GUIDE

TO

OTHER TRANSACTIONS

August 2023

INTRODUCTION

The Infrastructure Investment and Jobs Act—also known as the Bipartisan Infrastructure Law (BIL)—and the Inflation Reduction Act (IRA) mandate investments in clean energy technology supply chains that will allow America to develop and manufacture the energy technologies of the future in the U.S., strengthening our competitiveness within a global clean energy market expected to reach $23 trillion by the end of the decade. Urgency is needed in deploying these funds to achieve the objectives of BIL. To encourage and support these innovative technologies and spur supply chain and job growth, we must also be innovative in the use of all authorities and resources available to the Department of Energy (DOE or Department).

On August 15, 2022, the Chief of Staff, Christopher Davis, issued a memorandum to Ingrid Kolb, Director, Office of Management, and Samuel Walsh, General Counsel, directing them to establish a Working Group (WG) on Innovative Funding Mechanisms in support of BIL and IRA. The WG was to have two sub-WGs—one on Other Transaction (OT) Authority and the second on Partnership Intermediary Agreements (PIA).

The OT sub-WG was charged with examining how, beyond Technology Investment Agreements (TIA), the Department can utilize the flexibilities provided by statute. The OT sub-WG was also charged with reviewing the capacity of and training needs for contracting officers. OT Authority provides DOE the ability to enter into agreements that are not contracts or financial assistance awards. OT Authority provides the potential flexibility to work with entities that otherwise do not perform work funded by DOE, as most of the statutory and regulatory requirements that are otherwise applicable to contracts and financial assistance agreements do not apply to OTs. OT authority offers DOE the ability to fund activities in support of its mission that may otherwise not occur.

This Guide to Other Transactions (OT Guide) is a reference document that provides a compilation of nonregulatory information and guidance related to the award and administration of OT agreements. This guidance is intended to help DOE Federal employees use OT Authority in funding mission activities. The OT Guide will be used in conjunction with the DOE Guide to Financial Assistance, the DOE Merit Review Guide and the DOE Acquisition Guide. None of the Guides, including this OT Guide create legal requirements or obligations between DOE and any third-party. The Guides are intended to provide support to DOE Federal employees involved in the award of contracts, financial assistance agreements and OT agreements. This Guide does not include any requirements for applicants or awardees of OT agreements.

The OT Guide will be maintained by the Office of Acquisition Management. Requests for additional assistance, questions or concerns on the guide will be emailed to DOE_OAPMPolicy@hq.doe.gov.

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Chapter 1 – General Information

1.1 Definition of OT

An Other Transaction (OT) is a legal agreement between DOE and a non-federal entity that is generally defined by what it is not – it is not a procurement contract or financial assistance agreement used by the federal government to obtain supplies and services or support a public purpose. An OT Agreement provides the flexibility to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments.

OT Agreements are not required to comply with the statutes and regulations that specifically govern contracts and financial assistance agreements. However, certain statutory requirements do apply to OT Agreements, particularly those tied to award and use of federal funding rather than particular agreement types. In addition, all OT Agreements must include those terms and conditions required to define the effort being funded and protect the right of the parties during and after the period of performance in cases of intellectual property, data protection and similar provisions."

1.2 DOE's OT Authority

DOE's OT authority is provided in two subsections of DOE's Organization Act, 42 U.S.C. 7256: subsection (a) General Authority, and subsection (g) Additional Authorities. The Advanced Research Projects Agency – Energy (ARPA-E) also has specific OT authorizing language in its organic statute (42 U.S.C. 16538(f)).[1]

42 U.S.C. 7256(a) is a General Authority for DOE to enter into contracts, leases, cooperative agreements or "other similar transactions," and to make payments to public or private entities as the Secretary "may deem to be necessary or appropriate to carry out functions now or hereafter vested in the Secretary."

42 U.S.C. 7256(g) (Additional Authorities) is also an other transaction authority directed specifically to research, development, and demonstration. This authority includes statutory limits on its use, but also authorizes increased flexibilities not available under (a) General Authority related to intellectual property and data protection. This authority provides, among other things, the statutory basis for Technology Investment Agreements (TIAs) (see 10 C.F.R. Part 603 for the TIA regulations).

OTs are a one award method, but not a substitute for good acquisition and financial assistance practices. This OT Guide is intended to facilitate the transparent, accountable, and appropriate implementation of

[1] ARPA-E's OT authority is separate and additional to the DOE authorities; ARPA-E may employ either DOE OT authorities or its own. ARPA-E may issue guidance specific to its OT authority and/or initiate pilot program(s), which will be separate from this OT Guide.

DOE's OT authority. Heads of Contracting Activities may provide supplemental procedures and requirements.

1.3 Purpose and Benefits of OT

OT provides the flexibility for the Department to adopt and incorporate business best practices that reflect commercial industry standards into its award instruments. Since the issuance of the TIA regulations to implement 42 USC 7256(g), DOE has entered into TIAs for research, development, and demonstration on rare occasions. However, DOE has not employed the full scope of its OT authorities. Expanded use of OT Agreements would allow the Department to better meet its historic mission objectives - providing a flexible tool that enables the Department and its counterparties to more closely align their interests. In addition, the Infrastructure, Investment, and Jobs Act of 2021 and the Inflation Reduction Act of 2022, among others, direct DOE to undertake wholly new and expanded mission areas and activities, particularly related to the deployment of clean energy technologies. OT agreements may be an appropriate tool for DOE to achieve such objectives. However, the use of traditional methods of procurement contracts and financial assistance agreements must be considered before using OT agreements.

Among other benefits, OTs can:

a. Foster new relationships and practices involving traditional and non-traditional entities, especially those that may not be interested in entering into FAR-based contracts or cooperative agreements/grants with the federal government;

b. Tailor agreement terms to meet the specific needs of the federal government and the non-federal entities;

c. Permit flexible, potentially quicker, and cheaper project design and execution;

d. Leverage commercial industry investment in technology development and partner with industry to ensure DOE requirements, including US manufacturing requirements, are incorporated into future technologies and products; and

e. Support innovative models to achieve DOE mission objectives.

1.4 History/Background

Congress established OT authorities at certain agencies to address circumstances where neither acquisition nor financial assistance would be appropriate and to provide the agencies with greater flexibility in partnering with the private sector, including small businesses. Those federal agencies could use their OT authority to reduce barriers—such as having to comply with federal cost accounting standards—that discourage some potential partners from doing business with the federal government and to enhance the federal government's ability to acquire and support cutting-edge science and

technology. This authority is generally considered to have originated in 1958 when Congress gave the National Aeronautics and Space Administration (NASA) the authority to enter into contracts, leases, cooperative agreements, or "other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate." Other notable OT authorities include the Congressional grant to DoD's Defense Advanced Research Projects Agency of OT authority for research projects in 1989. Congress extended that authority to include prototype development projects in 1993, and further extended the authority to DoD more generally. The Homeland Security Act of 2002 created the Department of Homeland Security and granted the agency the authority to establish a pilot program using OT authority to carry out both research and development and prototype projects. Other agencies also have OT authorities, including the National Institutes of Health.

There is no standard format or set of terms and conditions in OT agreements – which is quite different from conventional federal mechanisms, such as contracts or grants. As reported in a January 2016 GAO Report (GAO-16-209), officials from seven of 11 agencies interviewed told GAO that their various OT authorities allowed them to develop customized agreements that addressed concerns over requirements in traditional mechanisms that some companies viewed as potential obstacles to doing business with a federal agency. This flexibility to negotiate terms and conditions allowed agencies to address concerns regarding intellectual property and cost accounting provisions that would otherwise, by law, need to be included when using traditional mechanisms. In addition, OT agreements allowed some agencies to tailor other terms and conditions of agreements as needed rather than use the terms and conditions required under FAR-based procurements or 2 CFR part 200 financial assistance awards. Most agencies—nine of the 11—used OT agreements for RD&D activities for a range of projects from medical research to energy development research. Two of the nine agencies—DoD and DHS—also used OT agreements for prototype activities. Three agencies, including TSA and NASA, used OT agreements for activities not related to RD&D or prototype development, including airport security and education and outreach.

Although the extent and type of limitations or requirements laid out in the agencies' statutory OT authorities vary, seven agencies' authorities include specific limitations or requirements, including limitations on the types of projects and research for which the OT authority may be used. DoD's statutory authority lays out several requirements that must be met for RD&D and prototype projects carried out under OT agreements. Specifically, to use an OT agreement for a RD&D project, entities must, to the extent DoD determines practicable, fund half of the project, and the research being conducted must not duplicate any other ongoing DoD research. The statute also states that DoD can only use OT agreements for RD&D when traditional contracts, grants, and cooperative agreements are not feasible or appropriate. To use an OT agreement for a prototype project, DoD's statute originally required that the project must be directly relevant to weapons or weapon systems. DoD generally requires significant participation of a nontraditional contractor for prototype projects and states that if this requirement cannot be met, then an entity other than the Federal government must fund at least one-third of a project's total costs, or agency officials must document that exceptional circumstances justify the use of an OT agreement and that use of a contract is not feasible or appropriate.

1.5 Applicable Statutes and Regulations

Many statutes and regulations that apply to traditional contracts and financial assistance awards do not apply to OT agreements. However, be aware that certain statutes and regulations do apply to OT agreements. In particular, statutes such as the Civil Rights Act, Title IX of the Education Amendments of 1972, Age Discrimination Act of 1975, and the Americans with Disabilities Act apply as conditions to the receipt of federal funds. On the other hand, statutes such as the Competition in Contracting Act and the Small Business Administration Act do not apply to OT agreements. Regulations that do not apply to OT agreements include the Federal Acquisition Regulation, the Uniform Administrative Requirements, Cost Principals and Audit Requirements for Federal Awards, the Department of Energy Acquisition Regulation and DOE's Financial Assistance Regulation. See Appendix B for a list of some statutes that do not apply to OT agreements. A comprehensive list of applicable statutes is not possible. Some applicable statutes are include in Appendix B. The OT agreement may include a additional statutes. Note, however, that for TIAs, certain parts of DOE's Financial Assistance Regulations *do* apply, under 10 C.F.R. Part 603.

1.6 Functions and Responsibilities of Federal Staff

1.6.1 Senior Procurement Executive

DOE has designated two Senior Procurement Executives (SPE); one for National Nuclear Security Administration (NNSA) activities and one for non-NNSA activities. The SPEs are responsible for the overall quality and effectiveness of the of the acquisition, financial assistance, and OT functions within DOE. The SPE OT functions include:

- Publishing regulations and procedural guidance
- Assuring an efficient and effective OT process
- Developing OT training
- Providing advice and guidance regarding OT policies and procedures
- Authorizing OT actions that exceed the delegated authority of heads of contracting activities

1.6.2 Head of Contracting Activity

The head of the contracting activity (HCA) is the DOE official with senior management authority for the award and administration of acquisition, financial assistance agreements, and OT agreements in a DOE organizational element. The HCA is responsible for these OT functions:

- Overseeing the OT function within that activity and ensuring that agency policies and procedures are implemented

- Establishing review and approval levels for OT agreements
- Appointing Agreement Officers

1.6.3 Agreements Officer

An Agreements Officer (AO) is a warranted official of DOE authorized to execute OT agreements on behalf of DOE and is responsible for the business management and non-program aspects of the OT process. AOs are similar to Contracting Officers (COs) and Grants Officers (GOs). An individual may be one or more of these three Officers. The AO will consult and coordinate with appropriate officials such as program staff, legal counsel, and servicing finance officers in carrying out these activities. Within the limits of delegated authority, a duly appointed AO must:

- Execute, administer, and modify OT agreements
- Determine the appropriate type of OT agreements
- Develop and post solicitations
- Administer OT agreements in such a way as to safeguard the funds and the interests of the federal government, ensure that all significant actions are fully documented, and assist program in ensuring the most effective use of program funds
- Perform budget reviews and cost analysis (if needed), risk assessments, and other related reviews such as adequacy of an applicant's accounting system, prior to award of OT agreements
- Negotiate, as necessary, the financial and business arrangements of OT agreements, including any cost share and program income
- Ensure that awardees comply with all terms and conditions of the award
- Review and approve or disapprove requests for payment
- Maintain the official files and ensure that they contain all pertinent materials, records, and documentation
- Take actions required to close out OT agreements

1.6.4 Agreement Technical Representative

The Agreement Technical Representative (ATR) is an individual designated in writing by the AO and whose assigned responsibilities include developing the programmatic aspects of a proposed solicitation, participating in the technical review and evaluation of applications, participating in the development of recommendations for selection, and monitoring the programmatic aspects of project performance.

1.6.5 General Counsel

The Office of the General Counsel provides legal advice and assistance to the AO and ATR through field counsel, program counsel, and others, including intellectual property counsel.

1.6.6 Integrated Project Teams

An Integrated Project Team (IPT) consists of the AO, the ATR, and representatives from the office of General Counsel, including Intellectual Property, the finance office, other program Subject Matter Experts (SMEs) and the assigned procurement analyst from the Field Assistance and Oversight Division. The AO may also consider asking for representatives from the Office of Small and Disadvantaged Business and the Office of Economic Impact and Diversity.

The IPT should be formed early in the planning process (see chapter 2.1). This group will have the expertise required to develop the specifics for each requirement. The IPT will be involved in market research and all areas of planning, see Chapter 2.

1.6.7 Acquisition Career Management Program

DOE's Acquisition Workforce consists of a broad range of professionals that are involved in the award and administration of contracts, financial assistance, sales, and other transactions. Contracting Officer's Representatives, Technical Project Officers, and ATRs, along with Personal Property Managers, Real Estate Contracting Officers, Federal Project Directors/Program Managers assist the CO/GO/AOs and Specialists in these activities. DOE's goal is to continue to develop and maintain a highly professional, well-trained Acquisition Workforce. DOE requires Acquisition Workforce members to meet a variety of federal and DOE established certifications based on a combination of education, experience, and training. DOE offers a specialized Acquisition Career Management Program (ACMP) to support the training and professional development of this workforce.

AOs and ATRs must follow the requirements in the Acquisition Certification Programs Handbook to attain a Certification in order to award and/or administer OT agreements. AOs must meet the warrant requirements in DOE O 541.1C or successor Order.

Chapter 2 - Planning (Pre-Award)

2.1. Planning and Objectives

Planning is the process of deciding in detail how to do something before you actually start to do it and creating a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the activity. Planning is generally considered the key to success.

It can be beneficial as early as possible during the brainstorming phase for Program Officials, such as one that would become an ATR, to engage with Program Counsel, local, intellectual property and other counsel, such as Assistant General Counsel for Technology Transfer and Intellectual Property, along with AOs, in contemplating how to achieve novel objectives of newly authorized programs as well as innovative ways of achieving more typical objectives. It is recommended that Program Officials seeking innovative paths for funding programs consider first what parameters would achieve the mission objective most effectively, including whether overcoming any obstacles experienced with similar programs in the past would assist the current program in achieving the objective more effectively. This consideration is likely to include brainstorming such questions as what stakeholders need to be reached and how, what unusual or unique challenges we already know those stakeholders have in engaging with the federal government, what unusual or unique outcomes would be effective in achieving the objective, what market challenges need to be overcome to achieve the objective, and whether industry has a business practice that is informative and can be adapted. These are only some of the questions that may present at an early stage.

Once a technically achievable paradigm has been determined, the AOs, the ATRs, Program Counsel, local and other DOE staff can work together to design and implement the funding program. In most cases, contracts and financial assistance are the right tool to use for a funding program. That being said, there may be cases where an OT could improve the likelihood of a given program's success. For example, the intended or potential awardees would not otherwise engage with DOE, other existing contracts and financial assistance mechanisms are a poor fit for purpose, statutory language mandates the necessity of a specific mechanism. In these cases, Program Officials will meet with the AO and other interested parties to review the rationale for utilizing OT instead of traditional methods. This may occur prior to announcement of a funding opportunity, or the need may arise following selection. If it is determined in advance that an OT agreement is an appropriate method, then the AO may either include OT agreements as one possible award instrument or use only OT agreements, depending on program need.

As part of the planning process, and in consultation with Program Counsel, local and other counsel as appropriate, consideration must be given to the program authorization and appropriations statutes, particularly since the form of award may be required by either or both. The Acquisition Guide in chapter 7.1 provides food for thought for planning. In addition, current administrative policies and nonapplicable statutes and regulations should be considered for inclusion in the OT agreement.

The planning process and decision must be documented for the file and modeled on standard review principles. For DOE, the Business Clearance Process is required for all OT agreements and for

solicitations that will only award OT agreements (see Acquisition Guide chapter 71.1). For NNSA, the normal clearance process applies (see Business Operating Procedure (BOP) 540.6).

