advanced research.
- To the maximum extent practicable, the research contemplated in the initial program or project does not duplicate research being done under other DoD programs.
    - Similarities in research efforts and outcomes are not considered duplicative when similar outcomes from multiple suppliers is sought in order to multiply, expand or improve capabilities
- Resource share is required and to the maximum extent practicable, the funds from the Government do not exceed the total amount provided by the other parties. This resource sharing requirement is intended to highlight the dual use focus of this authority and show commitment on the part of the performing team to pursue and/or commercialize the technology in the future. While the default position in the statute is generally a 50%/50% resource share, the final amount of the share is flexible and should be based on full consideration of the factors such as the performer's available resources, prior investment in the technology, commercial vs. military relevance, and the precompetitive nature of the project. For more details on resource sharing, turn to Section 2.D.4 of this Guide.

10 U.S.C. 4021 also includes authorities that may be beneficial in certain circumstances. Advanced payments can be made in any amount and without any other required approvals. Obviously, good business judgment should be used when utilizing advanced payments and they will

not be reasonable in some situations. An exception to the Freedom of Information Act (FOIA) is also included that allows information submitted during the course of a competitive or noncompetitive OT process to be withheld from release for 5 years. Finally, the statute allows for the recovery and retention of funds under an OT. For more details on how the recovery of funds works, see Section 2.D.5 of this Guide.

3. Identifying and Using Available Funding

The Government team should consult with their Comptroller's Office to determine the applicability of funding restrictions found in appropriations statutes (i.e. prohibitions for the use of funds for certain items from foreign sources or awarding funds to specific prohibited foreign organizations). While OTs are exempt from most acquisition and non-acquisition statutes and regulations, fiscal law requirements are applicable to OTs.

Appropriateness of available funding and fund type are considerations independent of the choice of award instrument. The agency decision to use an OT does not expand or restrict available funding. To determine the appropriate funding type, the intent and stage of development should be considered and the Government team should consult with their financial managers, agency legal counsel and comptrollers. Because Research OTs are intended for basic, applied and advanced research efforts, generally these types of OT will be limited to using Research, Development, Test, and Evaluation (RDT&E) appropriations. Incidental funding may supplement RDT&E funds in rare instances with financial manager justification and approval.

When OT awards provide for incremental funding or include expenditure-based characteristics, the Government team should include appropriate terms and conditions that address the limits on Government obligations.

4. Resource Sharing Considerations

Resource sharing in a transaction occurs when a portion of the total cost of the project is to be paid out of funds provided by sources other than the Federal Government. Contributions can be in cash or non-cash form, and costs can be either direct or indirect, so long as the contributions are allowable, allocable, reasonable, and consistently accounted for by the awardee. Generally, cash contributions are preferred over in-kind contributions as they are easier to value and often represent a higher level of commitment to the success of the program.

The requirement for resource sharing is a key element of the Research OT statute. Because Research OTs were originally created to address dual-use programs, the philosophy behind requiring resource sharing was that both the Government and the private sector would invest in the program with the ultimate goal of getting the resultant technology or product into the open market. Because the technology or product would have both military and civilian uses, it is reasonable to expect the performer to invest in the development as well as the Government. The performer's investment will also act as an incentive for it to commercialize the product or technology in order to recoup the research investment it incurred and shows it is willing and committed to assume some of the risk associated with the program. However, it is not reasonable in every situation to expect commercial investment or the timing of that investment may not coincide with the Government's investment, particularly in the early stages of the program. The statute allows for the amount of the expected resource sharing to vary according to the facts and circumstance of the individual circumstance. It is much more common to have resource or cost sharing in a Research OT than it is in any other type of OT.

a. General considerations

The Government team should carefully consider the amount and mix of resource-shared assets offered by a proposer during the negotiation process. The offered assets must be reasonably necessary for the accomplishment of the research objectives. The goal is resource-sharing, not resource-matching. The assets proposed need to be assets that will be directly used in the performance of the work, not just assets of value that match the dollar value of the Government's investment. The value of the resource-shared assets should be verifiable and reasonable, and the assets must be available and under the control of the proposer. Regardless of the type of resource-shared asset offered, any resource-shared Research OT will not include payment of profit or fee to the performer. Such a payment would skew the share ratio and would be contrary to the principles behind the need for resource sharing.

b. Cash vs In-Kind Assets

Resource sharing in Research OTs can involve two different types of assets – cash or in-kind. Cash is the preferred form of resource sharing because of the level of commitment it represents and the ease of valuation. Cash contributions can include costs like direct

labor, including benefit expenses and direct overhead; materials expenses; and Independent Research and Development (IR&D) costs. IR&D is acceptable as resource-sharing only for OTs, even though it may be reimbursed by the Government through other awards. It is standard business practice for all for-profit firms, including commercial firms, to recover their research and development costs through prices charged to their customers. Under Federal procurement contracts, the Federal Government allows some of its larger performers to recover these Independent Research and Development costs or independent research investments by allowing a pro-rated spread of these costs across the performer's federal business base.

