



U.S. National Science Foundation  
Division of Acquisition and Cooperative Support  
2415 Eisenhower Avenue  
Alexandria, Virginia 22314

Other Arrangements/Transactions Guide  
("OA/T Guide")

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**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 2 of 97**

**Table of Contents**

<b>ABOUT THIS OA/T GUIDE.....</b>	<b>5</b>
A. PURPOSE .....	5
B. BENEFITS OF OTHER ARRANGEMENTS AND TRANSACTIONS .....	6
C. OA/TS AS NON-PROCUREMENT, NON-ASSISTANCE CONTRACTS .....	7
<b>PLANNING AND FORMATION OF OA/T AWARDS .....</b>	<b>7</b>
A. WHEN TO USE AN OA/T .....	7
B. PLANNING .....	9
a. OA/T Authority Approval.....	9
b. Forming the OA/T Team .....	10
c. Market Intelligence .....	11
d. Defining the Problem.....	13
e. Understanding the Constraints and Opportunities of Law.....	13
f. Other Arrangement / Transaction Plan .....	14
C. COMPETITION.....	15
D. DRAFTING THE SOLICITATION.....	15
E. REVIEW AND APPROVAL .....	16
a. DACS Leadership .....	16
b. Office of the Director .....	16
c. Other NSF Organizational Entities .....	16
d. Office of International Science and Engineering (OISE) .....	17
e. National Science Board.....	17
F. IDENTIFY FUNDING SOURCES.....	17
G. PUBLICIZING THE OA/T OPPORTUNITY .....	17
H. EVALUATING OA/T PROPOSALS .....	18

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 3 of 97**

I.	NEGOTIATION OF TERMS AND CONDITIONS .....	18
J.	OA/T AWARD.....	22
K.	PROTESTS & LITIGATION .....	22
L.	THE OA/T FRAMEWORK’S INTEGRITY & ANTI-CORRUPTION SAFEGUARDS .....	22
	a.    OA/T Integrity Access & Disclosure Safeguards .....	23
	b.    Organizational Conflicts of Interest.....	24
	c.    Ethics & Personal Conflicts of Interest.....	25
	d.    OA/T Ethics & Compliance Programs .....	25
	<b>ADMINISTRATION OF OA/T AWARDS .....</b>	<b>25</b>
A.	FEDERAL REPORTING.....	25
B.	PERFORMANCE MONITORING.....	25
C.	FREEDOM OF INFORMATION ACT .....	26
D.	OA/T CLOSE-OUT .....	26
E.	ALLOWABLE COSTS .....	26
F.	AUDIT 27	
G.	PAYMENTS .....	27
H.	PAYABLE MILESTONES .....	27
	<b>APPENDICES .....</b>	<b>28</b>
	<b>APPENDIX A – APPLICABILITY OF GENERAL LAW TO OA/TS .....</b>	<b>29</b>
	<b>APPENDIX B – NSB IMPOSITION OF OTHER ARRANGEMENT FORMATION POLICY CONDITIONS .....</b>	<b>35</b>
	<b>APPENDIX C – PROCUREMENT ROUND TABLE PAPER.....</b>	<b>36</b>
	<b>APPENDIX D – RECOMMENDATION AND REQUEST FOR APPROVAL AND DELEGATION OF AUTHORITY .....</b>	<b>48</b>

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 4 of 97**

<b>APPENDIX E – OA/T PLAN TEMPLATE .....</b>	<b>51</b>
<b>OA/T AGREEMENT OFFICER.....</b>	<b>54</b>
<b>CUSTOMER DIRECTORATE DIVISION DIRECTOR .....</b>	<b>54</b>
<b>PROGRAM MANAGEMENT OFFICER .....</b>	<b>54</b>
<b>PROGRAM REPRESENTATIVE.....</b>	<b>54</b>
<b>APPENDIX F – SAMPLE OA/T AWARD DOCUMENT, CLAUSES, REPRESENTATIONS, AND CERTIFICATIONS.....</b>	<b>56</b>
<b>APPENDIX G – NON-DISCLOSURE AGREEMENT .....</b>	<b>79</b>
<b>APPENDIX H – SAMPLE SOLICITATION .....</b>	<b>82</b>
<b>APPENDIX I – OTHER ARRANGEMENT/TRANSACTION AGREEMENT OFFICER’S REPRESENTATIVE APPOINTMENT LETTER.....</b>	<b>92</b>

