



# "A Marriage Made in Heaven"?

## Other Transaction Authority Agreements and Data Rights

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**S**OMETIMES OPPOSITES ATTRACT—TWO magnets, peanut butter and jelly, or one spouse in a marriage who abhors fish yet agrees to visit the same sushi restaurant each week. Other Transaction Authority (OTA) agreements and data rights rules are an example of opposites attracting. Think of the Other Transaction (OT) as the spouse who would like to try a new restaurant and new meal every time, and the data-rights rules as the spouse who must go to the same restaurant, order the same food, and sit at the same table. Here we will discuss various methods of incorporating data rights into OT agreements, as well as delve into some of the benefits and risks to certain techniques.

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The Federal Acquisition Regulation (FAR) sets forth the principal rules governing federal acquisitions of supplies and services through procurement contracts. The Department of Defense (DoD) goes beyond the FAR with the Defense Federal Acquisition Regulation Supplement (DFARS). While OT agreements should cover both who gets patent ownership and rights related to subject inventions and the government's rights to use, or disclose, any technical data and software deliverables, let us focus here solely on data. Rights in technical data and computer software deliverables and rules for data markings for the DoD generally are based on the DFARS. Its clauses and provisions for data rights and data-rights markings are stringent and direct regarding what rights (not ownership) the DoD is entitled to receive.

The DoD generally includes the provisions and mandatory DFARS clauses in a solicitation to obtain the proper rights.

Specific standard data rights depend upon many factors. These include whether the deliverable is commercial or noncommercial, the type of data (form, fit, and function, or necessary for operation, maintenance, installation, and repair), or who funded development of the item, component, or process (government, industry, or both), or if it is data created exclusively at the DoD's expense in performance of a contract. This process is quite structured, has been used for decades, and often is time-consuming and bureaucratic. Figure 1 compares the DFARS-related data rights and those from using an OT.

Arguably opposite of procurement contracts in flexibility and specific requirements are OTs, vehicles that have been utilized by the government for decades. OTs can offer streamlined approaches to obtaining the best technology for the government. OTs are categorized into three types of agreements: (1) research, which often is referred to as a Technology Investment Agreement; (2) prototype; and (3) production. But OT agreements are not procurement contracts, and thus are not subject to the FAR, DFARS, or other procurement regulations or statutes. The Bayh-Dole Act (35 U.S. Code [U.S.C.] 201) on patent rights, does not apply, nor 10 U.S.C. 2320 and 10 U.S.C. 2321 (the statutory underpinnings of the DFARS clauses).