2.1.1 Risk Management

Risk is defined as a possibility of loss or injury: peril, or someone or something that creates or suggests a hazard. Managing risk is an integral part of planning for program and project success. Risk cannot be eliminated, but it can be mitigated. DOE is no stranger to considering risk in program and project management however, the inclusion of an OT agreement as an award type may increase or decrease risks that a selected project is not successful. The promise and peril of OTs are largely driven by the flexibilities listed in 2.1.2, as well as the increase in awards to entities that do not otherwise engage in government contracting and financial assistance programs. OT-specific risks can be mitigated with special award articles or terms and additional oversight by DOE. Additional risk may be acceptable to reach new technologies, new ideas and new entities.

Some risk can be managed by limiting the period of performance to five years or less. In addition, setting up regular review stages, which may include go/no-go decision points may help to mitigate risk.

2.1.2 OT Flexibilities

There are many flexibilities that DOE can leverage when using an OT agreement. The most common requested flexibilities are discussed below:

a) Competition

It is DOE policy to use competition to the “maximum extent practicable or feasible” for acquisition, financial assistance, and OT. The competitive processes for selection of OT agreements, other than TIAs, may be more flexible than for grants and cooperative agreements or contracts, however, competition must be used to the maximum extent possible to maintain a sense of integrity, fairness, and credibility in the Federal process. OTs awarded under 42 U.S.C. 7256(g) require the use of "such competitive, merit-based selection procedures" as determined in writing to be practicable.

As CICA and financial assistance policies do not apply to OT agreements, the AO is not obligated by law to use competitive procedures except the requirement of 42 U.S.C. 7256(g). The OT statute allows DOE to determine what the most appropriate competition path will be and how it will be structured, subject to other authorities. For example, in certain circumstances, competition could be limited to underserved communities or consortia of a certain makeup of entities, or DOE could restrict competition to entities that have never received a DOE award or have not received one in the past year. DOE is also not legally required to formally justify awards made without competition. However, as a matter of policy, award files must include documentation as to the reason for the non-competitive award.

b) Cost Accounting Standards and Cost Principles

Cost Accounting Standards (CAS) refer to those policies and procedures for applying the Cost Accounting Standards Board rules and regulations to negotiated contracts and subcontracts. These standards deal with the principles and methods of classification, measurement, treatment and assignment of revenue and its presentation and disclosure in cost statements. CAS may also affect institutions of higher education receiving federal financial assistance totaling $50 million or more. OT agreements are not subject to CAS and this flexibility is attractive to many for-profit companies.

The cost principles at FAR Part 31 and 2 CFR 200 Subpart E address allowable costs under contracts, grants, and cooperative agreements. DOE has applied these principles to cost reimbursable/expenditure-based TIAs, but OT agreements do not automatically incorporate them. This provides broader flexibility to negotiate the cost of the project. See 3.2.1 for additional information on cost principles.

c) Financial Management Standards and Procurement Standards

The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance), found in 2 CFR Part 200 and the Departmental supplementary regulations found in 2 CFR Part 910 apply to traditional forms of financial assistance but not to OTs. Such regulations prescribe award requirements including standards for the financial management systems of awardees of financial assistance, procurement standards, and cost principles. The FAR has similar requirements for approval of procurement, property, accounting, and other systems.

While the AO cannot ignore the validity of the awardees' financial management systems, especially where there is a cost share requirement, use of an OT agreement means that these systems do not as a matter of law require formal approval. However, as a matter of policy some review - to ensure the proposed awardee has policies and procedures that enable an accounting of costs appropriate for the terms and form of the particular award – is necessary.

d) Payment Terms

Grants and cooperative agreements generally provide for payment on the basis of cost reimbursement. Fixed support awards with milestone payments may also be used when cost share is not required. As DOE requires cost share for research, development, and demonstration projects in accordance with the Energy Policy Act (EPAct) 2005, Section 988, a fixed support award is not an option without a waiver of this requirement (see section on Cost Share Waivers below). TIA regulations allow for the inclusion of milestones or performance measures to allocate payments (10 CFR 603.570). Milestone-based payments provide the ability to focus on performance rather than day-to-day operations of the work and are structured for the underlying project and not by the incurrence of cost. Milestone payments can reduce the risk of costs being incurred without any project objectives being met. Milestone-based payments for demonstration projects have the added benefit of protecting government funds where, if the awardee does not meet their milestones, the DOE has the authority to end the partnership and use the remaining funds in the ended agreement for new or existing milestone-based demonstration projects.

e) Reporting

There may be an opportunity under the OT authority to reduce reporting burdens on awardees, or to design reporting requirements specifically tailored to the agreement's purpose. Report content and frequency may be reduced when no business purpose would be served by collections of data at routine intervals. The reporting required by the FAR and the financial assistance regulations can be a burden on some businesses in lost productivity or inefficient or misallocation of resources. An OT agreement allows AOs to tailor reporting requirements and lower or remove barriers if it can be done with proper stewardship of federal funds. Consideration may be given to providing for increased self-governance (i.e., giving awardees and sub-awardees more insight into and authority and responsibility for the programmatic and business aspects of the overall project than usual) and reduced frequency of written reporting and notifications to the Government. Note that OT authority alternatively enables increased reporting requirements should OT agreement negotiations lead to additional or more frequent reporting than traditional award methods.

f) Intellectual Property Rights

The Bayh-Dole Act allows non-profits, universities, and small business the right to elect title in DOE-funded inventions, whether first conceived or actually reduced to practice in the performance of work under a funding agreement, but does not apply to the OT Additional Authority—including provisions that detail the federal government use, march-in rights, and requirements for U.S. manufacture. By Executive Order, the principles of Bayh-Dole invention ownership have been extended to all types of parties to government funding agreements, to the extent permitted by law. Due to DOE's title vesting statutes, however, in the absence of Bayh-Dole providing a right to the awardee, title to inventions from DOE-funded activities would vest in DOE. However, flexibility for invention rights under DOE-fund research, development and demonstration is expressly provided in 7256(g) "Additional Authorities."

Negotiation of invention and patent rights is therefore available under 7256(g) "Additional Authorities", without regard to Bayh-Dole or the DOE title vesting statutes, such as when necessary to accomplish program objectives and foster Government interests, and to balance the interests of the contractor. Negotiated intellectual property clauses can facilitate DOE's and the funding program's mission and technology strategy, balancing the relative investments and risks borne by the parties both in past development of a technology and in future development and maintenance of a technology. Among the risks DOE may wish to take into consideration is the ability to use intellectual property rights to assure the nation enjoys the benefit of the federally funded technology through U.S. manufacture to the extent feasible and practicable. U.S. manufacturing clauses should almost always be included to the extent feasible and practicable to assure the nation enjoys the benefit of the federally funded technology.

In addition to patent and invention rights, there may also be some flexibilities available with regard to the federal government's rights to technical data, keeping in mind, however, that DOE's statutory requirements for data dissemination balanced against specific statutory provisions for data protection should still be considered. For example, under the TIA regulations, data and patent rights can be negotiated to accommodate expanded access or use rights, including in protected data among consortium or team members.

2.1.3 Market Intelligence

Market intelligence involves the collection and analysis of product or service market information in order to determine the best approach for satisfying DOE's needs. Market intelligence should be one of the first considerations during acquisition planning. Market intelligence is commensurate with the anticipated dollar value of the OT and is an integral part of any planning process. Market intelligence is especially important to attract non-traditional contractors to participate to a significant extent.

The IPT must conduct market intelligence early in the project planning process to gain knowledge and help make appropriate decisions. It may do so by researching the commercial marketplace and publicizing the project in commercial marketplace venues and publications. For example, posting a sources sought or special notification on government public portals such as the System for Award Management (SAM) https://www.SAM.gov/ or Grants.gov https://www.Grants.gov/ allows the opportunity for all businesses to review the DOE's requirement needs and specifications, and can improve small business participation. The notices may include screening criteria to allow the government to assess potential competitive sources, to determine whether a justification for other than full and open competition is required, or whether various socio-economic set-asides are appropriate.

Other ways to perform effective market intelligence include:

- Contacting Subject Matter Experts (SME) regarding market capabilities to meet requirements.
- Reviewing results of historical award data and previous market research efforts for similar or identical requirements.
- Querying Government-wide contract databases, which can be found on the U.S. General Services Administration (GSA) https://www.gsa.gov/ and U.S. Small Business Administration (SBA) https://www.sba.gov/ websites.
- Engaging with industry, Federal agencies and acquisition personnel, DOE's Office of Small and Disadvantaged Business Utilization (OSDBU), professional organizations, and other stakeholders.
- Reviewing catalogs and other product literature published by manufacturers and distributors.
- Hosting 'Industry Day' or 'Proposers' Day' events or pre-solicitation conferences to involve potential contractors and receive industry feedback during the beginning stage of the planning process.

Adequate market intelligence can help answer unknown questions during initial planning stages, such as, what public resources does the marketplace offer, are there small business sources capable of satisfying the agency's requirement, is the government's requirement unclear or overstated to preclude commercial items, and what are common industry practices for purchasing similar requirements. Reaching out to sources outside of the DOE can aid in conducting effective market intelligence by encouraging non-traditional partnerships and teaming arrangements, as well as participation from a variety of sources, including large and small businesses, start-up businesses, universities, nonprofits, other federal agencies (defense and civilian), and State departments.

2.1.4 Selecting the Award Instrument

Selecting the appropriate award instrument(s) begins with two questions: (1) What is the principal purpose of the activity? and (2) What types of entities are most likely to have the best approach to the activity? The answers to these two questions will lead to the award instrument or instruments to choose.

> The Federal Grant and Cooperative Agreement Act of 1977, codified at 31 U.S.C. §§ 6301 to 6308 (FGCAA) requires the decision on what is the principal purpose of the award – is the activity for the direct benefit of DOE or for a public purpose or to stimulate a public benefit. The type of awardee (e.g., university, non-profit, or for-profit organization) or a requirement for cost sharing are not factors in this determination. DOE has the flexibility to award a procurement contract no matter the principal purpose of the award. Under the FGCAA, a financial assistance agreement is either a grant or a cooperative agreement, depending on the level of involvement of the Government in the performance of the project. By contrast, OT agreements under 42 USC 7256(a) are not restricted by statute and may be used for any type of purpose. OT agreements under 42 USC 7256(g), including TIAs are limited to purposes set forth in that statute and in DOE regulations.

For example, OT agreements may be the best award instrument for reaching new entrants and non-traditional contractors. These entities may not have received funding from the federal government because they choose not to change their accounting systems, need more flexible intellectual property rights or other reasons that impact the current way of doing business.

This determination of award instrument(s) must be made before a solicitation (including a request for proposals, a funding opportunity announcement or other document requesting a proposal/offer/application) is issued. The decision must be documented for the file.

A decision matrix is provided in Appendix C.

2.2 Approval to use OT Authority

An OT agreement must be awarded by a duly authorized, warranted individual. For DOE, that person is an Agreements Officer or AO. Only the AO will be able to commit DOE to funding an activity. The AO may need the concurrence of local counsel, independent review, the HCA, and others in accordance with DOE and local procedures. Modifications of OT agreements must also be signed by the AO.

All DOE OT agreements must go through the Office of Acquisition Management (OAM) business clearance process (see the DOE Acquisition Guide at Chapter 71.1) and be approved by the SPE. All NNSA OT agreements must go through their applicable review process (see Business Operating Procedure (BOP) 540.6.

OT agreements that use the authority at 42 U.S.C. 7256(g) Additional Authorities must also comply with the statutory approval requirements. The responsible program officials must obtain the approval of an officer of the Department who has been appointed by the President by and with the advice and consent

of the Senate and who has been delegated the approval authority from the Secretary. This approval can be obtained before the solicitation is issued for all OT agreements awarded as a result of the solicitation or it can be obtained after selection and during negotiation for an individual award. The approval package will include a memorandum of record that provides information to justify the use of OT authority. See Appendix C for additional requirements on the memorandum of record's content. Program Counsel, local, and other counsel may be consulted in developing an approval package.

2.3 Cost Share

OT agreements are subject to the cost share requirements set forth at Section 988 of the Energy Policy Act (EPAct) of 2005. OT agreements may also be subject to individual program authorization or appropriation statutes.

OT agreements (including TIAs) under 42 USC 7256(g) Additional Authorities are additionally subject to the cost sharing requirements set forth at EPAct 2005 section 1007.

2.3.1 EPAct Section 1007

The DOE OT Additional Authority itself includes a requirement that the authority is subject to the same terms and conditions as the Secretary of Defense under 10 U.S.C. 2371 (other than subsections (b) and (f) of that section). Subsection (e) provides DOE and the DOD requirements:

> (e) Conditions. —The Secretary of Defense shall ensure that—to the extent that the Secretary determines practicable, the funds provided by the Government under a cooperative agreement containing a clause under subsection (d) or a transaction authorized by subsection (a) do not exceed the total amount provided by other parties to the cooperative agreement or other transaction

For TIAs, the CO/AO, in consultation with the ATR, has the authority to determine the amount of the Section 1007 cost share, although a 50% cost share is the standard amount required. However, any reduction is also subject to EPAct Section 988.

2.3.2 EPAct Section 988

EPAct Section 988 provisions on cost share requirements apply to agreements entered pursuant to both DOE OT authorities at 42 U.S.C. 7256(a) and (g).

Section 988 establishes minimum cost share requirements for research and development and demonstration or commercial applications programs. Under the section, the Secretary may reduce or eliminate cost share requirements for applied research and development and may reduce (but not eliminate) the requirement for demonstration or commercial applications if the Secretary determines that the "reduction is necessary and appropriate." For demonstration or commercial applications, the

determination must take "into consideration any technological risk relating to the activity." The ability to reduce or eliminate cost share is particularly important to reduce barriers for underserved/disadvantaged communities and small businesses. These entities may not have access to capital to meet cost share requirements. (See FAL 2023-XX for information on the cost share waiver pilot.)

Dependent upon the needs of the program, the Secretary (or individual acting with delegated authority) may set a cost share requirement for an individual OT agreement, or a class/group of OT agreements.

Additional requirements related to cost sharing apply to OT when a fixed-support OT agreement is the preferred payment type. A fixed-support OT requires an elevated level of confidence on the part of the AO and program officials that the awardee will expend the amount expected by DOE for the cost share required of the awardee. The agreement may need special articles and increased monitoring and oversight during the period of performance, including, e.g., a DOE right to seek audit of costs and expenditures as appropriate.

2.4 Cost Share Waivers

A waiver to reduce or eliminate cost share under EPAct 2005, Section 988 may apply to all awards under a solicitation, or a single award. Waivers/reductions for solicitations may be applicable to one type of entity or address multiple entity types, with various levels of reduction for each. Waivers are the responsibility of the ATR with the assistance of the AO. (See FAL 2023-XX for information on the cost share waiver pilot.)

When looking to waive cost share, the following items will be considered:

- The quality of the proposed consortium, partnership, or other teaming arrangement, including proposed cost share commitments;
- Whether the award will facilitate and expedite the further development and commercial deployment of technologies developed with DOE funding;
- Whether the awardee, proposed consortium, partnerships, or other teaming arrangements include or involve team members or partners with business experience or plans to further develop and deploy the technology as expeditiously as possible;
- Whether the project activities may be considered too risky, because of the technology or otherwise, by industry and have difficulty attracting sufficient private capital to meet cost share requirements;
- Whether reduction or elimination of the cost share requirement will maximize the quality of the award; and
- Whether institutions of higher education, national laboratories, nonprofit entities, small businesses and Federally Funded Research and Development Centers (FFRDCs) have limited financial resources (or, in the case of FFRDCs, limited sources of non-federal funding) that make it difficult to meet cost share requirements.

For awards under 42 U.S.C. 7265(g) Additional Authorities, including TIAs, waiver of cost sharing under 10 U.S.C. 4021(e) may also be required (see 2.3.1 above). The AO may consider whether the 10 U.S.C. 4021(e) cost sharing requirement is impracticable in a given case, unless there is a statutory requirement for cost sharing that applies to the particular program under which the award is to be made. Before deciding that cost sharing is impracticable, the AO, in consultation with the ATR, will carefully consider if there are other factors that demonstrate the awardee's self-interest in the success of the current project. Any impracticability determination must be documented in the award file.

2.5 Competition

It is DOE policy to use competition for all awards unless an exemption can be justified. Competition can reduce costs, provide a variety of solutions, and bring in new entities to doing business with the Government.

The CICA requires DOE to compete its acquisition requirements. CICA is implemented in FAR Part 6. While there are exceptions to competition, these are used only in exceptional circumstances. There is no overarching statute requiring competition in financial assistance; however, many program authorizations require competition and may even indicate the eligible entities. The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards and DOE financial assistance regulations require competition to the maximum extent possible. In addition, DOE was tasked with competing programs for research, development, demonstration, and commercial activities in Section 989 of the Energy Policy Act of 2005.

There may be instances where use of a noncompetitive OT agreement is appropriate. In these cases, the award file will indicate why that entity is the only one situated to perform the work including the flexibilities and benefits OT provides. Approval is required by one level above the AO.

