

**DARPA Electronics Resurgence Initiative
Page 3 Investments
TIA Model Companion Guide**

When are OTs used?

Companies and organizations that do not often do business with the Government but have or are conducting research on technology that could have Department of Defense (DoD) applications are ideal candidates for Other Transactions (OTs). Other entities, such as traditional defense contractors or universities, may also benefit from the use of OTs as an award vehicle under circumstances detailed below.

The two most common types of OTs are Technology Investment Agreements (TIAs) and Other Transactions for Prototypes (OTs for Prototypes). TIAs are typically used when the primary goal of the agreement is to perform a research effort, even if items are required to be created to test the credibility of the research, commonly referred to as dual-use research; this is the most likely type of OT that will be used for the DARPA Electronics Resurgence Initiative (ERI) Page 3 Investments. OTs for Prototypes are used when the main focus of the agreement is to create a prototype (although not as likely to be the type of OT used for ERI Page 3, it can still be used – the choice of instrument type is made by the Contracting Officer during negotiations based on the unique situation at hand).

How are OTs different from FAR-based procurement contracts or grants and cooperative agreements?

FAR-based procurement contracts are governed by the Federal Acquisition Regulation (FAR) and the DoD supplement (DFARS); these awards include standard FAR and DFARS clauses and are subject to the FAR cost accounting standards.

Grants and cooperative agreements are governed by the cost principles and requirements in 2 C.F.R. 200 and any subsequent DoD regulation and DARPA specific terms and conditions, which will be included in all awards.

OTs are not subject to the FAR or applicable grant and cooperative agreement regulations, and the clauses in OT awards can be negotiated between the awardee and the Government. Further, OT awardees are not subject to the FAR cost accounting standards.

TIAs

Because a TIA is not considered a procurement instrument, it is not subject to procurement regulations, such as the FAR or any of its supplements. Instead, TIAs are used in accordance with 10 U.S.C. § 2371 and Part 37 of the DoD Grant and Agreement Regulations (DoDGARs). TIAs are assistance instruments used to stimulate or support research designed to:

(a) reduce barriers to commercial firms participating in defense research, to give the DoD access to the broadest possible technology and industrial base; (b) promote new relationships among performers in both the defense and commercial sectors of that technology and industrial base; and (c) stimulate performers to develop, use, and disseminate improved performance and contracting practices. As a matter of DoD policy, a TIA may be awarded only when one or more for-profit firms are to be involved either in the: (1) performance of the research project; or (2) the commercial application of the research results (i.e., commercial transition partner). In addition, the statute requires that, to the maximum extent practicable, the non-Federal parties carrying out a research project under a TIA are to provide at least half of the costs of the project. This statutory cost-sharing requirement is not absolute but Performers having legitimate issues with the cost-sharing requirement should include clear and specific rationale for lessening this requirement in their proposal keeping in mind the overall program goals and objectives (to include the Performers level of commitment and contribution to the overall program goals and objectives). Generally Accepted Accounting Principles (GAAP) apply rather than the FAR or DFARS cost principles or cost accounting standards. However this is only a requirement in cases where a fixed price payable milestone agreement is not used (the ERI Page 3 TIA “Model” has been developed assuming use of a fixed price payable milestone type agreement and, as such, there are no cost accounting standards or financial reporting requirements).

It is important to note that the ERI Page 3 TIA Model assumes the standard prime/subcontractor relationship among proposal team members. It is also possible to structure a TIA as a formal consortium arrangement – where the proposal team members are operating more as equals (but with one taking the lead for administrative purposes). Such Consortium TIAs typically include an additional attachment that referred to as the “Articles of Collaboration” (the ground rules agreed to amongst the team members regarding roles and responsibilities, IP, payments, etc.). This may prove beneficial when forming teaming relationships with organizations who are not interested in being one level removed from the Government, or under a standard prime/subcontractor relationship (especially if there is no agreement on who would serve as the prime contractor), or if the team simply feels such an arrangement best suits the overall project goals and objectives. An “Articles of Collaboration” Model is not available for review since this is specific to each team and project. A proposer (team) wishing to propose such an instrument need only clearly articulate this in their proposal and the details will be arranged during negotiation (if the subject proposal is selected).

More information regarding instrument types, including information pertaining to OTs for Prototypes, can be found at <https://www.darpa.mil/work-with-us/contract-management#OtherTransactions>.