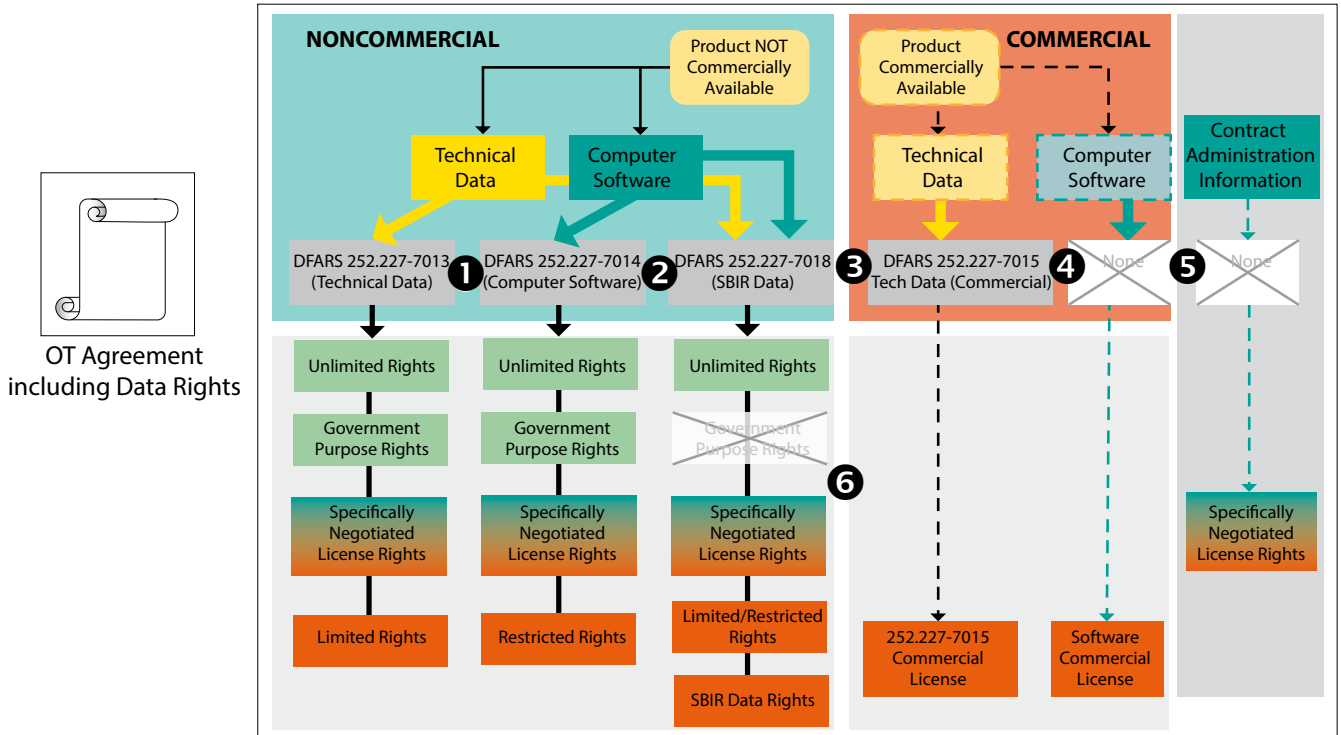
OTA is an acquisition and contracting tool that is especially useful for introducing new or emerging technology and attracting performers that would ordinarily avoid or not consider federal government contracting opportunities. In order to sustain new technological advances and capabilities, rights in technical data and computer software deliverables must be negotiated properly. Some vendors with advanced capabilities already available in the commercial sector might not be willing to provide rights to the government because those vendors may have funded the research, development, and commercialization on their own dime. However, in an OT, everything is up for negotiation, including data ownership, license rights, delivery, markings, and even license rights in intellectual property (IP)—like patents. A deeper overview of key elements of the DoD approach to data rights may be found at <https://www.dau.edu/cop/IPDR/Pages/Default.aspx>.

Emerging and innovative technology in a weapons system might be ripe for an OT agreement. Using an OT agreement to obtain the necessary and proper data delivery, license rights, and markings can be a match made in heaven for that weapons system. But special attention and critical thinking are crucial to address all those paramount issues in the agreement.

### **Interrelationship of OT and Data Rights**

The DFARS provides uniform policies and procedures applicable for DoD to issue a solicitation and enter and

**Figure 1. Comparison Of Data Rights of OT Agreement Versus DoD Contract**



Note: SBIR = Small Business Innovation Research  
 Source: Army Data and Data Rights Guide.

perform a procurement contract. An OT agreement may “borrow” DFARS language when it facilitates reaching an agreement between the parties, but there is no requirement to do so. The DFARS language may offer some useful approaches but may not be understood by the commercial partners. The goal is to utilize terms and conditions that are understandable and acceptable to both parties. And, because DFARS does not apply, DFARS clause numbers should never be referenced in an OT agreement. Likewise, any DFARS terms used must be defined because the definitions in the DFARS provisions and clauses likewise do not apply. In essence, during an OT agreement negotiation, both parties sit at a table and “negotiate” what each party needs, classifying which specific deliverables, license rights, and business terms are needed and otherwise on the menu.

If, for example, the OT agreement does not address the data deliverables and data license rights for the weapons system, the contractor is under no legal obligation to deliver the data or provide license rights to the DoD program office. If the OT agreement is successful, this could lead to “vendor lock”—a sole-source situation in which the DoD is locked into obtaining production, supplies, and services related to the weapons system from a single vendor. The costs for systems, spare parts, maintenance, training, and repair, obtained from a sole source likely will be higher than

those obtained using competition because the sole source will not experience any competitive pressure. Inadequately addressing data deliverables and rights also could lead to system obsolescence. When a weapons system component no longer is viable, operation could continue without sacrificing viability if the government has the necessary data or software and rights to use competition in buying, manufacturing, or replacing the component through other sources or to “plug in” a different component.