2.6 Solicitation

Solicitation is a generic term that includes request for proposals (RFPs) (48 CFR 15.203), Broad Agency Announcements (BAAs) and funding opportunity announcements (FOAs) (2 CFR 204). A solicitation provides the information necessary for interested parties to submit a proposal or application to obtain an award. Both RFPs and FOAs have prescribed outlines and required information; however, each are customizable to include the information and details specific to each requirement. A BAA should follow the FOA outline as applicable. (See Appendix E.) The AO will determine the appropriate type of solicitation.

The FOA will most often be the solicitation type that incorporates OT agreements as an available award type. DOE uses FOAs for many BAAs and other solicitations that include contracts and financial assistance agreements as award types. Including OT agreements in FOAs has been common practice since 2005 to allow for the award of TIAs.

A BAA should be used when only OT agreements will be awarded.

The type of solicitation dictates where, at a minimum, the solicitation is posted for interested parties to find. RFPs are posted on SAM.gov and FOAs are posted on Grants.gov. A BAA may be posted on either or both. Other methods of publishing the solicitation include the Federal Register.

2.7 Merit Review/Technical Evaluation and Selection

2.7.1 Merit Review/Technical Evaluation

The evaluation of an application for OT agreements will generally depend on how applications were requested. Evaluation under financial assistance, acquisition and OT only are addressed below. No matter the evaluation type, a selection plan will be developed to document the merit review/technical criteria and selection process. The selection process for OT should be structured in a manner that encourages new entrants to apply and encourages innovation. The OT selection process does not need to be written applications, but instead may rely on oral submissions, concept papers or any other technique that will provide the information necessary to select applications for funding.

In competing financial assistance opportunities, DOE uses a merit-based system of review. Each solicitation will include merit-based evaluation criteria upon which to evaluate applications. Examples of merit-based evaluation criteria include:

1. Significance: The extent to which the project, if successfully carried out, will make an important and/or original contribution to the field of endeavor.

2. Approach: The extent to which the concept, design, methods, analyses, and technologies are properly developed, well-integrated, and appropriate to the aims of the project.

3. Feasibility: The likelihood that the proposed work can be accomplished within the time and budget proposed by the investigators or the technical staff, given their experience and expertise, past progress, available resources, institutional/organizational commitment, and (if appropriate) access to technologies.

The Merit Review Guide for Financial Assistance and Unsolicited Proposals provides information for developing selection plans and reviewing applications.
https://www.energy.gov/management/articles/merit-review-guide-financial-assistance-and-unsolicited-proposals-current

In competing acquisition opportunities, DOE follows the FAR and the DEAR. The exact process for competition depends on which type of acquisition is the best method for obtaining the required supply or service. Opportunities over the simplified acquisition threshold are processed by using the GSA Multiple Award Schedules or an open announcement by IFB or RFP. When purchasing from the

Schedules or issuing an RFP, DOE chooses evaluation criteria that will distinguish between offers and lead to the selection of the best technical offer considering price and past performance. The DOE Acquisition Guide in chapters 8 and 16 provide additional information https://www.energy.gov/management/articles/department-energy-acquisition-guide.

If the solicitation is limited to OT agreements, the AO and IPT will select those review/evaluation criteria that will provide for selection of the best applications. The BAA must what is to be submitted, identify the criteria, and how the applications will be evaluated just as in any other solicitation. Selection decisions will be no different from those done for financial assistance or acquisition opportunities. The reviewers will consider the applications against the predetermined criteria. The Selection Official will consider the reviewers evaluation and make selection of the best overall application(s). The Selection Official will document their decision with a written narrative of the decision process.

No matter the type of evaluation, federal employees must be involved. This is most often DOE employees, but individuals from other agencies may be part of the evaluation team if they have expert knowledge. Evaluation teams are usually a team of three or five with the technical knowledge to evaluate the applications.

Evaluation may require the assistance of subject matter experts (SME) that provide expert opinions to the federal reviewers. The SMEs may be non-federal employees. These SMEs are not part of the consensus scoring of the evaluation; they are there only to provide information to the evaluation team and selection official. Non-federal peer reviewers are frequently used in this manner for financial assistance merit reviews.

All reviewers must be screened for conflicts of interest for each application by the AO. This is particularly important for non-federal reviewers that may work for an entity that submits an application. Non-federal reviewers must also sign a non-disclosure agreement (a sample is available in the Merit Review Guide) prior to the commencement of a merit review. Copies of each signed NDA must be kept on file by the AO.

2.7.2 Selection

Selection is made by the duly appointed Selection Official following the Selection Plan. The Selection Official must be a DOE federal employee. The Selection Official makes an independent determination of the best application(s) using the merit reviewer panel or the technical evaluators report. The Selection Official will document their decision with a written narrative of the decision process.

Chapter 3 – Award and Execution

When awarding OT agreements through competition, DOE will normally select applications for negotiation. The majority of the terms of the award will be open to negotiation with the selectee. DOE will maintain articles for AOs to use in developing an OT agreement (see Appendix D). Because there is no standard agreement, AOs should generally allow extra time in the schedule for developing and reviewing articles and the overall agreement.

DOE may also negotiate the project description, the period of performance, and any stages/options/continuation periods and conditions for continuing the agreement.

3.1 Pre-Award Business Evaluation

The AO must determine the applicant's qualification for award considering the entities:

a. Management capability and financial and technical resources;

b. Satisfactory record of performance;

c. Integrity and ethics; and

d. Eligibility under applicable laws.

The awardee must be a responsible entity capable of performing the work proposed.

The AO will ensure that the OT agreement is entered into with an entity or entities that can execute an agreement that legally binds the entity or entities. That entity may be a single company, joint venture, partnership, consortium, or team (through an authorized agent), or an awardee with sub-awardee relationships, among others. Consortia can be structured in a wide variety of ways. Consortia members may be technical performers, financial contributors, potential end users of products and technologies developed by the consortia, or otherwise interested in the project or projects being funded.

When structuring the OT agreement for an expenditure-based or resource-sharing type project, the AO will consider the capability of the awardee's accounting system. Agreements that impose requirements that will cause an awardee to revise or alter its existing accounting system are discouraged. The AO will not enter into an OT agreement that provides for payment based on cost reimbursement if the awardee does not have an accounting system capable of identifying the costs to individual awards.

3.2 Negotiation

Negotiation of the articles of the OT agreement will cover a wide variety of items, including the project description, budget or price, payment provisions, cost principles, data use rights and intellectual

property rights. Negotiation must also include reporting provisions, funding and cost share terms, and audit provisions. Security and foreign influence articles will be considered. The AO will also need to consider if the articles will flow-down to sub-awardees.

Appendix D provides a list of mandatory articles that all OT agreements must include. It also includes other articles for consideration. Each article includes a description of use and sample text.

3.2.1 Budget/Price and Cost Principles

Negotiating the cost of the project, whether to set a budget for a cost reimbursement agreement or a price for a fixed-support award, requires evaluation of the proposed costs against the project description. ATR and technical SMEs will perform this review to provide the AO with information to set targets for the budget/price.

The AO needs to consider the costs in a manner similar to an evaluation for a contract or financial assistance award. The AO needs to consider if the costs are allocable and reasonable. Unlike procurement contracts and financial assistance agreements, OT agreements (other than TIAs) are not subject to standard cost principles and a legally prescribed allowability determination. While not required under an OT award, the AO has the ability to include applicable cost principles in an OT agreement. If not included in an OT agreement as an element of cost allowability, the AO will use the cost principles in considering the amounts to accept for the budget/price. The AO must never include costs that are not allowable per the appropriate cost principles for the entity type in the budget/price of the award or in reimbursed costs. A profit or fee is not to be included when cost share is required., this includes when using a fixed-support award. Note that certain costs are not allowable as a matter of law, no matter whether cost principles are included as an article (e.g., lobbying costs).

A fixed-support award is not necessarily precluded when cost share is required. Extra attention must be given to establish the overall price of the project and the total cost of what DOE is responsible for. The AO must have confidence in the estimate of the expenditures required to achieve well-defined outcomes. Therefore, the AO must work carefully with program officials to select outcomes that, when the recipient achieves them, are reliable indicators of the amount of effort the recipient expended.

If a cost-sharing percentage is required, DOE will need to work carefully to include an appropriate auditing mechanism of the project at completion to determine that DOE has not contributed more than its share and allow for DOE to recover the over-payment. To illustrate the approach, consider a project for which the AO is confident that the recipient will have to expend at least $800,000 to achieve the specified outcomes. The AO must determine, in conjunction with program officials, the minimum level of recipient cost sharing required to demonstrate the recipient's commitment to the success of the project. For purposes of this illustration, let that minimum recipient cost sharing be 60% of the total project costs. In that case, the Federal share should be no more than 40% and the contracting officer could set a fixed level of Federal support at $320,000 (40% of $800,000). With that fixed level of Federal support, the recipient would be responsible for the balance of the costs needed to complete the project.

Costs incurred prior to the award of the OT agreement will rarely be allowed. However, costs incurred in the 90 days prior to award may be agreed upon at the time of award. These pre-award costs will not be paid until after award for cost reimbursement awards.

3.2.2 Payment Article

Payment methods are closely related to determining the budget/price of the agreement. An agreement that provides for reimbursement of costs as they are incurred will be included with a budget setting the estimate total cost of the project.

A fixed-support agreement will include milestone payments that must be negotiated with the price and the finalization of the project description. The milestones will set a payment amount for each stage of the project. Milestone payments vary, depending on the nature of the agreement and as such, may be non-consecutive; conditional; contingency-based; incrementally funded; included as priced options within the project; or designed in any other manner, or combination of manners, which are appropriate under the circumstances of the project.

Advance payments may be agreed to for large purchases. Cost share in expenditure based or reimbursable agreements is generally to be contributed in correlation with the incurrence of project costs. Where beneficial to DOE or necessary for project success, awardee cost share contributions may be elsewise correlated (e.g., the applicant provides less cost sharing at the beginning of a project and more towards its end). Such arrangement must ensure that the agreement provides for a truing of required cost share where an agreement ends prior to the anticipated cost share is applied to all costs and not to individual items.

The Payment article will also provide instructions on submission of requests for payments.

3.2.3 Funding

The OT agreement most often will be fully funded at award or incrementally funded. Fully funding the agreement is recommended but it is recognized that this is not always possible. If incrementally funded, the agreement must include an article that indicates additional funding is subject to the availability of appropriations. The amount of incremental funding will cover at least the first year of the award or the first milestone payment, depending on agreement type. OT agreements may include consideration other than monetary, such as property.

3.2.4 Audit

The AO will negotiate an audit article to review incurred costs. The article may allow for auditing during the period of performance and at the end of the period of performance. The audit article will include

procedures for ensuring cost share requirements are met (if applicable to such award). Sample articles are in the Appendix D.

For all entities other than for-profit companies, the Single Audit Act may also apply. The entity must expend $750,000 or more in federal award funds for financial assistance activities during its fiscal year. AOs may follow the guidance in 2 CFR 910 for for-profits.

In addition, an article addressing access to records and employees by the DOE IG and GAO must be included.

3.2.5 Internal Controls

The AO will ensure that the awardee has adequate internal controls for assessing the risks associated with meeting the project objectives, including:

- Estimating the risk's significance
- Assessing the likelihood for the risk to occur
- Deciding how to manage the risks and what specific actions to undertake

The AO also needs to consider the effectiveness of the awardee's business systems and their ability to account for costs and schedule.

3.2.6 Substantial Involvement

The AO may negotiate the level of involvement by DOE in the performance of the agreement. This involvement does not include normal monitoring activities such as reviewing reports and making payments. It also doesn't include reviews for any stage gate decisions, such as go/no-go decisions or options/continuations that may be included in the agreement.

3.2.7 Reporting

The OT agreement will include reporting requirements that provide DOE with enough information to ensure the project is on schedule and cost and will meet the objectives of the award. The frequency for reporting will also be negotiated but progress reports at least quarterly are recommended.

3.2.8 Foreign Influence and Involvement

The AO will include articles with respect to foreign influence and involvement that are similar to those in financial assistance agreements or the current version of DOE O 486.1. The article will consider the

sensitivity of the project, especially the research and development taking place and require a declaration from the researchers on not receiving any funding from Foreign Talent Programs. The AO may also consider adding a conflict-of-interest article. Vetting by the Research, Technology, and Economic Security (RTES) team may be required.

3.2.9 Changes

The OT agreement will clearly address how changes to the agreement will be handled. The AO will also consider whether DOE will have the right to make unilateral changes to the agreement, or whether all changes must be bilateral. The AO will consider the potential for unilateral changes to lead to disputes and claims, particularly for OT agreements with fixed-price characteristics.

Only the AO may amend/modify the OT agreement.

3.2.10 Protests and Disputes

The GAO generally does not review protests of an award or solicitation for the award of an OT. The only exception to this general rule involves situations in which an agency is exercising its OT authority, and a protester files a timely, pre-closing date protest alleging that the agency is improperly exercising the OT authority. The GAO has found that it may hear OT-related protests if they are in connection with a procurement or proposed procurement. The COFC has held that it has jurisdiction to decide OT-related claims when such claims are connected with a procurement, a proposed procurement, or any future action that may lead to a procurement. For more information seek advice of local counsel.

Although GAO and courts have repeatedly indicated that the OT is a non-FAR-based transaction and not a procurement, DOE must be aware that certain requirements may remain with regard to competition, and most specifically of those OTs relying on the General Authority of § 7256(a), that are *in connection with* a procurement or a proposed procurement, including "the process for determining a need for property or services" so long as the OT "had a direct effect on the award of a [procurement] contract." The U.S. Court of Federal Claims can review and render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation *in connection with* a procurement or a proposed procurement, even if the mechanism is an OT. This court review only applies to an OT in a bid protest if the underlying work is 'in connection with a procurement or a proposed procurement. DOE can address this risk by modeling competition of OTs *in connection with a procurement* on standard DOE review principles unless the competition flexibility of § 7256(g) applies, and even then, should follow standard principles to the extent practicable.

OT agreements are not subject to the Contracts Disputes Act. However, an OT agreement may be the subject of a claim in the U.S. Court of Federal Claims or a Federal District Court. The AO will ensure that the agreement addresses the basis and the procedures for resolving disputes.

The AO will work with their local counsel for any questions or issues that arise on protests and disputes.

3.2.11 Termination Article

The AO will include an article that indicates that the Government may terminate the agreement for default, mutual agreement or as negotiated by the parties before award. Terminations for default will be reported to the Federal Awardee Performance and Integrity Information System (FAPIIS).

3.2.12 DOE Inspector General (IG) and Government Accountability Office (GAO) access

The AO must include an article that will inform the awardee that it must comply with the IG and GAO on any audit or access request.

3.2.13 Intellectual Property

3.2.13.1 Negotiating Data and Patent Rights

The AO must confer with the cognizant program office(s) and intellectual property counsel to develop an overall strategy for intellectual property that takes into account inventions and data that may result from the project and future needs the Government may have for rights in them. The strategy should take into account program mission requirements and any special circumstances that would support modification of standard patent and data terms, and can include considerations such as the extent of the awardee's contribution to the development of the technology; expected Government or commercial use of the technology; the need to provide equitable treatment among consortium or team members; and the need for the DOE to engage non-traditional Government contractors with unique capabilities.

The AO may use discretion in negotiating Government rights to data and patentable subject inventions resulting from the RD&D under the agreements. As such, the considerations in 13.2.13.2 through 13.2.13.8 are intended to serve as OT IP guidelines specifically with respect to authority derived from 42 U.S.C. 7256(g) Additional Authorities, within which there is considerable latitude to negotiate IP provisions appropriate to a wide variety of circumstances that may arise.

3.2.13.2 Data Rights

For provisions regarding data rights for all entity types, the requirements at 2 CFR 910.362(d), Rights in data-general rule, can be used by the AO as a starting point. Here, the “Rights in Data - General” provision in Appendix A to Subpart D of 2 CFR 910 typically applies. This provision provides the

Government with unlimited rights in data first produced in the performance of the agreement, except as provided in paragraph (c) Copyright.

However, in certain circumstances, the requirements at 2 CFR 910.362(e), Rights in data - programs covered under special protected data statutes, which provide for data protection, can be used. Here, the "Rights in Data - Programs Covered Under Special Data Statutes" provision in Appendix A to Subpart D of 2 CFR 910 typically applies. This provision provides for a negotiable period of data protection (i.e., up to 30 years) based on the circumstances. Further, these provisions may be modified to accommodate particular circumstances (e.g., access to or expanded use rights in protected data among consortium or team members, reference to disposition of intellectual property rights in a collaboration agreement), or to list data or categories of data that the awardee must make available to the public. In any event, the period of data protection may not be extended beyond the statutory limit.

In some cases, the AO may negotiate special data rights requirements that vary from those in 2 CFR 910. For example, the CO could eliminate or modify the government paid-up nonexclusive copyright license to allow the awardee to benefit more directly from its investments. Modifications to the standard data provisions must be approved by intellectual property counsel.