The ERI Page 3 TIA Model

The ERI Page 3 TIA Model is provided solely so potential proposers gain a general understanding of the terms and conditions typically found in such an award instrument. The Model is not intended to be a first draft of the agreement as the Agreements Officer may choose to make changes prior to presenting a first draft of the agreement for review and comment/edit by the proposer. Such changes may include revisions to the Data Rights section of the Intellectual Property article (such as inputting information in the fill-in sections, or adding/deleting defined terms) based on discussions between the parties that will start after proposal selection. This is typically during the Informal Feedback Session, and continue through finalization of the Task Description Document (TDD) (OT version of a Statement of Work) and Payable Milestone Plan (Agreement Attachment 3). Every project, proposal (to include the amount of cost share involved), and proposer are Because of these realities, negotiation of each OT is unique and will take time (how much time is most often driven by the nature of the proposer – i.e., how many edits to the first draft of the agreement are requested). When negotiating an OT, one of the key components to minimizing the time to negotiate the agreement terms and conditions (especially those associated with Intellectual Property) is finalizing the TDD and Payable Milestone Plan. This is a process that will be conducted primarily by the DARPA Program Manager (PM) and the Proposer Principal Investigator (PI) along with the Agreement Officer's Representative (a technical subject matter expert/representative from one of DARPA's DoD transition partners). The OT negotiation is significantly easier for the Agreements Officer and the proposer's Contracting/Legal staff when there is agreement between the DARPA PM and the Proposer PI regarding the scope of work. The primary focus being, in this context, what data is being delivered to the Government and what the Government intends to do with each item of data (during and after the project). Disagreement between the DARPA PM and Proposer PI on such an important element of the project when the terms and conditions of the OT itself are being negotiated will most certainly increase the time it takes to finalize the OT and make award. The Performers can jump start this process by following the proposal preparation instructions provided in the BAA. This includes developing an articulate first draft TDD and Payable Milestone Plan (understanding that the Government will need an adequate level of rights to data deliverables in order to carry out the ERI Page 3 program goals and objectives, to include technology transition as stipulated in each of the program BAAs, allowing for a reasonable return on our investment).

It is important to note that the purpose of the OT is not to serve as a commercial license. It is intended to set forth the legal terms and conditions by which the parties will be bound during conduct of the subject research project and their obligations thereafter. Requesting that the Performer's standard license arrangement (terms and conditions) be used in place of the OT (terms and conditions) will not be accepted – the OT is solely for research projects (not for licensing of technology).

Narrative Explanation of Key OT Articles, Attachments, and Associated Performer Fill-ins

Article I: Scope of Agreement

Subparagraph A, Background

Unlike the background section in the TDD (Attachment 1 of the agreement), this background section is meant to succinctly articulate the overall goals/objectives and importance of the project to both the DoD and the Performer, given its dual-use nature, so that the rationale for the program/agreement is clearly understood by non-technical individuals. Some of this discussion typically comes directly from the Performer's technical proposal, while some may need to be original based on negotiations. During negotiations, the Agreement's Officer will request that the performer input the initial draft of this section after which the DARPA PM, Agreement Officer's Representative, and the Agreements Officer will edit as necessary. It is noted that the questions provided in the Model are simply a guide and are not intended to be answered directly. Instead, the narrative should be a seamless discussion that touches on such issues. On average, this section is typically between a half to full page in length depending on the complexity of the project and the intended uses of the resulting technology by the Performer and the DoD.

Disputes Clause

The standard OT disputes clause is a form of alternative dispute resolution (ADR). Traditional Government procurement contracts have a formal disputes process that is driven by statute and can be complex and time-consuming. In drafting the OT language, the intention is to have OTs mirror common commercial practice when handling disputes. There are a multitude of common ADR tools and methods, including mediation and arbitration. The standard OT disputes process is a three-tiered administrative process and the goal is to resolve the issue at an administrative level and avoid a more protracted and expensive legal action.

The process begins at the lowest level with joint discussions between the Performer and the AO. If these parties cannot come to resolution, it is elevated to senior leadership at the Agency and Performer who will review the information gathered at the lower tier, collect additional information, and have additional discussions. If resolution is not reached at the second level, it is elevated to the highest managerial levels within both parties. Ultimately, if a compromise cannot be reached at any level, the DARPA Director will make the final decision, which will end the administrative process. DARPA realizes that having the decision made this way is different from most commercial ADR procedures. This is due to Government restrictions, which generally does not agree to third party binding arbitration. The Government cannot have a non-Government entity make decisions that would affect federal funds. However, while the administrative process is closed with this decision process, this would not keep the Performer from being able to pursue an action in Federal court.

Intellectual Property

DARPA recognizes that intellectual property is an incredibly important and valuable asset to most Performers. The Performers may have made significant prior investment and complex commercialization plans which may be contemplated for the intellectual property that will be created under the OT. While DARPA is cognizant of those concerns, it must also protect the Government's investment and stake in the creation of the intellectual property. In most DARPA OTs, the Government is acting like an investor or partner and expects to receive some return for its investment like any investor. The goal with the OT provisions is to balance the needs of both parties so everyone can accomplish the program goals, now and in the future.