A program office may find it difficult to achieve this objective if the OT agreement does not require the contractor to:

- Develop the system and software architecture in accordance with Modular Open Systems Approach design principles to whatever Work Breakdown Structure level of indenture for subsystems and components the program’s Acquisition Strategy/Life Cycle Sustainment Plan states will be sustained through competition.
- Deliver the three types of technical baseline data necessary to implement a “plug-and-play/talk” solution during the system’s life cycle.

**Problem Statement**

Since an OT agreement is not a procurement contract and the DFARS is not applicable, all statutes, provisions, and clauses related to technical data and computer software rights and remedies are neither mandated nor



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automatically included in an OT agreement. This eliminates the DFARS protections for data rights for the DoD and introduces uncertainty for all parties, sort of similar to an engaged couple opting not to enter into a prenuptial agreement.

### **Risks and Opportunities**

In the Program Management Office and the Contracting Office, every decision presents risks and opportunities, and OTs are no exception.

#### **Risks**

An OT agreement used in acquiring data rights could give rise to problems.

■ Potential vendors and a DoD program office have a blank sheet to negotiate data deliverables, license rights, and markings. This can make bargaining power very important. For example, the least advantageous and least flexible position for the program office would likely occur where a weapon system prototype is contemplated and accurately labeled as non-military technology or capabilities already found in the commercial sector. While new to the government, if this technology already exists in the commercial sector and has been developed with private funding, the government may have little leverage and therefore may be unable to obtain data or rights. However, the program management office could retain flexibility and succeed by negotiating with a vendor and offering something of value, such as access to government labs or test facilities. Robust competition is the best form of leverage in this kind of scenario.

■ OT agreements have no default terms to address the data and data rights required to sustain a weapon system. In other words, each OT agreement is unique, and therefore its data deliverables and license rights should be tailored to the specific agreement. Failure to properly assess and agree on the data deliverables, license rights, and data markings could lead to the DoD not receiving the data or software it needs or, failing to receive the appropriate rights, place the DoD in a source-sole environment for follow-on awards. Again, this could prove extremely costly and inefficient.

■ Data marking can differ from the standard DFARS data right markings. The OT agreement should define all potential markings on the data and computer software deliverables (both noncommercial and commercial).

■ Critical terms such as “development” must be defined and the implications of those terms agreed upon—e.g., whether development considers the lowest component level, and whether there are potential impacts on rights based on which party funded development.

■ The agreement should consider as many contingencies as possible, addressing aspects such as the rights in data if a vendor does not perform, goes out of business, or sells to another company.

■ Not defining the data-related terms or modifying terms of art could be disastrous. As examples, using DFARS terms such as Government Purpose Rights, Form Fit and Function, and Operation, Maintenance Installation and Training, without specifying the definitions, could lead to disagreements and disputes during performance.

#### **Opportunities**

An OT agreement for acquisition of data rights has certain advantages.

■ It provides small business or nontraditional defense contractors an opportunity to obtain DoD contracts without agreeing to all FAR and DFARS requirements.

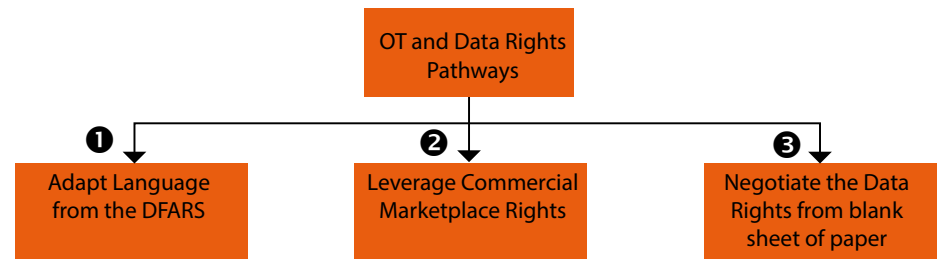
■ Both the vendor(s) and the DoD program office have the opportunity to negotiate all agreement terms, including data license rights and markings. The parties could negotiate a follow-on production contract such that the awardee undertakes an obligation of supporting a weapons system for “x” number of years. After this timeframe, the weapon system sustainment could be competed by allowing the DoD to make all data available to other vendors.