3.2.13.3 Rights in Inventions

As discussed in an earlier section, Section 7256(g) Additional Authorities provides flexibility for intellectual property considerations. When negotiating rights in inventions, the AO should negotiate terms that represent an appropriate balance between the Government's interests and the awardee's interests. Although, Bayh-Dole (Chapter 18 of Title 35, U.S.C.) does not automatically apply to OTs, patent rights provisions implemented via 37 CFR 401.14 as modified by the DOE (see e.g., U.S. Competitiveness provision and Department of Energy Determination of Exceptional Circumstances Under the Bayh-Dole Act to Further Promote Domestic Manufacture of DOE Science and Energy Technologies) may be used as a starting point for any type of awardee.

Bayh-Dole allows non-profits, universities, and small businesses the right to elect title in DOE-funded inventions, whether first conceived or actually reduced to practice in the performance of work under a funding agreement. Although Bayh-Dole rights have been extended via Executive Order to all types of entities, due to DOE's title vesting statutes, title to inventions from large businesses arising out of DOE-funded activities vest in DOE thereby requiring a patent waiver for title to such inventions to pass to the large businesses.

To provide for flexibility in invention rights in research, development, and demonstration 7256(g) "Additional Authorities" expressly provides intellectual property flexibilities. Therefore, the AO may negotiate Government rights that vary from the patent rights requirements described above when necessary to accomplish program objectives and foster the Government's interests. In this instance, the AO should decide, in consultation with the program office(s) and cognizant intellectual property counsel, what best represents a reasonable arrangement considering the circumstances, including, for example, past investments and anticipated future investments of the awardee to the development of the technology, contributions under the current OT, commitment to U.S. manufacturing (See section

3.2.13.5 re U.S. Competitiveness), and potential commercial and Government markets. Any change to the standard patent rights provisions must be approved by cognizant intellectual property counsel.

For example, as OTs under 42 U.S.C. 7256(g)(3) are not subject to DOE vesting statutes under 42 U.S.C. 2182 and 5908, the AO has the flexibility to provide awards to large businesses without requiring a patent waiver. Further, with the concurrence of intellectual property counsel, the AO also could eliminate or modify the nonexclusive paid-up license for practice by or on behalf of the Government to allow the awardee to benefit more directly from its investments. Additionally, to best meet the needs of the program, modifications with the concurrence of intellectual property counsel may under appropriate circumstances be made to March-in Rights found in 37 CFR 401.14, concerning actions that the Government may take to obtain the right to use subject inventions if the awardee fails to take effective steps to achieve practical application of the subject inventions within a reasonable time. Further, under appropriate circumstances, the march-in provision may be entirely removed (e.g., if an Awardee is providing most of the funding for a RD&D project, with the Government providing a much smaller share).

For subawards under an OT, the OT should typically indicate that sub-awardees will get title to inventions they make but alternative terms could be included such as those specifying that sub-awardees' invention rights are to be negotiated between awardee and sub-awardee or some other disposition of invention rights. Factors to be considered by the AO in addressing sub-awardee's invention rights include: the extent of cost sharing by parties at all tiers; a sub-awardee's status as a small business, nonprofit, or FFRDC; and whether an appropriate field of use licensing requirement would meet the needs of the parties.

Consortium members may allocate invention rights in their collaboration agreement, subject to the review of the AO. The AO, in performing such review, should consult with cognizant intellectual property counsel and can consider invention rights to be retained by the Government and rights that may be obtained by small business, nonprofit or FFRDC consortium members.

3.2.13.4 Marking of Documents Related to Inventions

To protect the awardee's interest in inventions, the OT should require the awardee to mark documents disclosing inventions it desires to protect by obtaining a patent. The awardee should mark the documents with a legend identifying them as intellectual property subject to public release or public disclosure restrictions, as provided in 35 U.S.C. 205.

3.2.13.5 Research and Technology Security and U.S. Competitiveness Provisions

Consistent with the objective of enhancing national security and United States competitiveness by increasing the public's reliance on the United States commercial technology, the AO may include provisions in an OT that address foreign access to technology developed under the OT. All DOE research

and technology security policies apply to OTs unless determined the activities being funded are outside the scope of the policies or otherwise exempted from the policies.

Provisions must be included in the OT that provide, at a minimum, that any transfer of the technology developed thereunder must be consistent with U.S. export laws, regulations and the Department of Commerce Export Administration Regulations at Chapter VII, Subchapter C, Title 15 of the CFR (15 CFR parts 730-774), as applicable.

Notice should be included in the OT indicating that products embodying any invention or produced through the use of any invention are subject to the U.S. Competitiveness terms outlined in modified 37 C.F.R. 401.14. Aside from any partial waiver or modification granted by intellectual property counsel, these terms should rarely be modified.

3.3 Consortium

When awarding to a consortium, the objective is to promote collaboration, gain exposure and access to a variety of performers, facilitate adoption of efficient business practices, and obtain access to a ready network with specialized abilities. The priority is identifying capable partners. This may mean that the Government's goals are best served where traditional defense contractors, non-traditional defense contractors (NDCs), academia, small businesses, or a combination of these are working together to achieve a common goal.

Consortium arrangements are commercial agreements and DOE is not party to the consortium. The consortium may choose one participant (often called a member) to function as the lead member and agent of the group or a consortium may be managed by a consortium manager that is a single entity responsible for performing the administrative duties of the consortium. There is no preference or policy dictating the use of consortium model for OTs and the decision of whether to the decision of whether to prompt creation of a new consortium or leverage an existing consortium falls within the discretion of the AO.

While OTs should enable AOs to exercise flexibility in their approach, and there is no standard checklist of issues they are required to address, AOs should consider the following:

• What is the business model for the consortium? Is there a consortium manager or a lead company? What functions will the lead company or consortium manager perform?

• What is the relationship between the consortium and the participants, and what are its implications for how the government will award and manage the OT? Are participants competitors or partners? How will work be distributed among participants?

• How will the addition or deletion of consortium participants impact performance? Would DOE's interests be served by having input over changes in the pool or qualifications of participants?

• What functions does the Government consider inappropriate for the consortium to perform (such as those considered to be inherently governmental)? Are the functions and any restricted functions clearly described in writing?

• How will the Government monitor the consortium's performance? Are separate measures of performance appropriate for management of the consortium and for projects awarded under the umbrella of the consortium?

• What costs are associated with the consortium?

• What entity or entities should be signatories to the OT agreement with the Government?

3.4 STRIPES

The AO will award the OT agreement in STRIPES. The agreement does not get reported to Federal Procurement Data System (FPDS) but will be included with financial assistance reporting to USASpending.

3.5 Congressional Notifications

OT agreements over $1 million are subject to the same Congressional notification requirements as contracts and financial assistance agreements. See the latest Acquisition Letter on "301" notifications for the current procedures.

OT agreements are also subject to the notifications performed by the Office of Congressional and Intergovernmental Affairs. Details are in the Acquisition Guide at Chapter 5.403.

Chapter 4 – Administration

4.1 Monitoring

Monitoring is a process whereby the programmatic progress and financial and business management aspects of an OT agreement are reviewed by accessing and assessing information gathered from program and financial reports, site visits, teleconferences, and other means. DOE requires awardees to have adequate management systems to ensure that project objectives are met and funds are properly spent. To the greatest extent possible, DOE AOs, and ATRs will rely on the management systems of the awardees to monitor their progress meeting project objectives, compliance with articles and conditions, and management of award funds.

4.1.1 Awardee Responsibilities

An awardee has full responsibility for the conduct of the project or activity supported and for the results achieved under their award. The awardee will monitor the performance of the project to assure adherence to performance goals, time schedules or other requirements as appropriate to the project and the terms and conditions of the award agreement. The Awardee is responsible for prompt reporting of issues and problems with performance.

The Awardee is responsible for monitoring the activities and performance of, and the passthrough requirements to, any and all subAwardees including FFRDCs and National Labs. SubAwardees must be monitored by the Awardee to ensure program/award/project performance and financial and administrative regulatory compliance. Awardees must ensure their subAwardee institutions possess adequate policies, processes, procedures, and systems to manage their awards from an Awardee.

4.2 Changes

As the project progresses, the agreement may need to be amended to reflect new activities, a revised project outcome, new budget, or new schedule. The AO and the ATR will need to review the Awardee's request and determine if those changes are in keeping with programmatic requirements, and the project. The agreement will be modified by the AO to reflect any negotiated changes.

4.3 Non-compliance

When a review of the Awardee's performance reveals an apparent failure to comply with the terms and conditions of the award, the non-compliance issue(s) must immediately be addressed with the Awardee. The AO must request the Awardee provide a written explanation and a correction action plan or remedy

for the specific noncompliance issue(s). If the Awardee does not provide a satisfactory explanation and a specific correction plan or remedy, the AO will then provide to the Awardee a written Notice of Noncompliance that includes corrective actions that must be taken by the Awardee. The Notice of Non-compliance (Notice) at a minimum must contain the factual and legal bases for the determination of non-compliance (the specific terms and conditions with which the Awardee has failed to comply) and the specific corrective actions that must be taken and the date (e.g., not less than 30 days after the date of the notice), by which they must be taken. DOE may take additional actions if the Awardee does not achieve compliance by the time specified in the Notice of Non-compliance or does not provide satisfactory assurances that actions have been initiated that will achieve compliance in a timely manner. The Notice must be sent by means that provide proof of delivery (e.g., email with read receipt, certified mail, return receipt requested) and can establish the "count down" period for corrective action. AOs must coordinate the non-compliance determination and the resulting corrective action plan activities with the ATR and appropriate legal counsel. The Guide to Financial Assistance has possible remedies for non-compliance.

4.4 Real Property

Title to real property acquired or improved under an OT agreement will vest upon acquisition in the awardee. The awardee cannot encumber this property without the approval of the AO. Except as otherwise provided by Federal statutes or by the DOE, real property will be used for the originally authorized purpose as long as needed for that purpose. When real property is no longer needed for the originally authorized purpose, the awardee must obtain disposition instructions from the DOE. The instructions must provide for one of the following alternatives:

a) retain title after compensating the DOE for federal cost share;

b) sell the property and compensate the DOE for cost share;

c) transfer title to the DOE or to a third party designated/approved by the DOE; or

d) with Secretarial, or designee, approval, retain title without compensating DOE for cost share.

TIAs have special conditions on the purchase of real property, see 10 CFR 603.680.

4.5 Closeout

Once performance is complete, the AO must close out the agreement in accordance with normal DOE procedures including ensuring all deliverables have been received, audits completed, and final payment made.

Appendix A – Acronyms and Definitions

Acronyms

AO	**Agreement Officer**
ARPA-E	**Advanced Research Projects Agency - Energy**
ATR	**Agreement Technical Representative**
BAA	**Broad Agency Announcement**
CAS	**Cost Accounting Standards**
CICA	**Competition in Contracting Act**
CO	**Contracting Officer**
DOE	**Department of Energy including ARPA-E and NNSA**
FA	**Financial Assistance**
FAR	**Federal Acquisition Regulation**
FOA	**Funding Opportunity Announcement**
GAO	**Government Accountability Office**
GO	**Grants Office**
IFB	**Invitation for Bids**
NNSA	**National Nuclear Security Administration**
OT	**Other Transactions**
RFP	**Request for Proposal**
SME	**Subject Matter Expert**
SPE	**Senior Procurement Executive**
TIA	**Technology Investment Agreement**

Definitions for this Guide

Allocable - A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a government contract if it-

a. Is incurred specifically for the contract;

b. Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

c. Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

Allowable - A cost is allowable only when the cost complies with all of the following requirements:

a. Reasonableness

b. Allocability

c. Standards promulgated by the CAS Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances

d. Terms of the agreement

Award Officer – The authorized, warranted official responsible for obligating DOE to the terms of an award i.e., Agreement Officers, Contracting Officers, and Grants Officers.

Awardee – the legal entity that receives an award from DOE.

Consortium – A group (as of companies) formed to undertake an enterprise beyond the resources of any one member.

Demonstration - The act or circumstance of proving or being proved conclusively, as by reasoning or a show of evidence. A project designed to determine the technical feasibility and economic potential of a technology on either a pilot or prototype scale.

Deployment - The implementation and rollout of new applications or infrastructure.

Development - The systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

Equipment - an item having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of the capitalization level established by the nonfederal entity for financial statement purposes, or $5,000.

New entrant or non-traditional contractor - A new entrant or non-traditional contractor is a business unit that has not, for a period of at least five years prior to the effective date of the OT agreement received a Federal prime award.

Real Property - land, including land improvements, structures, and appurtenances thereto, but excludes movable machinery and equipment.

Reasonable - A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.

Research - A systematic study directed toward fuller scientific knowledge or understanding of the subject studied.

Requirement – The activity or project that needs to be accomplished with DOE funding.

Solicitation – The document that requests proposals or applications to accomplish the requirement.

Sub-awardee – a legal entity that receives an award from the Awardee to perform part of the funded activity.

Appendix B - Statutes and Regulations

NOT APPLICABLE - The following is a list of statutes and regulations that DO NOT apply to OT agreements. This list is not all inclusive but represents the most common statutes and regulations that do not apply. The applicable General Counsel will be consulted in the preparation of any OT agreement for applicability/non-applicability.

1. **Anti-Kickback Act of 1986**, 41 USC § 51-58. Prohibits kickbacks in connection with Government contracts, and provides for civil and criminal penalties.

2. **Bayh-Dole Act**, 35 USC § 202-204. Prescribe the Government's rights in patentable inventions made with Government funds.

3. **Buy American Act**, 41 USC §10a-d. Provides preferences for domestic end products in production.

4. **Competition in Contracting Act**, Public Law 98-369 (1984), as amended.
Promotes use of competitive procurement procedures and prescribes uniform Government-wide policies and procedures regarding contract formation, award, publication, and cost or pricing data (truth in negotiations).

5. **Contract Disputes Act**, Public Law 95-563 (1987), as amended, 41 USC § 601 et seq. Provides for resolution of claims and disputes relating to Government contracts.

6. **Drug-Free Workplace Act of 1988**, 41 USC § 701-707. Applies to contracts and grants.

7. **Extraordinary Contractual Relief**, Public Law 85-804, 50 USC § 1431-1435.
Authorizes contractor remedies such as formalization of informal commitments, amendments without consideration, and correction of mistakes; and permits indemnification for unusually hazardous risks.

8. **Limitation on the Use of Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions,** 31 USC § 1352. Prohibits use of funds to influence or attempt to influence Government officials or members of Congress in connection with the award of contracts, grants, loans, or cooperative agreements.

9. **Procurement Integrity Act**, section 27 of the Office of Federal Procurement Policy Act, 41 USC § 423. Imposes civil, criminal, and administrative sanctions against individuals who inappropriately disclose or obtain source selection information or contractor bid and proposal information.

10. **Procurement Protest System**, Subtitle D of Competition in Contracting Act, Public Law 98-369 (1984), 31 USC § 3551 et seq. Provides a statutory basis for procurement protests, by

interested parties, to the Comptroller General. Insert at end: (But see guidance on protest jurisdiction set forth at section 3.2.10.)

11. **Service Contract Act**, 41 USC 351 et seq., Walsh Healey Act, 41 USC § 35-45;
Fair Labor Standards Act, 29 USC § 201-219. Provides protections for contractor employees.

APPLICABLE - The following is a list of statutes and regulations that DO apply to OT agreements. This list is not all inclusive but represents the most common statutes and regulations that would still apply. Local Counsel will be consulted in the preparation of any OT agreement for applicability/non-applicability.

1. Nonprocurement Suspension and Debarment, 2 CFR 180/2 CFR 901
2. EPAct cost share requirements, Section 988 of Pub. Law 109-58
3. EPAct merit review and competition requirements, Section 989 of Pub. Law 109-58
4. Federal Fiscal Laws – Annual Appropriations
5. Statutory Program Authorizations
6. Export Controls
7. Lobbying with appropriated moneys, 18 U.S.C. 1913
8. Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019
9. National Environmental Policy Act

Appendix C – Decision Matrix

Use this list of questions to help determine the appropriate award instrument.

1. What is the requirement?

    Are supplies or equipment needed?

    Are services needed – technical, administrative, research?

    Is the requirement unique in whole or part?

    Has it been done before?

    Is the requirement for classified work or does it have security concerns for the data and results?

    What does the program authorization statute say?

    What does the appropriation statute say?

2. Who needs the requirement?

    Does the DOE (requestor) need the supply or service?

    Does the requirement result in public stimulation or for the public good?

3. What entities would be interested in fulfilling the requirement?

    For-profits – large and small businesses

    Universities and non-profit organizations

    State, Local, Territory and/or Tribal Government

    Entities that do not often deal with the Federal Government

4. Have you had entities say they were interested in the project but didn't like certain requirements?

5. Have you solicited proposals/offers/applications before and not had the responses you expected?

Within these boundaries:

1. You must use a contract for classified requirements or requirements with security concerns for loss of data or results.