Historically, intellectual property has been a difficult negotiation in traditional Government contracts. The license rights the Government would receive was set by statute and the Government rarely chose to negotiate the standard data clauses. With OTs, all that is different. All aspects of intellectual property are negotiable and DARPA is open to discussing any and all intellectual property positions that will facilitate the program goals. In this, there are some important considerations to keep in mind:

- Each program, agreement, and Performer is different. DARPA's initial intellectual property position is tailored for the situation at hand and will be open-minded to the Performer's unique issues. DARPA avoids cookie-cutter approaches as much as possible.
- DARPA is investing significantly in the program and will generally expect to receive some level of license rights for its investment. What that level will be will depend on many factors, including the maturity of the technology; the commercial and military uses; the levels of investment by the Parties, both before and during the agreement. As a result, it is extremely unlikely that DARPA would ever agree to receive no rights at all.
- DARPA has included within its standard clause the option for the Performer to choose to protect its subject inventions as a trade secret instead by patent. This is a dramatic departure from traditional procurement contracts. DARPA does caution Performers who choose this option, however. DARPA will still expect a level of license rights in subject inventions protected as a trade secret and will be up to the Performer to assess whether providing the negotiated license to the Government would impact any later secrecy argument they may have to defend.
- In the vast majority of negotiations, the Performer will retain all commercial rights to the intellectual property and DARPA wants the Performer to be as successful as possible in future business endeavors. However, DARPA has an obligation to U.S. taxpayers to ensure that the Government investment is not wasted if the Performer chooses not to pursue the technology. To facilitate that, DARPA has included a clause that allows the Government to take action to ensure that the technology is utilized in very exceptional

circumstances. These circumstances are very unlikely and the Government's ability to take this action is narrowly proscribed.

- For those ERI Page 3 projects where the development of open-source software and/or data is a project goal/objective, the issue of data rights (rights to data/software developed under the project specifically for the US Government) would typically still apply. The open-source aspect of such a project is focused on public accessibility of the resulting software and/or data. Whereas, data rights is focused solely on the Government's use rights to the resulting software and/or data (to include, in some instances, access to such software/data by Government performers).

Foreign Access to Intellectual Property

In today's fast changing world, most companies must consider global implications and markets in order to remain viable and successful. DARPA recognizes this reality and understands that it is more common for companies today to have foreign subsidiaries, partners, vendors, and investors and those relationships are critical to growth and success. With that realization, however, comes the concurrent concern about the access foreign entities might get to technologies with critical military uses or implementations that have been developed, wholly or partially, with taxpayer investment. DARPA is part of the Department of Defense with a mission to help the U.S. military maintain capabilities and a level of superiority and must balance that with its complementary mission of supporting the advancement of science and technology.

To those ends, the standard DARPA OT contains a clause requiring Performers to notify DARPA when they intend to provide foreign access to intellectual property covered under the agreement and discuss the situation with the Government before the transfer occurs. This requirement is for a limited period of time and exempts certain standard business arrangements from the notification and discussion requirements. The goal of the clause is to give the Government greater awareness of foreign access to technology with potential military implications and allow the Parties the chance to talk about ways to effectuate the access while protecting the Government's interests.

For those ERI Page 3 projects where the development of open-source software and/or data is a project goal/objective it is very likely that material changes to the TIA Model Foreign Access to Technology article would be appropriate. In such instances, the negotiation would likely center on the extent to which any program technology would not be subject to open-source standards and ensuring these specific items/areas of technology are, as such, subject to foreign transfer controls.

Attachment 1 – Task Description Document (TDD)

This attachment is the same as a Statement of Work found in a standard FAR-based contract (it is referred to as a TDD for OTs). As noted in the Model, the TDD should include both program and project background sections that can be understood by a non-technical reader (if there are specific technical metrics they can be depicted in this section, by phase or technical area if necessary), a task description section that narratively describes each task to be performed (by Phase), and a deliverables section that

identifies all data and/or material deliverables (by Phase). Each data deliverable identified should include a general description of its content (this helps both the PM and PI from the project management perspective, as well as making the payable milestone acceptance process much easier to manage).

Attachment 3 – Schedule of Milestones and Payments

The Schedule of Milestones and Payments table will detail the list of milestones. Each milestone will mark the completion of a measurable event (i.e., completing a baseline execution plan, completing development of a part of the prototype, completing a test plan, completing production of the prototype, completing tape out of a design, completing fabrication of a design, completing and submitting the final report, etc.). Interim technical status reports are not appropriate as payable milestones (although as indicated above, the final report is typically included as part of the final payable milestone for either each phase or for the entire project – as applicable). The milestone description will show how the milestone will be demonstrably completed. There are generally two approaches to pricing a payable milestone (assuming a fixed price agreement, as this is the nature of the provided ERI Page 3 TIA Model): 1) pricing each milestone independently based on the estimated costs associated with its completion, or 2) pricing each milestone so that the amount captures all of the estimated project costs up through that point in time (or the time between two consecutive payable milestones). What should be avoided when pricing payable milestones is a situation where the payment amounts are imbalanced – such as when the amounts reflect a front-loading of the project costs/price (resulting in what is typically referred to as advanced payments). What should be avoided when defining the payable milestone descriptions and exit criteria is a situation where payment is tied specifically to meeting a technical metric - given that such metrics on a DARPA project are typically difficult to meet. Instead, as previously discussed, payable milestones descriptions and exit criteria should focus on the accomplishment of programmatic goals and objectives that show technical progress towards meeting the overall project goals and objectives (completing trades, completing a design, completing tape out of a design, fabrication of a design, testing and characterization of a design, etc.).