In-kind assets, on the other hand, include equipment, facilities, materials, intellectual property, and other similar items in the possession of performers but not charged as a direct cost to the program. In-kind assets are more difficult to value and are generally less desirable than cash assets, but can often be of great use to the program. When considering the value of physical items such as equipment or facilities, AOs will generally consider the depreciated value (unless the item is fully depreciated) or a reasonable usage cost. In determining a reasonable usage cost, the Government team should consider the original cost of the asset, total estimated remaining useful life at the time of negotiations, the effect of any increased maintenance charges or decreased efficiency due to age, and the amount of depreciation previously charged to procurement contracts and sub contracts.

It is often even harder to assess the value of intellectual property unless it is currently being sold or licensed on the open market. The value of intellectual property will not include its research or development expenses (otherwise known as sunk costs,) but AOs should focus instead on sound estimates of its market value, through licensing or some other commonly used valuation methodology.

Some costs will never be appropriate resource sharing assets. Foregone profit or fee on this or other awards, previously funded Government research, IR&D conducted prior to the OT award, or cost of money would not be consistent with general cost principles and should never be included in a shared arrangement.

c. Costs Incurred Before Award

If resource-sharing is required or included, the non-Federal amounts included as the performer's share may not include costs that were incurred before the date on which the OT award becomes effective. Costs offered as resource-sharing that were incurred for a program after the beginning of negotiations, but prior to the date the OT award becomes effective, may be considered as non-Federal share if the AO determines in writing that: (1) the performer incurred the costs in anticipation of the OT award; and (2) it was appropriate for the entity to incur the costs before the OT award in order to ensure the successful implementation of the OT award.

d. Resource Share Schedule and Monitoring

Generally, the Government's payments or financing should be representative of its share as the work progress, rather than front loading the Government's contributions. OTs that require resource sharing should generally provide for adjustment of the Government or performer investment or some other remedy if the other party is not able to meet its agreed investment amounts. The Research OT award should include provisions for verifying resource share contributions, the conditions that would trigger an adjustment and the procedures for making the adjustment. The OT award itself should include the share ratios, the expected contributions of all the parties and the sources of shared assets (i.e. members of the performing team, third party investors, bank loans or lines of credit) and amounts provided by each. The assets used for the performing team's share can come from virtually any source other than the Federal Government and the AO should take into account the legitimacy and credibility of the source, the availability of the asset and the security of the asset during negotiation.

5. **Recovery of Funds**

One of the more unusual provisions of the Research OT statute is the authority of the Government to recover funds from non-Federal sources. Generally, money that comes into the Government from an outside source other than Congress cannot be kept and used by the receiving agency but must be returned to the U.S. Treasury, absent statutory authority. 10 U.S.C. 4021 gives DoD not only the authority to recover funds but to retain those funds in support accounts at the U.S. Treasury and use those funds for other agency activities. Generally, this authority has been used under OT awards whereby the performer buys back equipment or other program materials

acquired under the OT from the Government for some negotiated amount. That negotiated amount represents the recovery of funds that would be placed in the agency's designated Treasury support account and would be available for the agency to use on subsequent programs. Other uses of the authority have occurred when performers use equipment for commercial purpose or obtain sales of commercial items produced as a result of the technology developments under the OT. The Government team should consult with their comptroller representative and legal counsel on the application of this provision, the disposition of the amount collected and whether support accounts have or can be established to capture the recovered funds.

6. Teaming

The research communities tend to be very collaborative, and Research OTs have the flexibility to accommodate a wide variety of teaming approaches. Generally, the Government does not want to dictate a certain teaming approach, unless the unique program or project requirements necessitate it. Instead, the Government's goal with OTs is to draw in a diversity of performers and solutions and let these performers organically form the team structure that works best for them. This may take the form of a prime/sub relationship, partnership, multi-party team, or any hybrids of these. The Government team should be open to all forms of teaming but certain team arrangements necessitate a little more due diligence and understanding of the team structure before the award is signed, specifically multi-party teams.

The internal structure of multi-party teams is governed by the members, but the Government needs to understand that structure to execute the OT award properly. This structure may take the form of a formal legal structure (i.e. incorporation or partnership) or they may be bound more informally but regardless, the team needs to have some legal agreement amongst themselves that governs their arrangement before the team can enter into the OT with the Government. These agreements are often called collaboration or teaming agreements, or articles of collaboration and set out the rights and responsibilities of each team member to the team. It binds the individual team members together, whereas the OT award binds the team, as a whole, to the Government. This teaming agreement should discuss all of the necessary aspects of the members' relationship. The Government team should understand the structure of the team, review its management plan for sound business approaches, and ensure the award is signed by all the members before the OT award is executed. The Government

is not a party to the teaming arrangement, however, and should not dictate terms or get involved in the internal negotiations within the team.

Each team approach has advantages and disadvantages for both the performing team and the Government. The Government team should be open to consider any teaming arrangement, but if a specific arrangement is necessary for a particular reason, the Government team must give adequate notice of this position in the solicitation. Such a circumstance should be rare.