2. If the requirement is for the direct benefit of DOE, use a contract unless the best entity to do the work wants relief from the FAR.

3. If the requirement is to stimulate public action or for another public purpose, use a grant or cooperative agreement unless a selected applicant wants relief from the FA regulations.

4. Does the use of an Ot agreement benefit the program? For example, reaching new entrants or new markets.

5. If the requirement needs to be awarded to an entity that needs relief from traditional regulations, use an OT agreement.

6. If the requirement is for RD&D and needs IP protections, use a TIA.

To use a TIA,

AOs may use a TIA only in appropriate situations. To do so, the use of a TIA must be documented in a memorandum for the record and justified based on:

a. The nature of the project;

b. The type of awardee;

c. The awardee's commitment and cost sharing;

d. The degree of involvement of the Government program official; and

e. The Agreement Officer's judgment that the use of a TIA could benefit the RD&D objectives in ways that likely would not happen if another type of instrument were used (i.e., a contract, grant or cooperative agreement is not feasible or appropriate).

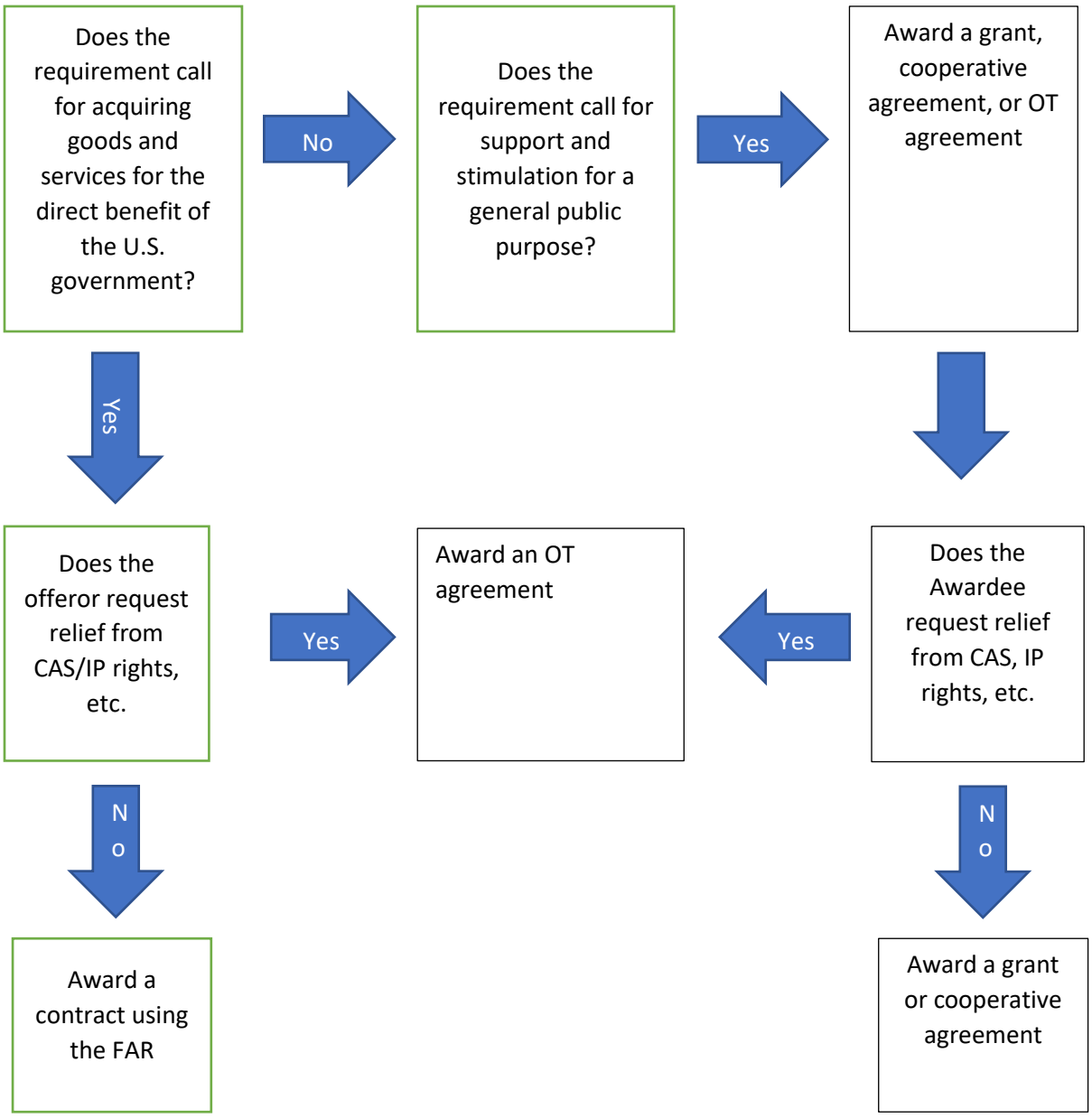
1. Will the use of a TIA permit the involvement in the RD&D of any commercial firms or business units of firms that would not otherwise participate in the project?

2. Will the use of a TIA allow the creation of new relationships among participants at the prime or subtier levels, among business units of the same firm, or between non-Federal participants and the Federal Government that will foster better technology?

3. Will the use of a TIA allow firms or business units of firms that traditionally accept Government awards to use new business practices in the execution of the RD&D project that will foster better technology, new technology more quickly or less expensively, or facilitate partnering with commercial firms?

4. Are there any other benefits to the use of a TIA that could help the Department of Energy better meet its objectives in carrying out the project?

Contracts	Grants/ Cooperative Agreements	OT	
		TIAs	Other
	2 CFR 200	42 U.S.C. 7256(g)	42 USC 7256(a)
48 CFR	2 CFR 910	10 CFR 603	42 USC 7256(g)
Acquisition Letters	Financial Assistance Letters	OT Letters	OT Letters
Acquisition Guide	Financial Assistance Guide	OT Guide	OT Guide
	Merit Review Guide		


Does the requirement call for acquiring goods and services for the direct benefit of the U.S. government?
No
Does the requirement call for support and stimulation for a general public purpose?
Yes
Award a grant, cooperative agreement, or OT agreement
Yes
Does the offeror request relief from CAS/IP rights, etc.
Yes
Award an OT agreement
Yes
Does the Awardee request relief from CAS, IP rights, etc.
No
Award a contract using the FAR
No
Award a grant or cooperative agreement

Appendix D – OT Agreement Articles

Mandatory – Articles marked as Mandatory must be included in the OT agreement. The sample text is provided as a model and may be altered to fit each OT agreement except for Articles required by statute must use the language as provided.

Optional – Articles marked as Optional will be included in OT agreements when the scope of work requires agreed to requirements.

Suggested – Titles of articles to consider depending on the project being funded.

Mandatory Articles

Authority to enter into the Agreement	
Description of Use	MANDATORY Provide the appropriate OT authority and program authority
Sample Language	This Agreement is entered into under 42 USC 7256 and *(add program authority)*. This agreement between the Department of Energy and INSERT AWARDEE is a transaction other than a procurement, grant, cooperative agreement, or loan. Only those terms or requirements set forth in this agreement and required by law for other transaction agreements awarded under [42 USC 7256(a)][42 USC 7256(g)Additional Authorities] are applicable.

Scope of the agreement - background, definitions, scope, goals and objectives	
Description of Use	MANDATORY
Sample Language	This article should be taken from the application. It should also include a description of the substantial involvement by DOE.

Period of Performance	
Description of Use	MANDATORY - The Agreements Officer shall insert the following article in all cost reimbursable agreements.
Sample Language	The Awardee shall commence performance of this agreement in accordance with the agreement terms and conditions on [insert effective date of agreement or date on which work is to begin] and continue through [insert the end date for agreement performance]. *[Insert the following in any awards that include more than one budget period:*

	The period of performance consists of the following Budget Periods: [insert project budget periods]. The threshold of each budget period following the first shall be considered a go/no-go decision point. Continuation into a subsequent budget period shall be determined by DOE following submission of a Continuation Application. Continuation Application. A continuation application is a non-competitive application for an additional budget period within a previously approved project period. At least 90 days before the end of each budget period, you must submit your continuation application to XXXXXX. The continuation application must include the following information: 1. A report on progress towards meeting the objectives of the project, including any significant findings, conclusions, or developments, and an estimate of any unobligated balances remaining at the end of the budget period. If the remaining unobligated balance is estimated to exceed 20 percent of the funds available for the budget period, explain why the excess funds have not been obligated and how they will be used in the next budget period. 2. A detailed budget and supporting justification for the upcoming budget period if additional funds are requested, a reduction of funds is anticipated, or a budget for the upcoming budget period was not approved at the time of award. 3. A description of your plans for the conduct of the project during the upcoming budget period, if there are changes from the DOE approved application.

Points of Contact	
Description of Use	MANDATORY - The Agreements Officer shall insert an article identifying the POCs w/addresses, phone numbers and email addresses.
Sample Language	To promote timely and effective agreement administration, correspondence delivered to the Government under this agreement shall reference the agreement

	number, title, and subject matter, and shall be subject to the following procedures: (a) Technical correspondence. Technical correspondence shall be addressed to the Agreement Technical Representative (ATR) for this agreement, and a copy of any such correspondence shall be sent to [insert Agreements Specialist or Agreements Officer]. As used herein, technical correspondence does not include correspondence where patent or rights in data issues are involved, nor which proposes or involves waivers, deviations, or modifications to the requirements, terms or conditions of this agreement. (b) Other Correspondence. (1) Correspondence regarding patent or rights in data issues should be sent to the Intellectual Property Counsel. A copy of such correspondence shall be provided to [insert Agreements Specialist or Agreements Officer]. (2) All correspondence, other than technical correspondence and correspondence regarding patent of rights in data, including correspondence regarding waivers, deviations, or modifications to requirements, terms or conditions of the agreement, shall be addressed to the [insert Agreements Specialist or Agreements Officer]. Copies of all such correspondence shall be provided to the ATR. (c) Information regarding correspondence addresses and contact information is as follows: (1) Agreements Specialist: (A) [Insert name of Agreements Specialist] (B) Telephone number [Insert Agreements Specialist's ten-digit telephone number] (C) Address [Insert mailing address of Agreements Specialist]

	(D) Email address [Insert email address of Agreements Specialist] (2) Agreements Officer (A) [Insert name of Agreements Officer] (B) Telephone number [Insert Agreements Officer's ten-digit telephone number] (C) Address [Insert mailing address of Agreements Officer] (D) Email address [Insert email address of Agreements Officer] (3) Agreement Technical Representative (A) [Insert name of ATR] (B) Telephone number [Insert ATR's ten-digit telephone number] (C) Address [Insert mailing address of ATR] (D) Email address [Insert email address of ATR] (4) Intellectual Property Counsel (A) [If any, insert name of Intellectual Property Counsel] (B) Telephone number [If any, insert Counsel's ten-digit telephone number] (C) Address [If any, insert address of Counsel] (D) Email address [If any, insert Counsel's email address] (5) Awardee POC (A) Name [Insert name of Awardee POC Administrator] (B) Telephone number [Insert ten-digit telephone number] (C) Mailing address [Insert mailing address] (D) Email address [Insert email address]

Estimated Cost/Price	
Description of Use	Mandatory – include language (cost or price) that reflects the total agreed to budget for the award. May be on the award form if used vs a signature page
Sample Language	The total estimate cost/price for this award is $xxxxxxxxx

<table>
<tr><td colspan="2">Cost Share</td></tr>
<tr><td>Description of Use</td><td>MANDATORY Include if the award is for research, development, demonstration, and commercial activities per EPAct 988 or cost share is otherwise required by statute. The Awardee's cost share for the budget must reflect the overall cost share ratio negotiated by the parties. This ratio must be at least the statutory minimum based on the nature of the project. The cost share should be generally the same for the entire award. However, it may be in the best interest of the project for DOE to provide a greater cost share at the beginning of the award. The risk of the Awardee not meeting the greater financial obligations should be weighed against the risk of the project not starting.</td></tr>
<tr><td>Sample Language</td><td><u>Cost Sharing Obligations</u>

By accepting federal funds under this Agreement, the Awardee agrees that it is liable for its percentage of the total allowable project costs as specified below:

<table><tr><td>Government Share
$/%</td><td>Awardee Share
$/%</td><td>Total Project Cost</td></tr><tr><td>$/%</td><td>$/%</td><td>$</td></tr></table>

The Awardee is required to pay the “Cost Share” amount as a percentage of the total project costs in each invoice period for the duration of the period of performance.

If the project is terminated or is otherwise not funded to completion, the Awardee is not required to pay the entire “Cost Share” amount; however, the Awardee is required to pay its share (i.e., percentage) of the total project cost incurred to date as of the termination or end date of the Agreement.</td></tr>
</table>

	<u>Source of Cost Share</u> Cost share shall be provided by non-Federal funds unless otherwise authorized by statute. In calculating the amount of the non-Federal contribution: (1) Base the non-Federal contribution on total project costs, including the cost of work where funds are provided directly to a partner, consortium member or subrecipient, such as a Federally Funded Research and Development Center; (2) Include the following costs as allowable in accordance with the applicable cost principles: (i) Cash; (ii) Personnel costs; (iii) The value of a service, other resource, or third-party in-kind contribution; (iv) Indirect costs or facilities and administrative costs; and/or (v) Any funds received under the power program of the Tennessee Valley Authority (except to the extent that such funds are made available under an annual appropriation Act); (3) Exclude the following costs: (i) Revenues or royalties from the prospective operation of an activity beyond the time considered in the award; (ii) Proceeds from the prospective sale of an asset of an activity; or

	(iii) Other appropriated Federal funds, unless otherwise authorized by statute. (4) Repayment of the Federal share of a cost-shared activity under Section 988 of the Energy Policy Act of 2005 shall not be a condition of the award. <u>Cost Share Recordkeeping</u> The Awardee is required to document and maintain records of project costs paid by DOE and project costs that the Awardee claims as cost sharing, including in-kind contributions. Upon request, the Awardee is required to provide such records to the Agreements Officer. <u>Inability to Comply with Cost Sharing Obligations</u> If the Awardee determines that it might be unable to meet its cost sharing obligations, the Awardee is required to notify the Agreements Officer in writing immediately. The notification must include the following information: (i) whether the Awardee intends to continue or phase out the project, and (ii) if the Awardee intends to continue the project, how the Awardee will pay (or secure replacement funding for) the Awardee's share of the total project cost. If the Awardee fails to meet its cost sharing obligations, the Agreements Officer may terminate this Agreement or otherwise recover some or all of the financial assistance provided. <u>Modifying Cost Sharing Contributions</u> The Awardee must notify and receive written authorization from the Agreements Officer before modifying the amount of cost share contributions.

Milestone Schedule	
Description of Use	MANDATORY – if the award is fixed support and includes milestone payments Describe the milestone including dates and payment amounts, and language stating (if applicable) that payment is dependent on DOE's determination that awardee has achieved the milestone.
Sample Language	Use info from application and negotiations to develop language to develop the milestones such as: **Milestone No. Milestone Description Amount Due at**

Audits	
Description of Use	MANDATORY – if the award is cost reimbursable or fixed support and includes cost share
Sample Language	The Awardee is required to provide any information, documents, site access, or other assistance requested by DOE or Federal auditing agencies (e.g., DOE Inspector General, Government Accountability Office, Defense Contracting Audit Agency) for the purpose of audits and investigations. Such assistance may include, but is not limited to, reasonable access to the Awardee's records relating to this Agreement. DOE will endeavor to provide reasonable advance notice of audits

	and will minimize interference with ongoing work, to the maximum extent practicable.

Single Audit Acts	
Description of Use	MANDATORY – if the award is considered Federal Award, is other than a for-profit entity and expends more than $750000 in Federal funds.
Sample Language	The Awardee is required to comply with the requirements of the Single Audit Act in accordance 2 CFR 200 Subpart F.

Reporting Requirements	
Description of Use	MANDATORY - Include a list of reporting requirements, where to send and the frequency of each item.
Sample Language	a. Report Deliverables

	Unless otherwise specified by the Agreements Officer, delivery of reports to be furnished to the DOE under this Agreement shall be delivered electronically. All deliverables in this agreement the Awardee shall provide documents to the Agreements Officer and Agreement Technical Representative unless otherwise indicated. b. Financial Reporting & Records As directed by the Agreements Officer, the Awardee shall maintain records in accordance with commercially acceptable business practices to account for all funding under this Agreement and shall maintain records in accordance with commercially acceptable business practices to account for Awardee funding under this Agreement. The Awardee's relevant financial records are subject to examination or audit on behalf of Government and/or the Comptroller General for a period not to exceed three (3) years after final payment of the Agreement. The Agreements Officer or Agreement Technical Representative shall have direct access to complete records and information of the Awardee, to the extent necessary to audit to ensure full accountability for all amounts reimbursed by the Government under this Agreement. Such audit, examination, or access shall be performed during business hours on business days upon at least six weeks prior written notice and shall be subject to the security requirements of the audited Party.