■ It provides flexibility for the DoD to obtain and vendors to provide varying degrees of data and license rights from one OT agreement to the next. In a perfect government-technology marriage, for example, the government could

negotiate rights to allow the government as a whole to utilize the technology in an open and fruitful manner. For instance, if the U.S. Air Force negotiates for innovative cyber advances to better protect Air Force systems, the best position would be to obtain the rights for any U.S. Government agency to use, modify, reproduce, release, or disclose the technical data or computer software with limited or no restrictions. With these types of rights, the U.S. Navy, U.S. Army, or any other U.S. Government entity could fully leverage this technology for similar purposes. Less ideally, vendors may not want to provide the government such robust rights to proprietary software or technology. However, if the government supports the development by contributing financially or providing assets such as a lab or subject-matter expertise, the government has more leverage to obtain data and license rights. This likewise could prove lucrative for vendors who may not have engaged previously with the government, and could potentially prove enticing to small businesses that otherwise would not have access to benefits such as use of government labs.

- It allows negotiation of mutually beneficial arrangements, such as incentivizing a contractor to provide more data and greater rights in order to obtain more funding.
- It allows the DoD to negotiate an agreement that implements data rights in interfaces and other deliverables required for Modular Open System Architecture.
- It enables the negotiation of agreements that react to a changing marketplace and changing requirements. Digital engineering and model-based deliverables are becoming more widely used throughout the DoD and by commercial vendors to conduct engineering and testing activities. For example, the B-52 Program Office employed an OT agreement for selecting and engaging with a commercial engine manufacturer for the B-52 commercial engine replacement program, which has implemented digital engineering.
- It provides flexibility to tailor data deliverables and license rights requirements to the particular needs of both parties to the agreement. Where commercial technology has been fully developed by a vendor, the government may receive extremely limited data deliverables and minimal rights. In a procurement (i.e., FAR-based) environment, this might not be permissible under the mandatory data rights clauses. However, in an OT agreement, the government could obtain the best technology possible by forgoing rights that a contractor is unwilling to grant. In some OT agreements, the

**Figure 2. Potential OT Pathways**



Source: The authors.

government might not be interested in data rights, especially in areas so advanced or nuanced to a specific industry, or where the government is merely interested in proving capability. On the other hand, OTs also would allow a nontraditional vendor new to government business to offer a greater data rights license for government work and thereby gain access to a new, major customer.

Some areas, however, present similar issues in the OT domain as those found in the realm of the FAR and DFARS. Commercial software licenses, for example, pose risks that could trigger issues in either type of agreement. Many commercial licenses have renewal clauses that automatically extend a period of performance—and payment obligations—at the end of the previously agreed upon term. In both a government OT agreement and a procurement contract, statutes and regulatory restrictions unrelated to acquisition matters generally still apply. For instance, fiscal law rules still apply to OTs, so that, under the Anti-Deficiency Act, automatic renewals commonly provided for in commercial software licenses could trigger a violation if they obligate funds not yet appropriated.

**Applying Data Rights to OT**

There are three basic pathways to negotiating data, data license rights, data markings, and data delivery in an OT: (1) adapt the language and concepts from the DFARS; (2) leverage commercial marketplace rights customary to what is being bought; or (3) negotiate from a blank piece of paper. Figure 2 depicts the potential pathways with an OT, but there is no “best” pathway since each approach is specifically tailored. The program management office subject-matter experts working with the agreement’s officer (with an OT agreement, an agreements officer is required; not a contracting officer) should determine the best pathway for the specific program. For speed, but with limited tailoring, Pathway No. 1 could be the best approach. For greater flexibility and new, innovative approaches to data and rights, Pathway No. 3 may be the best approach.