E. Competition and Award

1. General Considerations

While OTs are not subject to the requirements of the Competition in Contracting Act or the DoDGARs, competition is desired whenever practicable, and competitive award processes should be the default position in most cases. Philosophically, utilizing a competitive process makes sense for a number of reasons. Competition provides the Government with options and encourages performers to keep the quality of their products high while keeping costs at a reasonable level. Competition is especially key in the OT environment as one of the main goals of OTs is to encourage and attract new participants and new technologies to the defense research and industrial base. Without advertising new opportunities widely to potential performers, how will the Government ever know what performers are working in the marketplace and what technologies, new and existing, are available as possible solutions? It is critical that the Government carefully consider how the competition will be conducted to attract maximum participation. With OTs, the Government team is free to create a competitive process that is efficient and can be targeted to the audience it is trying to attract. There are no standard procedures, time limitations or procedural requirements, but Research OT competitions are generally well-suited for merit-based competitive procedures. What is key to maintain in every OT competitive procedure is fairness and transparency.

While competition is preferred and should be the default in the OT environment, there is no prohibition against making a sole source award. The rationale for choosing to award without competition must be clearly documented, although there is no requirement for a formal justification and approval as is done under a Competition in Contracting Act competition or the DoDGARs.

2. Solicitation Methods

There are a wide variety of OT solicitation methodologies and practices that have been utilized with the heightened use of OTs. Government teams are free to use an existing or familiar methodology if it fits its circumstances but should not feel restricted to choose a path that others have already established. The Government team may determine that none of the existing options fit its situation and is free to create a new approach. One of the great flexibilities of the OT authority is this ability to come up with a new and innovative solicitation approach to address a current scenario.

Whether the Government team decides to use an existing approach or forge its own path, there are some common considerations that should be taken into account to maintain the fairness and transparency of the process. The solicitation should discuss whether the Government team will only be awarding Research OTs or if the OT is just one of many award options that the performer could request, pending Government approval. Many organizations use Broad Agency Announcements or Commercial Solutions Openings which can allow for a variety of award options, including OTs. Other solicitation approaches may limit the award vehicle to only OTs. It is important to be clear with industry what the award options will be so they may properly respond to the solicitation.

The solicitation should also discuss the statutory requirements of 10 U.S.C. 4021 – the Government team is looking for basic, applied, and advanced research solutions, that cost-sharing will generally be expected, and that any proposed research cannot duplicate research being done for another part of DoD. Any activities that will occur during the course of the solicitation process should be explained to give the potential proposers the opportunity to prepare. These activities can include, but are not limited to, requests for white papers or abstract, oral presentations, panel pitches, and technology demonstrations. New innovative solicitation options are being implemented by DoD organizations every day and the Government team should investigate the various approaches to determine what would work best for its situation. Whatever approach is selected, it should be tailored to the complexity and potential value of the problem set, as well as to industry norms.

Once the solicitation methodology is determined and the document is created, the Government team must determine how to effectively advertise the opportunity. There are no required advertising venues that must be used for Research OTs, but most organizations will opt to at least utilize standard Government publication options. The Government team should not stop there, however. In its quest to find new participants and new technologies, the team should consider how to maximize exposure of the problem set to relevant

technology providers, both traditional defense contractors and non-traditional or commercial sources, and the opportunity should be marketed through multiple avenues such as social media.

The evaluation process that the Government team intends to utilize to select proposals for award should also be clearly stated in the solicitation so that potential proposers understand how they need to respond and how selections will be made. Government teams are free to create their own evaluation processes and should not feel compelled to incorporate any traditional government evaluation methods unless it makes sense for the particular situation. Generally, the goal with OT solicitations is to be as efficient as possible and make the selection determination quickly so as not to delay award.

3. Selection and Negotiation

a. Selection Considerations

In OT competitive procedures, offerors with solutions that are most advantageous to the Government are typically selected for negotiation. Unlike traditional Government awards, the terms and conditions for the award of an OT may take considerable time to draft and negotiate as the proposed solutions, schedules, terms and conditions, and price are likely to vary significantly among competitors and there are no standard terms and conditions. It is not uncommon with an OT solicitation for multiple selections to be made. In cases where the Government team and a selected offeror cannot come to agreement, the Government may choose to negotiate with the next most advantageous offeror that was not initially selected for negotiation. The process and standards that will govern the selection should be clearly stated in the solicitation.

b. Negotiation

i. Price reasonableness

The Government team will likely be required to determine reasonableness of the total price to perform the research as supported by the award. In the OT environment, performers are not required to have Government-approved accounting systems and the Government should not expect the performer to change its accounting systems or practices to accommodate Government desires. The Government team may need additional data to establish price reasonableness, including commercial pricing data, market data, parametric data, or cost information. The AO should exhaust other means to establish price reasonableness before resorting to requesting cost information from the proposer. Key

areas of consideration in Research OTs will generally be direct labor, associated indirect costs and equipment.

The Government team can also use the principles of price analysis and value analysis to determine price reasonableness. Value analysis is useful particularly when proposers are providing substantial cost share.

ii. Common Award Terms and Conditions

It is the Government team's responsibility to ensure the terms and conditions negotiated in the award are appropriate for the particular program and provide for any expected future program needs. It is important to note that terms and conditions can evolve via modification as a project proceeds through multiple phases of technical maturity. The Government team may create any format for the agreement it prefers but should not use a traditional government contract format or government forms. There are many different sample OT agreements available from on-line sources to help the Government team get started. One such resource is DARPA's Acquisition Innovation website at https://acquisitioninnovation.darpa.mil.

While OT awards will vary, there are some common topics that most OTs will address in the terms and conditions.