Obligation of Funding	
Description of Use	MANDATORY address the dollars obligated to the agreement

Sample Language	The maximum obligation of the DOE is limited to *$XXXXXXXXXX*. You are not obligated to continue performance of the project beyond the total amount obligated and your pro rata share of the project costs. *If not fully funded:* Subject to the availability of additional funds appropriated by Congress for the purpose of this program and the availability of future-year budget authority, DOE anticipates obligating the total estimated amount for the duration of this project. However, future funding is not guaranteed. Incurrence of costs for which funding has not been obligated is at the risk of the awardee.

Payment	
Description of Use	MANDATORY address the payment provisions for cost reimbursable agreements
Sample Language	Only the Awardee may submit reimbursement requests to DOE. Subawardees must submit reimbursement requests to the Awardee. The Awardee is required to submit reimbursement requests electronically through DOE's Oak Ridge Financial Service Center Vender Inquiry Payment Electronic Reporting System (VIPERS). To access and use VIPERS, the Awardee is required to enroll and login to the VIPERS website (https://vipers.oro.doe.gov/). DOE will disburse payments under this Agreement through Automated Clearing House (ACH) VIPERS. The Awardee may check the status of its payments at the VIPERS website. All payments are made by electronic funds transfer to the bank account identified on the ACH Vendor/Miscellaneous Payment Enrollment Form (SF 3881) filed by the Awardee.

	The Awardee's submission of reimbursement requests should coincide with the Awardee's normal billing pattern. DOE will approve reimbursement requests within 30 days of receipt, unless the billing is improper, or the Awardee fails to comply with the terms and conditions of this Agreement. b. Documentation Required Every reimbursement request submitted by the Awardee must include: A Standard Form (SF) 270 ("Request for Advance or Reimbursement"); A "Reimbursement Request Spreadsheet," which must contain the information shown in [Insert appendix/attachment and number/alphabet] hereto; and Supporting documentation, which may consist of summary information (e.g., printouts from internal financial systems) or detailed documentation (e.g., invoices on appropriate letterhead, timecards, travel vouchers). The supporting documentation must show the method by which the Awardee calculated the total Federal share and non-Federal cost share. Upon request by Agreements Technical Representative or Agreements Officer, the Awardee is required to provide DOE with additional supporting documentation to explain or justify particular expenditures for which it is seeking reimbursement.

Payment	
Description of Use	MANDATORY address the payment provisions for fixed support agreements

Sample Language	Only the Awardee may submit payment requests to DOE. Subawardees must submit reimbursement requests to the Awardee. The Awardee is required to submit reimbursement requests electronically through DOE's Oak Ridge Financial Service Center Vender Inquiry Payment Electronic Reporting System (VIPERS). To access and use VIPERS, the Awardee is required to enroll and login to the VIPERS website (https://vipers.oro.doe.gov/). DOE will disburse payments under this Agreement through Automated Clearing House (ACH) VIPERS. The Awardee may check the status of its payments at the VIPERS website. All payments are made by electronic funds transfer to the bank account identified on the ACH Vendor/Miscellaneous Payment Enrollment Form (SF 3881) filed by the Awardee. The Awardee's submission of payment requests should coincide with the milestone schedule described in this Agreement.

Modifications	
Description of Use	MANDATORY – include to identify procedures and the AO's authority to modify the Agreement
Sample Language	As the result of changing circumstances at any point during the term of this agreement, progress or results may indicate that a change to the agreement may be beneficial to program objectives. Recommendations for modifications, including justifications to support those changes, will be documented in writing and submitted by the performer to the Agreements Officer. This documentation will detail the technical, schedule, and financial impact of the proposed modification. The Agreements officer and the awardee shall approve any agreement modification. The DOE is not obligated to pay for additional costs

	related to modifications until formally agreed to by the Agreements Officer and the awardee. The Agreements Officer shall be responsible for the review and verification of any recommendations to revise or otherwise modify the agreement. For minor or administrative modifications (e.g., changes to the paying office or appropriation data)), awardee approval is not required. The Agreements Officer is responsible for instituting all modifications to this agreement.

System for Award Management	
Description of Use	Mandatory – include for information on awardee, esp. payment info.
Sample Language	*Registered in the System for Award Management (SAM)* means that - (1) The Offeror has entered all mandatory information, including the unique entity identifier and the EFT indicator, if applicable, the Commercial and Government Entity (CAGE) code, as well as data required by the Federal Funding Accountability and Transparency Act of 2006 into SAM; (2) The offeror has completed the Core, Assertions, and Representations and Certifications, and Points of Contact sections of the registration in SAM; (3) The Government has validated all mandatory data fields, to include validation of the Taxpayer Identification Number (TIN) with the Internal Revenue Service (IRS). The offeror will be required to provide consent for TIN validation to the Government as a part of the SAM registration process; and (4) The Government has marked the record "Active". *Unique entity identifier* means a number or other identifier used to identify a specific commercial, nonprofit, or Government entity. See *www.sam.gov* for the designated entity for establishing unique entity identifiers.

	(b)(1) An Offeror is required to be registered in SAM when submitting an offer or quotation, and shall continue to be registered until time of award, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from this solicitation. (2) The Offeror shall enter, in the block with its name and address on the cover page of its offer, the annotation "Unique Entity Identifier" followed by the unique entity identifier that identifies the Offeror's name and address exactly as stated in the offer. The Offeror also shall enter its EFT indicator, if applicable. The unique entity identifier will be used by the Contracting Officer to verify that the Offeror is registered in SAM. (c) If the Offeror does not have a unique entity identifier, it should contact the entity designated at *www.sam.gov* for establishment of the unique entity identifier directly to obtain one. The Offeror should be prepared to provide the following information: (1) Company legal business name. (2) Tradestyle, doing business, or other name by which your entity is commonly recognized. (3) Company physical street address, city, state, and Zip Code. (4) Company mailing address, city, state and Zip Code (if separate from physical). (5) Company telephone number. (6) Date the company was started. (7) Number of employees at your location. (8) Chief executive officer/key manager. (9) Line of business (industry). (10) Company headquarters name and address (reporting relationship within your entity).

Closeout	
Description of Use	MANDATORY – provide instruction on closing out the award
Sample Language	Upon agreement completion, the AO must close out the agreement in accordance with standard DOE procedures including ensuring all deliverables have been accepted, audits completed, final payment made, and excess funds deobligated. The Awardee agrees to provide DOE all documents requested to closeout this award.

Performance of Work in the United States	
Description of Use	MANDATORY - Agreements Officer and Agreement Technical Representative should include percentage negotiated between the parties minimum of 50% otherwise must be 100%.
Sample Language	All work under this Agreement must be performed in the United States (i.e., the Awardee must expend 100% of the total project cost in the United States), unless the Awardee receives advance written authorization from the Agreements Officer to perform certain work overseas.
Lobbying Restrictions	
Description of Use	MANDATORY per 18 U.S.C. 1913
Required Language	LOBBYING RESTRICTIONS By accepting funds under this agreement., you agree that none of the funds obligated on the agreement shall be expended, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. 1913. This restriction is in addition to those prescribed elsewhere in statute and regulation.
Suspension and Debarment	
Description of Use	MANDATORY per Executive Orders 12549 and 12689

Required Language	In accordance with Executive Orders 12549 and 12689, the regulations at 2 CFR part 180, OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) are applicable to this agreement.
Access to Records	
Description of Use	MANDATORY per 42 USC 7137
Required Language	In accordance with 42 USC 7137, the Comptroller General of the United States, or any of his duly authorized representatives, shall have access to and the right to examine any books, documents, papers, records, or other recorded information of any awardees of Federal funds or assistance under this agreement, including subagreements.
Nondisclosure and Confidentiality Agreements Assurances	
Description of Use	MANDATORY per recent appropriations acts – see Section 743, Titles VII, General Provisions – Government-Wide, of the Consolidated Appropriations Act, 2023
Required Language	(1) By entering into this agreement, the awardee does not and will not require its employees or contractors to sign internal nondisclosure or confidentiality agreements or statements prohibiting or otherwise restricting its employees or contactors from lawfully reporting waste, fraud, or abuse to a designated investigative or law enforcement representative of a federal department or agency authorized to receive such information. (2) The undersigned further attests that awardee does not and will not use any Federal funds to implement or enforce any nondisclosure and/or confidentiality policy, form, or agreement it uses unless it contains the following provisions: a. These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions,

	requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling. b. The limitation above shall not contravene requirements applicable to Standard Form 312, Form 4414, or any other form issued by a Federal department or agency governing the nondisclosure of classified information. c. Notwithstanding provision listed in paragraph (a), a nondisclosure or confidentiality policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure or confidentiality forms shall also make it clear that they do not bar disclosures to Congress, or to an authorized official of an executive agency or the Department of Justice, that are essential to reporting a substantial violation of law.
Corporate Felony Conviction and Federal Tax Liability Assurances	
Description of Use	MANDATORY per recent appropriations acts – see Sections 744 and 745, Titles VII, General Provisions – Government-Wide, of the Consolidated Appropriations Act, 2023
Sample Language	By entering into this agreement, the undersigned attests that [insert corporation name] has not been convicted of a felony criminal violation under Federal law in the 24 months preceding the date of signature. The undersigned further attests that [insert corporation name] does not have any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not

	being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability. For purposes of these assurances, the following definitions apply: A Corporation includes any entity that has filed articles of incorporation in any of the 50 states, the District of Columbia, or the various territories of the United States [but not foreign corporations]. It includes both for-profit and non-profit organizations.
Insolvency, Bankruptcy or Receivership	
Description of Use	MANDATORY
Sample Language	a. You shall immediately notify the DOE of the occurrence of any of the following events: (i) you or your parent's filing of a voluntary case seeking liquidation or reorganization under the Bankruptcy Act; (ii) your consent to the institution of an involuntary case under the Bankruptcy Act against you or your parent; (iii) the filing of any similar proceeding for or against you or your parent, or its consent to, the dissolution, winding-up or readjustment of your debts, appointment of a receiver, conservator, trustee, or other officer with similar powers over you, under any other applicable state or federal law; or (iv) your insolvency due to your inability to pay your debts generally as they become due. b. Such notification shall be in writing and shall: (i) specifically set out the details of the occurrence of an event referenced in paragraph a; (ii) provide the facts surrounding that event; and (iii) provide the impact such event will have on the project being funded by this agreement. c. Upon the occurrence of any of the four events described in the first paragraph, DOE reserves the right to conduct a review of your agreement to determine your compliance with the required elements of the agreement (including such items as cost share, progress towards technical project objectives, and submission of required reports). If the DOE review determines that there are significant deficiencies or concerns with your performance under the agreement, DOE reserves the right to impose additional requirements, as needed, including (i) change your payment method; or (ii) institute payment controls.

	d. Failure of the Awardee to comply with this term may be considered a material noncompliance of this agreement.
Disputes and Appeals	
Description of Use	MANDATORY – AOs will use a disputes clause.
Sample Language	***(a)Informal dispute resolution.*** Whenever practicable, DOE will attempt to resolve informally any dispute over the administration of Federal financial assistance. Informal resolution, including resolution through an alternative dispute resolution mechanism, will be preferred over formal procedures, to the extent practicable. Disputes will be raised by the awardee to the Agreement officer or by the Agreements Officer to the awardee point of contact. (b) ***Final determination.*** Whenever a dispute is not resolved informally, DOE will mail (by certified mail) a brief written determination signed by an Agreement Officer, setting forth DOE's final disposition of such dispute. Such determination will contain the following information: (1) A summary of the dispute, including a statement of the issues and of the positions taken by DOE and the party or parties to the dispute; and (2) The factual, legal and, if appropriate, policy reasons for DOE's disposition of the dispute. (c) ***Right of appeal.*** Except as provided in paragraph (e) of this section, the final determination under paragraph (b) of this section may be appealed to the cognizant Senior Procurement Executive (SPE) for either DOE or the National Nuclear Security Administration (NNSA). The appeal must be received by DOE within 90 days of the receipt of the final determination. The mailing address for the DOE SPE is Office of Acquisition Management, 1000 Independence Ave., SW., Washington, DC 20585. The mailing address for the NNSA SPE is Office of Partnership and Acquisition Services, National Nuclear Security Administration (NNSA), 1000 Independence Ave. SW., Washington, DC 20585. (d) ***Effect of appeal.*** The filing of an appeal with the SPE will not stay any determination or action taken by DOE which is the subject of the appeal. Consistent with its obligation to protect the interests of the Federal Government,

	DOE may take such authorized actions as may be necessary to preserve the status quo pending decision by the SPE, or to preserve its ability to provide relief in the event the SPE decides in favor of the appellant. (e) ***Review on appeal.*** (1) The SPE will have no jurisdiction to review: (i) DOE denial of a request for an Exception; (ii) DOE denial of a request for a budget revision or other change in the approved project under another term or condition of the award; (iii) Any DOE decision about an action requiring prior DOE approval under another term or condition of the award; (2) In addition to any right of appeal established by applicable law, the SPE will have jurisdiction to review: (i) A DOE determination that the awardee has failed to comply with the applicable program statute or rules, or other terms and conditions of the award; and (ii) Termination of an award, in whole or in part; (3) In reviewing disputes authorized under paragraph (e)(2) of this section, the SPE will be bound by the applicable law, statutes, and rules, including the requirements of this part, and by the terms and conditions of the award. (4) The decision of the SPE will be the final agency decision of DOE.
Termination	
Description of Use	MANDATORY - include a termination clause that outlines the rights of DOE and the awardee
Sample Language	(1) An award may be terminated in whole or in part by the AO, if the awardee materially fails to comply with the terms and conditions of the award. (2) An award may be terminated in whole or in part by mutual agreement of the parties by providing at least 30 days advance written notice to the other party, provided such notice is preceded by consultation between the parties. The two parties will negotiate the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated. If either party determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purpose for which the award was made, the award may be terminated in its entirety.

	(3) An award may be terminated in whole or in part by either party if the agreement includes an article with the terms and procedures for termination.
Fraud, Waste and Abuse	
Description of Use	Mandatory
Sample Language	The mission of the DOE Office of Inspector General (OIG) is to strengthen the integrity, economy and efficiency of DOE's programs and operations including deterring and detecting fraud, waste, abuse and mismanagement. The OIG accomplishes this mission primarily through investigations, audits, and inspections of Department of Energy activities to include grants, cooperative agreements, loans, and contracts. The OIG maintains a Hotline for reporting allegations of fraud, waste, abuse, or mismanagement. To report such allegations, please visit https://www.energy.gov/ig/ig-hotline. The non-Federal entity must disclose, in a timely manner, in writing to DOE all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the award.
Indemnification	
Description of Use	Mandatory for high-risk awards with other than State and institutions of higher education
Sample Language	The Awardee will indemnify the Government and its officers, agents, or employees for any and all liability, including litigation expenses and attorneys' fees, arising from suits, actions, or claims of any character for death, bodily injury, or loss of or damage to property or to the environment, resulting from the project, except to the extent that such liability results from the direct fault or negligence of Government officers, agents or employees, or to the extent such liability may be covered by applicable allowable costs provisions.

Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment	
Description of Use	MANDATORY – when the award may require any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system per Section 889 of the of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232)
Sample Language	(a) Definitions. As used in this clauseCovered foreign country means The People's Republic of China. Covered telecommunications equipment or services means(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation [or any subsidiary or affiliate of such entities); (2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes. video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities); (3) Telecommunications or video surveillance services provided by such entities or using such equipment; or (4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of investigation, reasonably believes to be an entity owned or conlrolled by, or otherwise connected to, the government of a covered foreign country. Critical technology means(1) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations; (2) Items included on the Commerce Control List set forth in Supplement No. 1 to part 77 4 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled[i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or (ii) For reasons relating to regional stability or surreptitious listening; (3) Specially designed and prepared nuclear

	equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities); (4) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material); (5) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or (6) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 u.s.c. 4817). Substantial or essential component means any component necessary for the proper function or performance of a piece of equipment, system, or service. (b) Prohibition. Section 889(a)(l)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The Contractor is prohibited from providing to the Government any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (cl of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in Federal Acquisition Regulation 4.2104. (cl Exceptions. This clause does not prohibit contractors from providing(1) A service that connects to Lhe facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or (2) Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles. (d) Reporting requirement. (1) In the event the Contractor identifies covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance, or the Contractor is notified of such

	by a subcontractor at any tier or by any other source, the Contractor shall report the information in paragraph (d)(2) of this clause to the Contracting Officer, unless elsewhere in this contract are established procedures for reporting the information; in the case of the Department of Defense, the Contractor shall report to the website at https:1/ dibnet.dod.mil. For indefinite delivery contracts, the Contractor shall report to the Contracting Officer for the indefinite delivery contract and the Contracting Officer(s) for any affected order or, in the case of the Department of Defense, identify both the indefinite delivery contract and any affected orders in the report provided at https:/1 dibnet.dod.mil. (2) The Contractor shall report the following information pursuant to paragraph (d)(l) of this clause: (i) Within one business day from the date of such identification or notification: The contract number; the order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended. (ii) Within 10 business days of submitting the information in paragraph (d)(2)(i) of this clause: Any further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of covered telecommunications equipment or services, and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services. (e) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (el, in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items.