Generally, in OTs, use of “procurement” terms (meaning FAR or DFARS terms) is discouraged. The rationale is to

attract commercial performers to work with the government by neither using government-unique phrases nor asking the performers to change their commercial terms to accommodate the government. The November 2018 DoD *Other Transactions Guide* emphasizes the importance of agreements officers understanding the statutes underlying the government's rights in patents (the Bayh-Dole Act, 35 U.S.C. 201) and data (10 U.S.C. 2320) while emphasizing that these statutes do not constrain OTs. Since every OT is unique, agreements officers should start with those fundamental concepts and tailor data deliverables and license rights to what the government is buying and to the particular business situation.

The second option, leveraging commercial marketplace rights, may be the most expeditious path to an agreement, but beware of red flags (similar in significance to your spouse asking you to attend marriage counseling). For instance, the government can only agree to federal jurisdiction, meaning only federal laws apply. However, many commercial vendors include state laws and choice of a state jurisdiction for any disputes in their agreements. There also are other standard clauses and terms vendors may habitually include in commercial agreements to which federal entities cannot agree—such as the previously discussed issues with automatic renewals. So it is important to be cautious in utilizing commercial language.

Finally, the most tailored approach is to negotiate the agreement, including data and license rights, from a blank piece of paper. While this may be the most time-consuming approach upfront, it could ensure that the rights and deliverables are structured narrowly to the item or services at hand, are relevant, and best meet the needs of both parties. If this is the desired approach, however, it may be prudent to begin as early as practicable so that the data rights negotiation does not unduly delay the OT agreement. The agreements officer always should keep in mind that the basic foundation of FAR and DFARS data rights is to inform business decisions even if the parties are working from a blank slate.

### **OT Agreement Example and Lessons Learned**

In the Naval Operation Business Logistics Enterprise (NOBLE) OT agreement, the Navy generally utilized the DFARS data rights language to protect its interests. However, where commercial data were privately funded the Navy accepted very minimal rights. The Navy also yielded benefits from identifying each component at the lowest possible level, as well as identifying version numbers for software. Where a vendor exclusively funded software version 1.0, for instance, the government accepted a low level of rights to use and disclose that software. However, where both parties financially contributed to development of

version 2.0, the government reasonably expected to obtain the equivalent of Government Purpose Rights.

Successfully negotiating data, data license rights, and data markings within an OT agreement requires a team effort from each functional area within the program office. The agreements officer cannot perform this task alone. The logistician knows what data deliverables are required to sustain the weapon system—and the required data license rights. The software engineer will know what noncommercial computer software (source code/executable code) must be delivered to maintain and update the software for the weapon system's life cycle. And the program and data rights attorneys will be mindful of legal considerations, such as potential Anti-Deficiency Act violations, as well as risks and rewards from obtaining data and rights.

Premarital counseling may help identify potential causes of strain in an impending marriage. In the same way, a beneficial approach to researching appropriate data rights in an OT environment may be to engage in a focused "industry day" to communicate to industry the government's requirements for data deliverables and license rights. This could further allow industry to proffer vital input and ideas on how to provide the necessary and proper data and rights based on the program management office life-cycle requirements and specific industry practice.

The OT agreement also should address both commercial and noncommercial data delivery in a clear format. While the data rights could be negotiated correctly within the OT agreement, problems likely will arise if no language directs the contractor how to deliver the necessary and proper data to the DoD and to whom to deliver it. This risk could appreciably materialize if the vendor is a nontraditional vendor unfamiliar with government contracts.

### **Where to Find Assistance**

The Under Secretary of Defense for Acquisition and Sustainment issued the *Other Transactions Guide* in November 2018 to provide "advice and lessons learned on the planning, publicizing, soliciting, evaluating, negotiation, award, and administration of OTs." While this is not a step-by-step or "how-to" guide for data rights negotiation in an OT environment, it provides an excellent baseline for key considerations.

Moreover, the Defense Acquisition University can provide tailored workshops to assist the program management offices and agreements officer on data deliverables, data rights, and data markings in an OT agreement.

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