- Program Vision – this will be a summary of the goals of the program, including a discussion of the program's purpose and objectives.
- Program Management – this should describe the relationship between the Government team and the performer as well as the overall technical and administrative management of the program.
- Funding – the award should state the total amount of funding available for the program, including any incremental funding, and the total period of performance. There should also be a description of the resource sharing allocation between the Government and the performer and within the performing team.

- Payment – the award should include a description of the payment methodology with instructions to the performers how, when and where to submit payment requests. For further guidance, reference as required Defense Pricing and Contracting Memorandum "Required and Recommended Use of eBusiness Tools Administering Other Transactions." The Government teams should leverage electronic invoicing procedures to make payments. The more common types of payment methodologies are discussed in Section 3.I of this Guide.
- Modifications – these are fairly common in OT awards, and the agreement should discuss how changes will be handled. The Government team should discuss whether or not it will have the option to make unilateral changes. Unilateral changes are uncommon in resource shared awards since they tend to more closely resemble commercial arrangements.
- Disputes – the award should address the basis and procedures for either party to raise a dispute and the process to resolve it. The Government team should seek to reduce the risk of costly litigation by negotiating a disputes provision which maximizes the use of alternative dispute resolution procedures when possible and appropriate.
- Termination – the award should describe the procedures for termination. In OTs where there is an apportionment of risk allocation and resource sharing, as is common in Research OTs, it could be appropriate to allow an awardee the right to terminate as well as reserving that right for the Government. This provision should identify the conditions that would permit terminations and include the procedures for notifying the other party and deciding termination settlements.
- Intellectual Property – the award should consider both patent and data rights in the context of the program goals. These considerations will include any likely commercialization of the research and balance the relative investments and risks borne by the parties in both the past development of the technology and in future development and maintenance of the technology. See Section J.2 of this Guide for more details.

- Physical Property – the award should discuss the handling and ownership interests in physical property. See Section J.1 of this Guide for more details.
- Flow-Down Provisions – the award should state which OT award provisions the awardee must flow down to any subawardees. In developing this negotiation position, the Government team should consider both the needs of the Government (i.e. audits) and the protections (i.e. IP) afforded to all participants. Generally, provisions such as intellectual property and foreign access are the more common provisions to require to flow-down.

Section 3 - Administration

F. Reporting

1. Performance Reporting

Effective performance reporting typically addresses cost, schedule, and technical progress. It compares the work accomplished and the actual cost to the work planned and the estimated cost and explains any variances. There is not a "one-size-fits-all" approach. The type of award, the complexity of the projects and the period of performance will factor into the decision by the AO and PM as to how much reporting is necessary. There could be little, if any, performance reporting required if the award price is fixed and financing is provided by fixed support payable milestones. Also, small dollar value efforts with short periods of performance may need little reporting. If, however, payments on the program will be made as expenditure-based or some other type of payment method that uses actual costs as the basis or if the program requires a complex technical solution, performance reporting should be considered.

The solicitation and resulting award should identify the frequency and type of performance reports necessary to support effective management. Typically, awards will have performance reporting done on a quarterly or semiannual basis, but more frequent reporting may be wise for complex programs. AOs should remember to leave sufficient time between reporting periods to allow performers to make progress on the effort. Asking for reports too frequently can be counter-productive and expensive for the Government. Any performance reporting should focus on progress made toward achieving the agreement's performance goals, including issues, problems and/or developments.

The Government team should consider whether reports required of the Research OT awardee are important enough to warrant establishment of line items or separate

payable milestones. Research OTs using the payable milestone payment method will often have report submission tied to milestone events for convenience and ease of evaluation. There is no specific requirement for a final report under a Research OT, but it is a good practice to require one at the end of the effort. AOs should retain a copy of the final report in the award file and a copy should be sent to the Defense Technical Information Center (DTIC). This submission can be done by the Government or the agreement can specify that the submission to DTIC is to be made directly by the performer.

2. Required DoD Reporting

In addition, the Government team must record Research OTs in the Financial Assistance Award Data Collection (FAADC), which is part of the Federal Procurement Data System – Next Generation (FPDS-NG). Research OTs must identify the 9th position of the award number as a "3". The other positions of the award number and modifications will be assigned the same as procurement contracts, or grants and cooperative agreements.

G. Financial Management Systems

The general policy for Research OTs is to avoid requirements that would force participants to use different financial management systems than they currently use in their ordinary course of business. An acceptable system should follow recognized accounting principles, such as generally accepted accounting principles (GAAP), and should maintain funds to ensure full accountability for the federal funds received. In addition, the system will have complete, accurate, and current records that document the source of funds and the purposes for which they were disbursed. The Research OT agreement should stipulate that Federal funds and the performer's resource-shared amount, if any, are to be used for costs that a reasonable and prudent person would incur in carrying out the project and are being used for purposes permitted by the agreement.

H. Audit

In general, with Research OTs, audits and access to financial records are subject to negotiation. In most cases, fixed support awards should not require any type of audit provision. When audits may be necessary or prudent, the Government team has the flexibility to use internal Government auditors, if appropriate, or outside independent auditors in circumstances where the performer is unwilling to give Government auditors access to its financial accounting systems. If an independent auditor is used, generally the performer would pay for the cost of the audit.