Acquired Real Property	
Description of Use	Include if 1 or 2 applies Use FY23 appropriations authority for vesting unconditional title DOE funds property under conditional title

Sample Language	Alt (1) FY23 appropriations language if approved by Secretary or designee Title to real property acquired or improved under a Federal award will vest upon acquisition with the non-Federal entity. The Awardee will use the property for its original authorized purpose during the term of the award. The Awardee will maintain appropriate records of the property acquisition and maintain adequate insurance on the property. Alt (2) all other purchases of real property Title to real property acquired or improved under a Federal award will vest conditionally upon acquisition. The Awardee cannot encumber this property without prior written approval from the AO. Except as otherwise provided by Federal statutes or by the Federal awarding agency, real property will be used for the originally authorized purpose as long as needed for that purpose. When real property is no longer needed for the originally authorized purpose, the non-Federal entity must obtain disposition instructions from the Federal awarding agency. The Awardee will use the property for its original authorized purpose during the term of the award. The Awardee will maintain appropriate records of the property acquisition and maintain adequate insurance on the property. (See Continued Use clause in PF2022-43 and 2 CFR for additional information.)

Foreign National Participation	
Description of Use	MANDATORY
Sample Language	If the Awardee (including any of its subawardees and contractors) anticipates involving foreign nationals in the performance of the Award, the Awardee must, upon DOE's request, provide DOE with specific information about each foreign national to ensure compliance with the requirements for participation and access approval. The volume and type of information required may depend on various factors associated with the Award. The DOE AO will notify the Awardee if this information is required. DOE may elect to deny a foreign national's participation in the Award. Likewise, DOE may elect to deny a foreign national's access to a DOE sites, information, technologies, equipment, programs, or personnel.

Intellectual Property	
Description of Use	MANDATORY – if IP rights are required
Sample Language	Work with local IP Counsel to develop the rights applicable to the award such as Data Rights, Rights in Inventions and U.S. Competitiveness (See Section 3.2.13)

US Competitiveness	
Description of Use	MANDATORY - Insert when IP rights for inventions are included in the OT agreement and with cognizant IP counsel to review the terms.
Sample Language	The Awardee agrees that any products embodying any subject invention or produced through the use of any subject invention will be manufactured substantially in the United States unless the Awardee can show to the satisfaction of DOE that it is not commercially feasible. In the event DOE agrees to foreign manufacture, there will be a requirement that the Government's support of the technology be recognized in some appropriate manner, e.g., alternative binding commitments to provide an overall net benefit to the U.S. economy. The Awardee

	agrees that it will not license, assign or otherwise transfer any subject invention to any entity, at any tier, unless that entity agrees to these same requirements. Should the Awardee or other such entity receiving rights in the invention(s): (1) undergo a change in ownership amounting to a controlling interest, or (2) sell, assign, or otherwise transfer title or exclusive rights in the invention(s), then the assignment, license, or other transfer of rights in the subject invention(s) is/are suspended until approved in writing by DOE. The Awardee and any successor assignee will convey to DOE, upon written request from DOE, title to any subject invention, upon a breach of this paragraph. The Awardee will include this paragraph in all subawards/contracts, regardless of tier, for experimental, developmental or research work. The requirements, rights and administration of the above paragraph are further clarified as follows: 1. Waivers. The Awardee (or any entity subject to [[INSERT REFERENCE TO US COMPETITIVENESS PARAGRAPH]]) may request a waiver or modification of [[INSERT REFERENCE TO US COMPETITIVENESS PARAGRAPH]]. Such waivers or modifications may be granted when DOE determines that (1) the Awardee (or any entity subject to [[INSERT REFERENCE TO US COMPETITIVENESS PARAGRAPH]]) has demonstrated, with quantifiable data, that manufacturing in the United States is not commercially feasible and (2) a waiver or modification would best serve the interests of the United States and the general public. 2. Final determination of breach of [[INSERT REFERENCE TO US COMPETITIVENESS PARAGRAPH]]. If DOE determines the Awardee is in breach of [[INSERT REFERENCE TO US COMPETITIVENESS PARAGRAPH]], the Department may issue a final written determination of such breach. If such determination includes a demand for title to the subject inventions under the award, the demand for title will cause an immediate conveyance and assignment of all rights to all subject inventions under the award to the United States Government,

	including all pending patent applications and all patents that cover any subject invention, without compensation. Any such final determination shall be signed by the cognizant DOE Contracting Officer with the concurrence of the Assistant General Counsel for Technology Transfer & Intellectual Property. Advanced notice will be provided for comment to the Awardee before any final written determination by DOE is issued. 3. For clarity, if DOE determines that the Awardee is in breach of [[INSERT REFERENCE TO US COMPETITIVENESS PARAGRAPH]], the Awardee shall not be entitled to any compensation, or to the license to the subject invention including the reserved license in 37 C.F.R. 401.14(e)(1) unless DOE re-grants a license through a separately agreed upon licensing agreement.

Optional Articles

Purpose	
Description of Use	OPTIONAL - This article will briefly describe the purpose of the OT agreement
Sample Language	The purposes of this Agreement are to: 1) Provide funding to (insert awardee name) support Research, Development, Demonstration & Deployment of innovative technologies; 2) Leverage use of small, disadvantaged businesses; and 3) *add as desired.*

Cybersecurity Plan	
Description of Use	OPTIONAL: Insert if project includes Information Technology or as otherwise designated by CESER
Sample Language	The Awardee must meet the stated objectives and milestones set forth in its Cybersecurity Plan, which is incorporated into the Award as Attachment X. A report on the Awardee's progress towards meeting the objectives and milestones set forth in the Cybersecurity Plan must be included in the continuation application. Any DOE and/or Laboratory review comments or feedback provided to Awardees does not constitute an endorsement or approval of any specific elements within the cybersecurity plan or the proposed security approach. Therefore, such feedback should not be referenced or used in marketing or promotional materials.

Site Visits	
Description of Use	Optional – Include if DOE will need to visit the Awardees facilities
Sample Language	DOE's authorized representatives have the right to make site visits at reasonable times to review project accomplishments and management control systems and to provide technical assistance, if required. You must provide, and must require your subawardees to provide, reasonable access to facilities, office space, resources, and assistance for the safety and convenience of the government representatives in the performance of their duties. All site visits and evaluations must be performed in a manner that does not unduly interfere with or delay the work.

Pre-award	
Description of Use	MANDATORY - Choose one option No pre-award costs allowed Pre-award costs with prior approval Pre-award costs at own risk
Sample Language	You are entitled to reimbursement for costs incurred on or after [MonthDayYear], as authorized by the pre-award costs letter dated [Date of Approval Letter], if such costs are allowable under this agreement. If the Awardee elects to undertake activities that are not authorized for Federal funding by the Agreement Officer in advance of DOE completing the NEPA review, the Awardee is doing so at risk of not receiving Federal funding and such costs may not be recognized as allowable cost share. Nothing contained in the pre-award cost reimbursement regulations or any pre-award costs approval letter from the Agreement Officer override these NEPA requirements to obtain the written authorization from the Agreement Officer prior to taking any action that

	may have an adverse effect on the environment or limit the choice of reasonable alternatives.

National Policy Assurances	
Description of Use	OPTIONAL
Sample Language	The Awardee acknowledges that it is subject to all relevant U.S. Laws and implementing regulations/Executive Orders, in particular: 1. Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d and 2000e, respectively, (prohibiting discrimination based on race, color, religion, sex, and national origin) 2. The Age Discrimination in Employment Act of 1967, 29 USC § 621 et. seq. (prohibits employment discrimination against persons 40 years of age or older) 3. The Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. (prohibits unjustified discrimination based on disability) 4. The Clean Water Act, 33 U.S.C. § 1251 et. seq. 5. The Clean Air Act, 42 U.S.C. § 7401 et. seq. 6. The Occupational Safety and Health Act of 1970, 29 USC § 651 et. seq. (promotes safe and healthful working conditions) 7. Executive Order No. 13224, Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism, 66 FR 49079 8. The National Environmental Policy Act, 42 U.S.C. §4321 et. seq.

Conference Spending	
Description of Use	OPTIONAL
Sample Language	The awardee will not expend any funds on a conference not directly and programmatically related to the purpose for which the agreement was awarded

	that would defray the cost to the United States Government of a conference held by any Executive branch department, agency, board, commission, or office for which the cost to the United States Government would otherwise exceed $20,000, thereby circumventing the required notification by the head of any such Executive Branch department, agency, board, commission, or office to the Inspector General (or senior ethics official for any entity without an Inspector General), of the date, location, and number of employees attending such conference.

Publications	
Description of Use	OPTIONAL – include if there is the possibility for publications acknowledgement and disclaimer to be included in publications.
Sample Language	An acknowledgment of Federal support and a disclaimer must appear in the publication of any material, whether copyrighted or not, based on or developed under this project, as follows: Acknowledgment: "This material is based upon work supported by the Department of Energy [National Nuclear Security Administration] [Add Other Agencies] under Award Number(s) [Enter the award number(s)]." Disclaimer: "This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States Government nor any agency thereof, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or any agency thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency thereof."

Inspection and Acceptance	
Description of Use	OPTIONAL
Sample Language	The AO or the duly authorized representative will perform inspection and acceptance of materials and services to be provided under this agreement. The Company will only tender for acceptance deliverables that substantially conform to the requirements of the agreement. The Government reserves the right to inspect deliverables that have been tendered for acceptance for a period of thirty (30) days. The Government may require resubmittal of nonconforming deliverables, after the Company consults with the Government regarding deliverables reasonably determined by the Government, in writing, to be nonconforming, at no increase in agreement price. The Government must exercise its resubmittal rights and deliver a detailed written description of any nonconformance to Company within thirty (30) days after any defect was discovered or should have been discovered, per the Notice requirements of this agreement. Inspection and acceptance will be performed by (fill-in AO, ATR, or other), at: (fill-in address)

National Security: Classifiable Results Originating Under an Award	
Description of Use	OPTIONAL – consider if R&D could lead to classifiable results or other information that needs to be protected.
Sample Language	This award is intended for unclassified, publicly releasable research. You will not be granted access to classified information. DOE does not expect that the results of the research project will involve classified information. Under certain circumstances, however, a classification review of information originated under the award may be required. The Department may review research work generated under this award at any time to determine if it requires classification.

	a. Executive Order 12958 (60 Fed. Reg. 19,825 (1995)) states that basic scientific research information not clearly related to the national security will not be classified. Nevertheless, some information concerning (among other things) scientific, technological, or economic matters relating to national security or cryptology may require classification. If you originate information during the course of this award that you believe requires classification, you must promptly: 1. Notify the AO and ATR; 2. Submit the information by registered mail directly to the Director, Office of Classification and Information Control, SO-10.2; U.S. Department of Energy; P.O. Box A; Germantown, MD 20875-0963, for classification review. 3. Restrict access to the information to the maximum extent possible until you are informed that the information is not classified, but no longer than 30 days after receipt by the Director, Office of Classification and Information Control. b. If you originate information concerning the production or utilization of special nuclear material (i.e., plutonium, uranium enriched in the isotope 233 or 235, and any other material so determined under section 51 of the Atomic Energy Act) or nuclear energy, you must: 1. Notify the AO and ATR; 2. Submit the information by registered mail directly to the Director, Office of Classification and Information Control, SO-10.2; U.S. Department of Energy; P. O. Box A; Germantown, MD 20875-0963 for classification review within 180 days of the date the recipient first discovers or first has reason to believe that the information is useful in such production or utilization; and 3. Restrict access to the information to the maximum extent possible until you are informed that the information is not classified, but no longer than 90 days after receipt by the Director, Office of Classification and Information Control. c. If DOE determines any of the information requires classification, you agree that the Government may terminate the award with consent of the recipient and award to a contract. All material deemed to be classified must be forwarded to the DOE, in a manner specified by DOE.

Export Control	
Description of Use	OPTIONAL
Sample Language	The U.S. government regulates the transfer of information, commodities, technology, and software considered to be strategically important to the U.S. to protect national security, foreign policy, and economic interests without imposing undue regulatory burdens on legitimate international trade. There is a network of Federal agencies and regulations that govern exports that are collectively referred to as "Export Controls." All awardees and subawardees are responsible for ensuring compliance with all applicable United States Export Control laws and regulations relating to any work performed under a resulting award. The Awardee must immediately report to DOE any export control violations related to the project funded under this award, at the awardee or subawardee level, and provide the corrective action(s) to prevent future violations.

Human Subjects Research 1	
Description of Use	OPTIONAL
Sample Language	Research involving human subjects, biospecimens, or identifiable private information conducted with Department of Energy (DOE) funding is subject to the requirements of DOE Order 443.1C, *Protection of Human Research Subjects*, 45 CFR Part 46, *Protection of Human Subjects* (*subpart A which is referred to as the "Common Rule"),* and 10 CFR Part 745, *Protection of Human Subjects*.

	Federal regulation and the DOE Order require review by an Institutional Review Board (IRB) of all proposed human subjects research projects. The IRB is an interdisciplinary ethics board responsible for ensuring that the proposed research is sound and justifies the use of human subjects or their data; the potential risks to human subjects have been minimized; participation is voluntary; and clear and accurate information about the study, the benefits and risks of participating, and how individuals' data/specimens will be protected/used, is provided to potential participants for their use in determining whether or not to participate. The Awardee will provide the Federal Wide Assurance number identified in item 1 below and the certification identified in item 2 below to DOE prior to initiation of any project that will involve interactions with humans in some way (e.g., through surveys); analysis of their identifiable data (e.g., demographic data and energy use over time); asking individuals to test devices, products, or materials developed through research; and/or testing of commercially available devices in buildings/homes in which humans will be present. *Note:* This list of examples is illustrative and not all inclusive. No DOE funded research activity involving human subjects, biospecimens, or identifiable private information will be conducted without: A registration and a Federal Wide Assurance of compliance accepted by the Office of Human Research Protection (OHRP) in the Department of Health and Human Services; and Certification that the research has been reviewed and approved by an Institutional Review Board (IRB) provided for in the assurance. IRB review may be accomplished by the awardee's institutional IRB; by the Central DOE IRB; or if collaborating with one of the DOE national laboratories, by the DOE national laboratory IRB.

	The Awardee is responsible for ensuring all subawardees comply and for reporting information on the project annually to the DOE Human Subjects Research Database (HSRD) at https://science.osti.gov/HumanSubjects/Human-Subjects-Database/home. *Note:* If a DOE IRB is used, no end of year reporting will be needed. Additional information on the DOE Human Subjects Research Program can be found at: https://science.osti.gov/ber/human-subjects

Human Subjects Research 2	
Description of Use	OPTIONAL - Use for agreements when research will involve use of human subjects and the Institutional Review Board (IRB) approval has not been granted prior to award.
Sample Language	The research to be performed under this award will involve the use of human subjects. Research involving human subjects conducted with DOE funding is subject to the requirements 10 CFR Part 745, Protection of Human Subjects, and 45 CFR Part 46, Protection of Human Subjects. In Particular, no research activity involving human subjects will be conducted with DOE funding without 1) a registration and a Federal Wide Assurance accepted by the Office of Human Research Protection (OHRP) in the Department of Health and Human Services and 2) certification that the research has been reviewed and approved by an Institutional Review Board (IRB) provided for in the assurance and will be subject to continuing review by the IRB, in accordance with 10 CFR Section 745.103. The recipient will provide the assurance number identified in item 1 and the certification identified in item 2 to DOE prior to initiation of any research involving human subjects as defined in 10 CFR Section 745.102. Violation of these requirements is a material violation of the terms and conditions of the award, and subject to DOE enforcement, up to and including termination, in accordance with 10 CFR Section 745.123. The recipient will apply this provision to subrecipients in accordance with 10 CFR Section 745.101.

	Additional information on the DOE Human Subjects Research Program at https://science.osti.gov/HumanSubjects/Human-Subjects-Database/home.
National Environmental Policy Act (NEPA) Requirements	
Description of Use	Optional only if a NEPA clearance is not required.
Sample Language	You are restricted from taking any action using Federal funds, which would have an adverse effect on the environment or limit the choice of reasonable alternatives prior to DOE/NNSA providing either a NEPA clearance or a final NEPA decision regarding this project. Prohibited actions include: [Activities that cannot be performed before the NEPA clearance or decision is completed]. This restriction does not preclude you from activities that can be performed before the NEPA clearance or decision is completed]. If you move forward with activities that are not authorized for federal funding by the DOE Agreements Officer in advance of the final NEPA decision, you are doing so at risk of not receiving federal funding and such costs may not be recognized as allowable cost share. If this award includes construction activities, you must submit an environmental evaluation report/evaluation notification form addressing NEPA issues prior to DOE/NNSA initiating the NEPA process.