## ABOUT THIS OA/T GUIDE

### A. Purpose

The National Science Foundation Act of 1950, (42 U.S.C. § 1861 et seq., “Organic Act” or “NSF Act”), provides the Foundation with broad authority, within the limits of available appropriations, to use Other Arrangements (“OAs”)(42 U.S.C. § 1870(c)), while the CHIPS and Science Act (42 U.S.C. § 19116) states in pertinent part that the NSF Director may provide awards in the form of Other Transactions (“OTs”) in carrying out the statutory activities of the Technology, Innovation, and Partnerships (TIP) Directorate, as set forth under 42 U.S.C. §§ 19101 to 19120.

This Other Arrangements/Transactions Guide (hereinafter, “OA/T Guide”) covers the planning, publicizing, soliciting, evaluating, negotiation, award, and administration of other arrangements (“OAs”) and other transactions (“OTs”). This Guidance does NOT address grants and cooperative agreements under the Federal Grant and Cooperative Agreement Act of 1977 (“FGCAA”), Federal Acquisition Regulation (“FAR”) procurement contracts, Instruments of Understanding (e.g., MOUs, MOAs, etc.), or any other instrument type. In general, OA/Ts are not subject to restrictions on or regulations implementing these other instrument types. By congressional and NSF design, OA/Ts are entirely separate and distinct from the frameworks governing procurement contracts and financial assistance.

Through the Senior Procurement Executive, the Division of Acquisition and Cooperative Support (“DACs”) is the organizational entity responsible for issuing and maintaining this guidance with the delegated authority to do so. NSF’s Director delegated to NSF’s Senior Procurement Executive overall authority and responsibility for the Foundation’s OA/T activities, including but not limited to managing the direction of OA/T policy for NSF, and the development of unique contracting policies, guidance, or similar materials regarding such transactions.

This OA/T Guide is intended as guidance. It contains both (1) statements of general applicability issued by NSF to inform the public of NSF’s OA/T practices, policies, and legal interpretations; and (2) guidance for internal NSF stakeholders. It does not have the force and effect of law (except where it may become binding by operation of being incorporated by reference into an OA/T contract). Nor does this guidance constitute a formal policy document nor purport to offer a final interpretation of statutory or policy requirements. Further, this guidance is not intended to, does not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with NSF or the United States. It is designed to demonstrate how NSF understands, and is likely to apply, its underlying OA/T authorities to promote transparency, fairness, and efficiency in DACs’s discretionary exercise of NSF’s OA/Ts. Accordingly, this OA/T Guide should not be construed as including mandatory language

directed towards the public, although agency staff are directed not to depart from this Guidance absent coordination with DACS's Division Director.

Another purpose for this guidance is to inspire the pursuit of innovative arrangements powered by OA/Ts where appropriate. This guidance attempts to set an intellectual framework for OA/Ts that will honor the OA/T framework's inherent "freedom to contract" and forge win-win partnerships. This mindset is crucial as NSF captures OA/T opportunities to further its mission. If a specific strategy, practice, or procedure is in the best interests of NSF and is not addressed in this OA/T Guide, nor prohibited by law (including statutes, regulations, executive orders, and case law), then the OA/T team should generally assume it is permitted.

Given the flexibility associated with the use of OA/Ts and the inability of this OA/T Guide to cover every nuance of law or policy, the Office of General Counsel (OGC) should be consulted whenever the award of an OA/T is contemplated.

#### B. Benefits of Other Arrangements and Transactions

The inherent contractual flexibility of OA/Ts makes them an important tool to help NSF keep our country at the forefront of science and engineering innovation. It provides NSF with access to state-of-the-art technology solutions, from traditional and non-traditional participants, via partnership arrangements tailored to the particular needs of NSF and the participants. This flexibility allows for highly tailored, transformational science and engineering transactions.

Some OA/T benefits include, but are not limited to:

- Contracting in a flexible, goal-oriented manner where terms and conditions are broadly negotiable.
- Flexibility to include, amend, or exclude contract clauses and requirements that are mandatory in traditional acquisition or financial assistance transactions.
- Flexibility to structure business relationships in numerous ways, including joint ventures, partnerships, consortia, or multiple agencies joining together to fund an agreement encompassing multiple providers.
- Broadening the base of potential participants available to NSF.
- Reducing the lead time on project design and execution.