I. Payments

1. **Advance Payments**

   Advanced payments are specifically allowed in Research OTs under 10 U.S.C. 4021(c). The Government team should exercise good business judgement when determining if and when to allow advanced payments. Some examples in which advance payments may be beneficial include reducing the financial burden on the performer for large, up-front expenditures or long-lead items and ensuring adequate cash flow for small companies. Advanced payments may be used in awards utilizing either fixed support or expenditure-based payments or payable milestones.

   If advanced payments are given, the performer is required to maintain any amounts received in excess of need in an interest-bearing account with the interest to be reimbursed to the Government. The performer is not required to maintain this account if the best reasonably available account would not be expected to earn interest in excess of $1000 per year or if the depository would require an average or minimum balance so high that it would not be feasible with the expected Federal and non-Federal cash resources for the program.

2. **Fixed support vs. Expenditure-Based Payment Approaches**

   Program payment structures are negotiable and should reflect the optimal payment option for the particular circumstances. The award must clearly identify the basis and procedures for payment. Generally, the initial consideration focuses on whether the payments will be made on fixed support basis or based on expenditures incurred by the performer. Both types of efforts may involve resource sharing and both may be functionally paid through payable milestones. Awards may also utilize hybrid options that include both types of payments.

   i. **Fixed support payment method**

      In a fixed support methodology, the performer will be paid a fixed amount of money to perform the agreed effort. This can be a risky payment methodology for the performer, so it is often reserved for lower dollar value efforts and/or shorter periods of performance. In addition, the performer must be confident in its estimate of the costs required to achieve well-defined outcomes. Outcomes in fixed support awards should reflect the amount of effort necessary to achieve them. Payments should not be based on the success of the technology, but on successful achievement of identified tasks.

   ii. **Expenditure-based payment method**

In an expenditure-based payment method, payments are based on actual expenses incurred by the performer over the course of the agreement. This methodology is used when the performer is unable to come up with a confident estimate of expenditures because of the inherent uncertainty involved in the program. Awards using expenditure-based payments are somewhat riskier for the Government team and will require a higher level of program oversight to ensure that costs remain within the established program budget. Performers who receive expenditure-based awards are not required to have approved Government accounting systems but may continue to use their existing financial management system as long as that system complies with GAAP and effectively controls all program funds, including Federal funds and any resource sharing. The agreement's terms and conditions should require the return of interest should excess cash balances occur.

3. Payable Milestones

The most common mechanism to make payments in Research OTs is through payable milestones. Payable milestones may be fixed support, expenditure-based, or a hybrid. Well-structured payable milestones will serve the dual purpose of meeting the cash flow needs of the performer and as a management tool to verify observable achievements on the critical path to program success. Payable milestones are jointly identified and priced by the parties at the time of award and may be adjusted as the program progresses in response to changing circumstances. What will remain constant is that the upcoming milestone is paid at its agreed value if accomplished, regardless of expenditures. Milestones are adjusted prospectively, not retroactively. Also key to the success of this payment method is that, if the performer does not achieve the milestone objective, the Government does not pay and the parties will be forced to meet to analyze the circumstances and determine the path forward, if any. This mechanism of paying only for successful performance helps ensure that both parties are addressing issues as they occur in real time and can serve to lessen the risk to the Government in expenditure-based arrangements.

Payable milestone structures can vary widely, depending on the inherent nature of the award and as such, may be non-consecutive; conditional; contingency-based; incrementally funded; or designed in any other manner, or combination of manners, that are appropriate under the circumstances of the individual effort. The AO and PM must assess the reasonableness of the observable event and estimated amount for each milestone and determine

the appropriate amount of resource sharing at each milestone. The milestone amounts do not have to be proportional or identical in either payments or resource sharing. For example, initial milestones might have a larger Federal share if a project involves a start-up company with limited resources. What is important is that the aggregate percentage of resource sharing of each party is achieved by the last milestone.

Finally, the use of payable milestones is not required, but is encouraged as a best practice. Agencies are free to craft any other type of payment mechanism that is agreeable to both parties and ensures that the agreement effort is achieved within budget.

4. Financial Reporting

The Government team should be sure to require sufficient financial reports during the course of the award to effectively monitor expenditures. Fixed support awards will likely need little, if any, financial reporting, whereas expenditure-based awards will need more frequent, detailed reporting. If the payable milestone methodology is used in the award, it is efficient and effective to tie the submission of financial reports to specific payable milestones. This will allow the Government team to have sufficient information to determine if future payable milestones should be adjusted and negotiate the changed circumstances. The format and content of the financial reporting should be negotiated by the parties.

J. Property

1. Physical Property

The Government is not required to, and generally should not, take title to physical property acquired or produced by a performer in an OT, except property that the agreement identifies as a deliverable. In deciding whether or not to take title to physical property under a Research OT, the Government should consider whether known or future efforts may benefit by Government ownership of the property. In general, performers should use their own funds to acquire property necessary for performance; however, it is permissible for program funds to be used. If program funds are used for acquisition, the Government will have an ownership interest in the property at the end of the agreement and will participate in any disposition.