Foreign Collaboration Considerations	
Description of Use	OPTIONAL – include if it is anticipated that foreign organizations may collaborate on the award.
Sample Language	Consideration of new collaborations with foreign organizations and governments. The Recipient must provide DOE with advanced written notification of any potential collaboration with foreign organizations or governments in connection with its DOE-funded award scope. The Recipient must await further guidance from DOE prior to contacting the proposed foreign organization or government

	regarding the potential collaboration or negotiating the terms of any potential agreement. Existing collaborations with foreign organizations and governments. The Recipient must provide DOE with a written list of all existing foreign collaborations in which has entered in connection with its DOE-funded award scope. Description of collaborations that should be reported: In general, a collaboration will involve some provision of a thing of value to, or from, the Recipient. A thing of value includes but may not be limited to all resources made available to, or from, the recipient in support of and/or related to the Award, regardless of whether or not they have monetary value. Things of value also may include in-kind contributions (such as office/laboratory space, data, equipment, supplies, employees, students). In-kind contributions not intended for direct use on the Award but resulting in provision of a thing of value from or to the Award must also be reported. Collaborations do not include routine workshops, conferences, use of the Recipient's services and facilities by foreign investigators resulting from its standard published process for evaluating requests for access, or the routine use of foreign facilities by awardee staff in accordance with the Recipient's standard policies and procedures.

Buy American Requirement for Infrastructure Projects	
Description of Use	*OPTIONAL - This term must be included in awards that the program office has determined, or the applicant has stated, contain infrastructure projects or*

	activities. This term should not be included in prime awards made to For-Profit Entities unless the For-Profit Entity, through its proposal or negotiation, has agreed to the Buy America Requirement.
Sample Language	**A. Definitions** **Components** are defined as the articles, materials, or supplies incorporated directly into the end manufactured product(s). **Construction Materials** are an article, material, or supply—other than an item primarily of iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is used in an infrastructure project and is or consists primarily of non-ferrous metals, plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables), glass (including optic glass), lumber, drywall, coatings (paints and stains), optical fiber, clay brick; composite building materials; or engineered wood products. **Domestic Content Procurement Preference Requirement**- means a requirement that no amounts made available through a program for federal financial assistance may be obligated for an infrastructure project unless— (A) all iron and steel used in the project are produced in the United States; (B) the manufactured products used in the project are produced in the United States; or (C) the construction materials used in the project are produced in the United States. Also referred to as the **Buy America Requirement**. **Infrastructure** includes, at a minimum, the structures, facilities, and equipment located in the United States, for: roads, highways, and bridges; public

	transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and generation, transportation, and distribution of energy -including electric vehicle (EV) charging. The term "infrastructure" should be interpreted broadly, and the definition provided above should be considered as illustrative and not exhaustive. **Manufactured Products** are items used for an infrastructure project made up of components that are not primarily of iron or steel; construction materials; cement and cementitious materials' aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. **Primarily of iron or steel** means greater than 50% iron or steel, measured by cost. **Project** means the construction, alteration, maintenance, or repair of infrastructure in the United States. **Public** The Buy America Requirement does not apply to non-public infrastructure. For purposes of this guidance, infrastructure should be considered "public" if it is: (1) publicly owned or (2) privately owned but utilized primarily for a public purpose. Infrastructure should be considered to be "utilized primarily for a public purpose" if it is privately operated on behalf of the public or is a place of public accommodation. **B. Buy America Requirement** None of the funds provided under this award (includes federal share and Awardee cost-share) may be used for a project for infrastructure unless:

	All iron and steel used in the project is produced in the United States—this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States; All manufactured products used in the project are produced in the United States—this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and All construction materials are manufactured in the United States—this means that all manufacturing processes for the construction material occurred in the United States. The Buy America Requirement only applies to articles, materials, and supplies that are consumed in, incorporated into, or permanently affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought into the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America Requirement apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project but are not an integral part of the structure or permanently affixed to the infrastructure project. Awardees are responsible for administering their award in accordance with the terms and conditions, including the Buy America Requirement. The awardee must ensure that the Buy America Requirement flows down to all subawards and that the subawardees and subawardees comply with the Buy America Requirement.

	The Buy America Requirement term and condition must be included all sub-awards, contracts, subcontracts, and purchase orders for work performed under the infrastructure project. **C. Certification of Compliance** The Awardee must certify or provide equivalent documentation for proof of compliance that a good faith effort was made to solicit bids for domestic products used in the infrastructure project under this Award. The Awardee must also maintain certifications or equivalent documentation for proof of compliance that those articles, materials, and supplies that are consumed in, incorporated into, affixed to, or otherwise used in the infrastructure project, not covered by a waiver or exemption, are produced in the United States. The certification or proof of compliance must be provided by the suppliers or manufacturers of the iron, steel, manufactured products and construction materials and flow up from all subawardees, contractors and vendors to the Awardee. The Awardee must keep these certifications with the award/project files and be able to produce them upon request from DOE, auditors or Office of Inspector General. **D. Waivers** When necessary, the Awardee may apply for, and DOE may grant, a waiver from the Buy America Requirement. Requests to waive the application of the Buy America Requirement must be in writing to the AO. Waiver requests are subject to review by DOE and the Office of Management and Budget, as well as a public comment period of no less than 15 calendar days. Waivers must be based on one of the following justifications:

	1. Public Interest- Applying the Buy America Requirement would be inconsistent with the public interest; 2. Non-Availability- The types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or 3. Unreasonable Cost- The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. Requests to waive the Buy America Requirement must include the following: • Waiver type (Public Interest, Non-Availability, or Unreasonable Cost); • Awardee name and Unique Entity Identifier (UEI); • Award information (Federal Award Identification Number, Assistance Listing number); • A brief description of the project, its location, and the specific infrastructure involved; • Total estimated project cost, with estimated federal share and awardee cost share breakdowns; • Total estimated infrastructure costs, with estimated federal share and awardee cost share breakdowns; • List and description of iron or steel item(s), manufactured goods, and/or construction material(s) the awardee seeks to waive from the Buy America Requirement, including name, cost, quantity(ies), country(ies) of origin, and relevant Product Service Codes (PSC) and North American Industry Classification System (NAICS) codes for each; • A detailed justification as to how the non-domestic item(s) is/are essential to the project;

	• A certification that the awardee made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and non-proprietary communications with potential suppliers; • A justification statement—based on one of the applicable justifications outlined above—as to why the listed items cannot be procured domestically, including the due diligence performed (e.g., market research, industry outreach, cost analysis, cost-benefit analysis) by the awardee to attempt to avoid the need for a waiver. This justification may cite, if applicable, the absence of any Buy America-compliant bids received for domestic products in response to a solicitation; and • Anticipated impact to the project if no waiver is issued. The Awardee should consider using the following principles as minimum requirements contained in their waiver request: • Time-limited: Consider a waiver constrained principally by a length of time, rather than by the specific project/award to which it applies. Waivers of this type may be appropriate, for example, when an item that is "non-available" is widely used in the project. When requesting such a waiver, the Awardee should identify a reasonable, definite time frame (e.g., no more than one to two years) designed so that the waiver is reviewed to ensure the condition for the waiver ("non-availability") has not changed (e.g., domestic supplies have become more available). • Targeted: Waiver requests should apply only to the item(s), product(s), or material(s) or category(ies) of item(s), product(s), or material(s) as necessary and justified. Waivers should not be overly broad as this will undermine domestic preference policies. • Conditional: The Awardee may request a waiver with specific conditions that support the policies of IIJA/BABA and Executive Order 14017.

	DOE may request, and the awardee must provide, additional information for consideration of this wavier. DOE may reject or grant waivers in whole or in part depending on its review, analysis, and/or feedback from OMB or the public. DOEs final determination regarding approval or rejection of the waiver request may not be appealed. Waiver requests may take up to 90 calendar days to process.

Suggested Articles

Conflict of Interest

Cost Principles

Direct Funding of FFRDCs

Statement of Federal Stewardship

Rebudgeting of costs

Use of Program Income

Federal, State, and Municipal Requirements

Insurance Coverage

Federally Owned and Exempt Property

Personal Property – Equipment and Supplies

Conditional Availability of Funds

Historic Preservation

Decontamination and/or Decommissioning

Animal Welfare

Subawards to DOE National Laboratories

Organization Conflicts of Interest

Personal Conflicts of Interest

Reporting Executive Compensation and First-Tier Subcontract Awards

Change of Ownership/Change of Control

Nuclear Hazards Indemnification Limitation of Damages

Order if Precedence

Execution

Non-assignability

Limitation of Damages

Appendix E – Broad Agency Announcement Template

Below is a template for a BAA where only OT agreements will be awarded.

A. Program Description

This section should identify that DOE is awarding only OT agreements under 42 U.S.C 7256 and why OT agreements were chosen for the award instrument.

This section describes the technical or focus areas which the DOE funding is available. As appropriate, it may include any program history (*e.g.,* whether this is a new program or a new or changed area of program emphasis). This section must include program goals and objectives and the expected performance goals, indicators, targets, baseline data, data collection, and other outcomes DOE expects the project to achieve. This section also may include other information DOE deems necessary, and must at a minimum include citations for authorizing statutes and regulations for the funding opportunity.

B. Federal Award Information

This section provides sufficient information to help an applicant make an informed decision about whether to submit a proposal. Relevant information could include the total amount of funding that the DOE expects to award through the announcement; the expected performance indicators, targets, baseline data, and data collection; the anticipated number of awards; the expected amounts of individual awards (which may be a range); the amount of funding per award, on average, experienced in previous years; and the anticipated start dates and periods of performance for new awards.

C. Eligibility Information

This section addresses the considerations or factors that determine applicant or application eligibility. This includes the eligibility of particular types of applicant organizations, any factors affecting the eligibility of the principal investigator or project director, and any criteria that make particular projects ineligible. This section should make clear whether an applicant's failure to meet an eligibility criterion by the time of an application deadline will result in the DOE returning the application without review. Key elements to be addressed are:

1. ***Eligible Applicants.*** Announcements must clearly identify the types of entities that are eligible to apply as primes and subrecipients. If there are no restrictions on eligibility, this section may simply indicate that all potential applicants are eligible. If there are restrictions on eligibility, it is important to be clear about the specific types of entities that are eligible, not just the types that are ineligible. For example, if the program is limited to nonprofit organizations subject to 26 U.S.C. 501(c)(3) of the tax code (26 U.S.C. 501(c)(3)), the announcement should say so. Similarly, it is better to state explicitly that Native American tribal organizations are eligible than to assume that they can unambiguously infer that from a statement that nonprofit organizations may apply. This section should also include a discussion on how consortia, partnership and teaming arrangements will be considered. Eligibility also can be expressed by exception, (e.g., open to all types of domestic

applicants other than individuals). DOE National Laboratories are not eligible for an OT agreement, but their eligibility as a subawardee should be included.

2. ***Cost Sharing or Matching.*** Announcements must state whether there is required cost sharing, matching, or cost participation without which an application would be ineligible (if cost sharing is not required, the announcement must explicitly say so). Required cost sharing may be a certain percentage or amount, or may be in the form of contributions of specified items or activities (*e.g.,* provision of equipment). It is important that the announcement be clear about any restrictions on the types of cost (*e.g.,* in-kind contributions) that are acceptable as cost sharing.

3. ***Other.*** If there are other eligibility criteria (i.e., criteria that have the effect of making an application or project ineligible for Federal awards, whether referred to as "responsiveness" criteria, "go-no go" criteria, "threshold" criteria, or in other ways), must be clearly stated and must include a reference to the regulation of requirement that describes the restriction, as applicable. For example, if entities that have been found to be in violation of a particular Federal statute are ineligible, it is important to say so. This section must also state any limit on the number of applications an applicant may submit under the announcement and make clear whether the limitation is on the submitting organization, individual investigator/program director, or both. This section should also address any eligibility criteria for beneficiaries or for program participants other than Federal award recipients.

D. Application and Submission Information

1. ***Address to Request Application Package.*** Potential applicants must be told how to get application forms, kits, or other materials needed to apply (if this announcement contains everything needed, this section need only say so). An Internet address where the materials can be accessed is acceptable. However, since high-speed Internet access is not yet universally available for downloading documents, and applicants may have additional accessibility requirements, there also should be a way for potential applicants to request paper copies of materials, such as a U.S. Postal Service mailing address, telephone or FAX number, Telephone Device for the Deaf (TDD), Text Telephone (TTY) number, and/or Federal Information Relay Service (FIRS) number.

2. ***Content and Form of Application Submission.*** This section must identify the required content of an application and the forms or formats that an applicant must use to submit it. If any requirements are stated elsewhere because they are general requirements that apply to multiple programs or opportunities, this section should refer to where those requirements may be found. This section also should include required forms or formats as part of the announcement or state where the applicant may obtain them.

This section should specifically address content and form or format requirements for:

i. Pre-applications, letters of intent, or white papers required or encouraged (see Section D.4), including any limitations on the number of pages or other formatting requirements similar to those for full applications.

ii. The application as a whole. For all submissions, this would include any limitations on the number of pages, font size and typeface, margins, paper size, number of copies, and sequence or

assembly requirements. If electronic submission is permitted or required, this could include special requirements for formatting or signatures.

iii. Component pieces of the application (e.g., if all copies of the application must bear original signatures on the face page or the program narrative may not exceed 10 pages). This includes any pieces that may be submitted separately by third parties (e.g., references or letters confirming commitments from third parties that will be contributing a portion of any required cost sharing).

iv. Information that successful applicants must submit after notification of selection but prior to award.

3. ***Unique entity identifier and System for Award Management (SAM).*** This paragraph must state clearly that each applicant (unless an exception was approved DOE) is required to:

(i) Be registered in SAM before submitting its application;

(ii) Provide a valid unique entity identifier in its application; and

(iii) Continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency. It also must state that the Federal awarding agency may not make a Federal award to an applicant until the applicant has complied with all applicable unique entity identifier and SAM requirements and, if an applicant has not fully complied with the requirements by the time the Federal awarding agency is ready to make a Federal award, the Federal awarding agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant.

4. ***Submission Dates and Times.*** Announcements must identify due dates and times for all submissions. This includes not only the full applications but also any preliminary submissions (*e.g.,* letters of intent, white papers, or pre-applications). It also includes any other submissions of information before Federal award that are separate from the full application.

5. ***Funding Restrictions.*** Notices must include information on funding restrictions in order to allow an applicant to develop an application and budget consistent with program requirements. Examples are whether construction is an allowable activity, if there are any limitations on direct costs such as foreign travel or equipment purchases, and if there are any limits on indirect costs (or facilities and administrative costs). Applicants must be advised if the awards will not allow reimbursement of pre-award costs.

E. Application Review Information

1. ***Criteria.*** This section must address the criteria that DOE will use to evaluate applications. This includes the merit and other review criteria that evaluators will use to judge applications, including any statutory, regulatory, or other preferences (e.g., minority status or Native American tribal preferences) that will be applied in the review process. These criteria are distinct from eligibility criteria that are addressed before an application is accepted for review and any program policy or other factors that are applied during the selection process, after the review process is completed.

The intent is to make the application process transparent so applicants can make informed decisions when preparing their applications to maximize fairness of the process. The announcement should clearly describe all criteria, including any sub-criteria. If criteria vary in importance, the announcement should specify the relative percentages, weights, or other means used to distinguish among them. For statutory, regulatory, or other preferences, the announcement should provide a detailed explanation of those preferences with an explicit indication of their effect (e.g., whether they result in additional points being assigned).

2. ***Review and Selection Process.*** This section must list any program policy or other factors or elements, other than merit criteria, that the selecting official may use in selecting applications for award (e.g., geographical dispersion, program balance, or diversity). The DOE may also include other appropriate details. For example, this section may indicate who is responsible for evaluation against the merit criteria (e.g., peers external to the DOE) and/or who makes the final selections for awards. If there is a multi-phase review process, the announcement must describe the phases.

3. ***Anticipated Announcement and Award Dates.*** This section is intended to provide applicants with information they can use for planning purposes. If there is a single application deadline followed by the simultaneous review of all applications, the DOE can include in this section information about the anticipated dates for announcing or notifying successful and unsuccessful applicants and for having DOE awards in place.

F. Federal Award Administration Information

1. ***Award Notice.*** This section must address what a successful applicant can expect to receive following selection.

2. ***Reporting.*** This section must include general information about the type (*e.g.,* financial or performance), frequency, and means of submission (paper or electronic) of post-Federal award reporting requirements.

G. DOE Contact(s)

The announcement must give potential applicants a point(s) of contact for answering questions or helping with problems while the funding opportunity is open.

H. Other Information

This section may include any additional information that will assist an applicant.