OTAs: The 3 Crucial Terms and Conditions to Negotiate
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Freedom from the shackles of the FAR is one of the most appealing aspects of an Other Transaction Agreement for both the contractor and the Agreement Officer. So who would advocate loading these agreements back up with terms and conditions? Successful contractors like 3M and Halliburton for starters.

The reason: removing FAR clauses often negates contractor protections that are inherent in government work, and can create differing expectations on the part of the contractor and the agreement officer. The key to offsetting this problem is knowing what, when and how to negotiate favorable terms and conditions into your OTA. Not only does it facilitate a smooth transaction, a well-executed OTA can help you leverage your success for a follow-on contract.

Here are 3 crucial areas to get written agreement on prior to signing on the dotted line – and don't forget to flow them down in any sub-agreements:

1. Inventions, proprietary and technical data. Clarify how patent rights will be disclosed, described and declared. Traditional technology contracts often require monthly reports to the Contracting Officer or the filing of a DD Form 822 to declare contractor rights to inventions. In the absence of these requirements, your invention could be fair game. Have a solid understanding of what type of documentation will be sufficient to preserve your rights, get it in writing, and follow through. Also, make sure your OTA:

- Puts limits on the "Government Purpose License" - traditional contracts involving technical data usually include a clause that, for a period of time, allows disclosure only for government purposes. After that, the government assumes unlimited rights to use the data to encourage commercialization of government technology (DFARS 227). Minnesota-based 3M Co., works with the CO in advance to limit what the agency can disclose both for government purposes and commercially, says Richard Kuyath, general counsel.
- Specifies no "March-in-Rights" - This government entitlement is incorporated into traditional contracts - not always spelled out - with the clause at FAR 52.227-11-13 (Patent Rights). Typically, if you have a patentable invention you haven't commercialized within a reasonable time frame, the government can license it to a third party if they pay you a royalty, says Kuyath. The agency sets the time and payment terms and could give your technology to your competitor.

2. Payment terms. OTAs often deal with new technologies, and it is very hard to bring your technology to market without a positive cash-flow, so make sure you negotiate favorable payment terms, warns Bob Sherry, partner, Krikpatrick & Lockhart, LLP, San Francisco, Calif. For example, renegotiate the typical share-in-cost savings contracts, where typically you would need to produce results before you get paid, to tag more

frequent payments to identifiable deliverables. Figure out what you reasonably need up front to sustain operations and make sure the agreement supports this.

Don't forget to negotiate a termination liability schedule into every agreement so you can recover costs in the case of a cancellation, says cost accounting expert William Walter, director of compliance, Halliburton KBR. Set a fee schedule that holds the agency to terms such as "if you terminate after one month you owe me X...two months, X...etc..." Don't forget equipment and other costs you want to recoup in your figures.

3. Audits. To woo more innovative commercial contractors into the government market, OTs have traditionally been off limits to the auditors. But audit authority is creeping back into some areas of the OT market. For example, DoD now pushes for audits on cost-type agreements and subagremeents exceeding $5 million – about 22% of the OTs accounting for 89% of the dollars. But there are ways to avoid opening your books to the government

- **Understand the thresholds**. Agreements officers can make the determination as to whether an audit is necessary or not. If your agreement is under $5 million, make sure you get agreement there will be no audit. If you can't, try to renegotiate the agreement to stay under $5 million, says Holly Emrick Svetz, attorney with Morrison & Foerster in Washington, D.C
- **Ensure audits performed by an Independent Public Accountant (IPA) will be acceptable.** Always choose an IPA that follows the Generally Accepted Government Auditing Standards (GAGAS). If there is evidence GAGAS was not followed, the government will be granted access to the IPA's work papers.
- **Make the case for a waiver**. If the audit requirement would prevent you from incorporating a necessary commercial technology into the project or executing the end result of the project, the AO can grant a waiver. To make the AOs job easier, prepare the waiver justification yourself, incorporating arguments from your sub-agreement partners as well, suggests Svetz.