If the Government takes title to property or furnishes to the performing team Government-owned property, then management of the property is subject to the Federal Property and Administrative Services Act, and, at a minimum, the award terms should include the following:

- A list of property to which the Government will obtain title and when title will transfer to the Government
    - Whether the performer or the Government is responsible for maintenance, repair or replacement;
    - Whether the performer or the Government is liable for loss, theft, destruction of, or damage to the property; or
    - Whether the performer or the Government is liable for loss or damage as a result of use of the property
- The procedures for accounting for, controlling, and disposing of the property. Generally, when the performer is a company that does not traditionally do business with the Government, the performer's commercial property control system should be used to account for the government property.
- When the government provides property to an OT awardee for performance of that OT the GFP Module and the Component's accountable property system is required. (see Defense Pricing and Contracting Memorandum "Required and Recommended Use of eBusiness Tools Administering Other Transactions").
- What guarantees (if any) the Government makes regarding the property's suitability for its intended use, the condition in which the property should be returned, and any limitations on how or the time the property may be used; and
- A list of the property the Government will furnish for the performance of the agreement

When a member of the performing team has title to property, the value of that property will be factored into the team's resource share amount. The performer and the Government should agree on the method for determining the value of the property and how the property will be handled at the end of the agreement.

2. Intellectual property

Intellectual property rights will be a key aspect of negotiations on any Research OT and will probably be the aspect of the award negotiations that will take the most time and be the most complex. One of the main advantages of all types of OTs is that intellectual property rights are fully

negotiable. OTs are not subject to the statutory regimes of the Bayh-Dole Act (35 U.S.C. 201-204) for patentable inventions or 10 U.S.C. 3771 for technical data, as most other DoD award instruments are. It is helpful for the Government team to have a baseline working knowledge of these traditional regimes, but the Government team must also understand the typical handling of intellectual property (IP) rights in the private sector.

The negotiated IP clause should take into account the program goals, including any likely commercialization of the research, and balance the relative investments and risks borne by the parties in both past development of the technology and in future development and maintenance of the technology. By establishing the short-term and long-term needs and plans of both parties, a tailored IP approach can be more easily determined and factored into the Government's IP negotiation strategy.

Because knowledge of complex IP issues is not generally a core skill set of AOs, it is important for the Government team to include the necessary experts to assist in the formulation of the Government's IP position and in negotiation. At a minimum, inclusion of agency legal experts will be key, but it is also important to include the Program Manager or technical experts. Generally, AOs and agency attorneys are not technical experts, and it is key that the technical experts assist in identifying the important IP that will come out of the award and what IP rights are necessary for the Government to retain to facilitate its future needs. The strategy should take into account any Government-owned IP that will be used in the program; any pre-existing proprietary IP the performer will use in the program; and IP that may be created under the award. All pre-existing IP, both the Government's and the performer's, should be marked to give notice of its status.

Because Research OTs can involve significant resource sharing by the performer, the Government team must take this investment into account when negotiating IP. The facts and circumstances of each Research OT can vary greatly and must be considered during negotiation. The Government team's goal is to find a good balance between DoD and performer interests. The DoD's interests are generally in gaining access to the best technologies in the marketplace for defense needs and providing adequate protection of DoD's investment. At the same time, one objective of Research OTs is to help incorporate defense requirements into the development of what ultimately will be commercially available technologies, an objective that is best served by reducing barriers to

commercial firms' participation in the research. This objective may be impeded by attempting to negotiate for the Government excessive or unnecessary IP rights, especially when the performer's investment has been or will be substantial or when the Government's right would inhibit commercialization. Finding a fair balance is key, especially since enticing and encouraging the involvement of commercial industry in Government programs is another important objective of Research OTs. See Appendix C for a detailed discussion of additional IP negotiation considerations.

K. Foreign Access

While a key goal of Research OTs is to encourage commercial industry to participate in Government technology development programs, there is a legitimate concern about foreign participation in such programs and how that participation could compromise defense needs and national security. Such concerns must be balanced with the reality that most commercial businesses, especially larger companies, rely on global markets and a geographically diverse workforce for success. It is important that the Government team consider how foreign participation in the Research OT should be handled as early in the planning stages as possible.

While Research OTs are exempt from the majority of acquisition and assistance statutes and regulations, they are not exempt from the U.S. export laws, regulations and policies (*e.g.* the International Traffic in Arms Regulations at 22 CFR parts 120-130; the DoD Industrial Security Regulations at DoD 5220.22R; and the Department of Commerce Export Regulations at 15 CFR parts 730-774, as applicable). In addition to these laws and regulations, the Government team should consider whether access by foreign entities or persons will endanger the defense needs and goals of the program. In many programs, one goal may be to create domestic manufacturing capability for a key technology or product. The Government team should determine whether foreign participation restrictions will help achieve this goal and, if so, how long those restrictions should be in place. Performers should be given notice of any restrictions in the solicitation so they can make necessary business decisions. Such restrictions will often survive past the period of performance and the Government team should describe in the agreement any procedures for enforcement and consideration of exemptions that may arise.

Certain foreign firms have been determined to be too great a threat to national defense to be used by any industry partner either in a deliverable or in their internal infrastructure. Similarly, some guidance prohibits awarding funds to specific prohibited foreign organizations. See Appendix E for recent guidance.

L. Agreement Administration

Awarding AOs can choose to retain Research OTs for administration or request administration assistance from the Defense Contracts Management Agency (DCMA) or the Office of Naval Research as specified in DoDGARS. Depending on the AO's choice, the administration functions and responsibilities will be performed in accordance with the administrating agency's applicable internal guidance.

M. Agreement Closeout

Research OT closeout activities should occur in accordance with the awarding agency's procedures, taking into account special areas of concerns, such as any audit requirements, resource sharing, payments, property, IP and reporting. While there are no specific closeout requirements for Research OTs, the general closeout steps that apply to any contractual agreement should be considered –

- Is the award effort complete?
- Have all deliverables been delivered?
- Have all required reports been received?
- Have all disputes or outstanding agreement issues been resolved?
- Has any property belonging to the Government been returned?
- Have all payments been made to the performer?

Appendix A – Glossary

Agreement. The mutually agreed terms and conditions of the parties to an OT. Absent exceptional circumstances, it will take the form of a legally binding written instrument.

Agreements Officer (AO). A warranted individual with authority to enter into, administer, or terminate OTs. To be appointed as an AO, the individual must possess a level of responsibility, business acumen, and judgment that enables them to operate in the relatively unstructured environment of OTs. AOs need not be Contracting Officers, unless required by the Component's appointment process.

Awardee. Any responsible entity that is a signatory to an OT agreement. A *sub-awardee* is any responsible entity performing effort under the OT agreement, other than the awardee.

Broad Agency Announcement (BAA). A BAA is a general solicitation as defined at 10 U.S.C. 3064. BAAs should only be used to solicit for research and development when the Government reserves the right to award a contract or another type of agreement, such as a grant, cooperative agreement, or other transaction. This must be clearly articulated in the solicitation.

Computer software. Computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

Dual Use. Items or research that have both civilian and military applications

Expenditure-Based OT. Agreements where payments are exclusively or primarily based on amounts generated from the awardee's financial or cost records.

Fixed-support OT. Agreements where the primary method of payment is not based on amounts generated from the awardee's financial or cost records, including agreements where the price is fixed against established milestones and/or estimated level-of-effort.

Non-traditional Defense contractor (NDC). An entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by DoD for the procurement or transaction, any contract or subcontract for the DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section (see 10 U.S.C. 3014).

Note: Per the statutory definition, NDCs are all entities that have not performed under a narrowly defined set of circumstances within one year of solicitation of

the current OT opportunity. In order for an entity to not qualify for NDC status, it would need to meet all elements of the prescribed definition within that time period. This includes performance of a DoD contract or subcontract subject to full cost accounting standards (CAS) coverage within one year prior to solicitation of the current OT opportunity. The effect of this narrow definition, is that a large number of entities will fall into the NDC category, including nearly all small business concerns, and even those firms that work exclusively with DoD. This is in part due to the exemptions to CAS coverage under 41 U.S.C. § 1502 and FAR Part 30, which exempt commercial contracts, Firm Fixed Price contracts based on adequate price competition, and any contract or subcontract with a small business concern, amongst other exemptions. Further, even where an entity is not outright exempt from CAS coverage, the entity may not have been subject to "full" CAS coverage. This is because full CAS coverage only applies to firms that receive a single CAS-covered contract award of $50 million or more; or received $50 million or more in net CAS-covered awards during its preceding cost accounting period.

Procurement contract. A contract awarded pursuant to the Federal Acquisition Regulation.

State of the Art. The highest level of general development, as of a device, technique, or scientific field achieved at a particular time.

Technical data. Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

Appendix B – Other Transaction Authority Comparison Table

A comparison of Research, Prototype, and Production OTs

Research OT	Prototype OT
Applicability:	
▪ Basic, applied, and advanced research	▪ Prototype Project ▪ Directly relevant to enhancing mission effectiveness of military personnel, supporting platform, systems, components, or materials to be acquired by DoD, or improvements thereto
Conditions for Use:	
▪ No duplications of research to maximum extent practicable (generally non-issue) ▪ 50/50 Cost Share to the extent practicable ▪ Competition to maximum extent practicable	▪ All participants small or non-traditional; **or** ▪ At least one non-traditional defense contractor or non-profit research institution must participate to a significant extent in the prototype project; **or** ▪ At least 1/3 of total costs must be paid by parties to the OT other than the Government; **or** ▪ Senior procurement executive for the Agency determines, in writing, that exceptional circumstances justify the use of an OT ▪ Cost share not required (if non-traditional contractor participates); fee/profit negotiable ▪ Competitive procedures to maximum extent practicable
Production OT	
▪ Follow-on contract or transaction may be awarded without the use of competitive procedures if: o Competitive procedures were used in the Prototype OT, and o The prototype project in the transaction was "successfully completed"	

***Note**: "practicable" and "maximum extent practicable." If cost sharing aids in pushing the project forward, it is practicable. If it proves an obstacle, it is not.*

Appendix C – Intellectual Property (IP) Considerations

1. Negotiation.

In negotiating IP under an OT, it is a best practice for the Government and performer to identify the short-term and long-term needs of the parties. By doing this exercise initially, a tailored IP scheme can more easily be determined and factored into the Government's IP negotiation strategy.

Tailored IP terms may include, but are not limited to: royalty provisions, limited licenses (Scope, Duration, Manner), options, conditions, right-of-first refusal, and exclusive dealing terms, amongst others.

The negotiated IP terms and conditions should facilitate all parties' business plans and project goals and balance the relative investments and risks borne by the parties both in past development of the technology and in future development and maintenance of the technology. The AO should consider the effect of other forms of IP (*e.g.*, trademarks, registered vessel hulls, etc.), that may impact the acquisition strategy for the technology.

Where the project goals call for reliance on the commercial marketplace to produce, maintain, modify, or upgrade the technology, there may be a reduced need for rights in IP for those purposes. *However, since the government tends to use technology well past the norm in the commercial marketplace, the AO should consider the long-term maintenance and support of the technology when the technology is no longer supported by the commercial market and consider obtaining at no additional cost a license sufficient to address the Government's long term needs to the technology*.

2. Agreements Officer Responsibilities

It is important that the AO be familiar with IP rights under the Bayh-Dole Act (35 U.S.C. §201-204) for patents and 10 U.S.C. §2320-21 for technical data; however, these statutes do not apply to OTs and **negotiation of rights of a different scope is permissible and encouraged**. At a minimum, the AO should ensure that the award addresses the following:

a. **Disputes:** Disputes clauses included in the award can accommodate specialized disputes arising under the IP clauses, such as the exercise of IP march-in rights or the validation of restrictions on technical data or computer software.

b. **Flow-down:** Determine whether it is necessary that the IP clauses applicable to the awardee flow down to subawardees, including whether to allow other subawardees to submit any applicable IP licenses directly to the Government.

c. **Licensing:** Consider restricting awardees from licensing technology developed under the OT to domestic or foreign firms under circumstances that would hinder potential domestic manufacture or use of the technology.

d. **Export:** Be aware that export restrictions prohibit awardees from disclosing or licensing certain technology to foreign firms.

e. **Additional rights:** Consider including in the IP clauses any additional rights available to the Government in the case of inability or refusal of the private party or team to continue to perform.

f. **Time based:** It may also be appropriate to consider negotiating time periods after which the Government will automatically obtain greater rights (for example, if the original negotiated rights limited government's rights for a specified period of time to permit commercialization of the technology).

g. **Patents:** Negotiate a patents rights clause necessary to accomplish program objectives and foster the Government's interest while balancing the needs of the performer. In determining what represents a reasonable arrangement under the circumstances, the AO should consider the Government's needs for patents and patent rights to use the developed technology, or what other IP rights will be needed should the award provide for trade secret protection instead of patent protection.

h. **Trade Secret Protection:** Consider allowing subject inventions to remain trade secrets as long as the Government's interest in the continued use of the technology is protected. In making this evaluation, the AO should consider whether allowing the technology to remain a trade secret creates an unacceptable risk of a third party patenting the same technology, the Government's right to utilize this technology with third parties, and whether there are available means to mitigate these risks outside of requiring patent protection.

i. **Software data rights:** Refers to a combined copyright, know-how, and/or trade secret license that defines the Government's ability to use, reproduce, modify, release, and disclose technical data and computer software. The focus of license negotiations often centers on the Government's ability to release or disclose outside the Government. In addition, computer software licenses require additional consideration because restrictions may impact the Government's use, maintenance, and upgrade of computer software used as an operational element of the prototype technology. The OT should typically address definitions, allocation of rights, delivery requirements, and restrictive legends. The OT should account for certain emergency or special circumstances in which the government may need additional rights, such as the need to disclose technical data or computer software for emergency repair or overhaul.

j. **Commercial data:** The AO should consider commercial technical data and commercial computer software. The government typically does not need extensive rights in commercial technical data and software. However, depending on the project scope and goals, the Government may need to negotiate for greater rights in order to utilize the developed technology.

k. **Cyber Incident Reporting:** Ensure the company is properly protecting data and compliant with specific government reporting procedures in the event government data is compromised.

l. **Authorization and Consent:** Authorization and consent policies provide that work by an awardee under an award may not be enjoined by reason of patent infringement and shifts liability for such infringement to the government (see 28

U.S.C. 1498). The government's liability for damages in any such suit may, however, ultimately be borne by the awardee in accordance with the terms of a patent indemnity clause. The agreement should not include an authorization and consent clause when both complete performance and delivery are outside the United States, its possessions, and Puerto Rico.

m. **Notice and Assistance:** Notice policy requires the awardee to notify the AO of all claims of infringement that come to the awardee's attention in connection with performing the agreement. Assistance policy requires the Awardee, when requested, to assist the Government with any evidence and information in its possession in connection with any suit against the government, or any claims against the Government made before suit has been instituted that alleges patent or copyright infringement arising out of performance under the agreement.

n. **Indemnity:** Indemnity clauses mitigate the government's risk of cost increases caused by infringement of a third-party owned patent. Such a clause may be appropriate if the supplies or services used in the prototype technology developed under the agreement normally are or have been sold or offered for sale to the public in the commercial open market, either with or without modifications. In addition, where trade secret protection is allowed in lieu of patent protection for patentable subject inventions, a perpetual patent indemnity clause might be considered as a mechanism for mitigating risks. The award should not include a clause whereby the government expressly agrees to indemnify the awardee against liability for infringement.