Along with these benefits come potential risks. Some OA/T risks that need to be considered include, but are not limited to:

- Unlike traditional contracts where the government controls the negotiation process by specifying well-defined contract requirements in a statement of work and predefined contract clauses, OA/Ts provide more leverage for vendors to exert control over the negotiations.

- OA/Ts are not subject to many of the federal laws and regulations that apply to other obligation instruments, which requires the cognizant OA/T agreement officer and program ensure that terms are designed to provide the protection afforded by the other obligation instruments, as appropriate.
- Many OA/Ts, like many NSF financial assistance agreements, may be issued on a cost reimbursable basis, requiring significant review of claimed costs.
- Potential failure to attract non-traditional NSF awardees.
- Potential failure to achieve the stated intent.

With proper planning and appropriate supervision, the potential benefits can outweigh the risks.

### C. OA/Ts as Non-Procurement, Non-Assistance Contracts

Other Arrangements (OAs) and Other Transactions (OT) Agreements (collectively OA/Ts) are contractual instruments that allow for: (1) mutuality of intent to contract; (2) offer and acceptance; (3) consideration; and (4) authority to bind the United States Federal Government. The NSF Director has provided the delegation of OA/T authority to the Division Director, DACS.

While OA/Ts are not traditional government transaction agreements, i.e., procurement contracts, grants, or cooperative agreements, they are generally executed as legally valid contractual instruments with enforceable terms and conditions. For this reason, OA/Ts are typically considered legally binding instruments, but in some cases, they may take other non-binding forms (e.g., Instruments of Understanding). Whether an OA/T is intended as binding or not hinges in part upon the context, including negotiations and the provisions of the executed OA/T. When OA/T is formed, it should include language expressly clarifying whether it is intended as a binding or non-binding arrangement.

## PLANNING AND FORMATION OF OA/T AWARDS

### A. When to use an OA/T

In considering whether to recommend use of the OA/T framework, there are two important matters to consider. First, the OA/T must comply with applicable law, including NSF's organic act requirements, such as the organic act's "science or engineering" ("S&E") activities nexus requirement (42 U.S.C. § 1870(c)) for other arrangements or the CHIPS and Science Act for other transaction agreements. Second, documentation must be created and maintained documenting the decision to form an OA/T.

NSF compliance with its statutory requirements is necessary for use of OA/T authority when OA/Ts are used in lieu of a traditional instrument (i.e., a procurement contract, cooperative agreement, or grant). DACS looks to standards beyond the Federal Grants and Cooperative

Agreements Act (“FGCAA”) in weighing whether to select an OA/T as an appropriate choice-of-instrument for any particular transaction.<sup>1</sup> OA/Ts are only appropriate for a small number of NSF’s projects, so program offices should be judicious in requesting an OA/T. Many NSF programs may be successfully achieved using a procurement or financial assistance transaction. As a reminder, NSF may only form OTs when carrying out the activities of the TIP Directorate and OAs can only be formed if there is a nexus to a S&E activity.

Crucial to any determination to use an OA/T is documentation for why this instrument was selected. Failure to reasonably document this determination presents litigation risks. As a result, the documentation of the determination warrants careful attention as a key initial step in deciding whether an OA/T is best suited for the transaction (reference the discussion found in Appendix A).

OA/T agreement officers should look for characteristics in a particular problem statement or project challenge that indicate the efficacy of an OA/T. Below are some examples of characteristics that indicate a potential use case for OA/Ts. Please note that the following list is not comprehensive and there may be other use cases with characteristics that differ from those below.

One characteristic indicating that an OA/T may be best suited for the transaction, is the need or utility of “relational contracting.”<sup>2</sup> Relational approaches to contract formation and administration generally allow for joint exploration and negotiation that leads to a common understanding at the outset. Relational contracting is best used when the NSF seeks to create a relationship to solve or provide a complex problem or service. Because of the extended duration of the planned association, parts of the exchange cannot be precisely defined at the time of contract execution. This necessitates a planning strategy that favors open, negotiated terms, reserves discretion in performance to one or both parties, and incorporates dispute resolution procedures into the final arrangement.

Another characteristic suggesting a potential OA/T use case, is a situation where the traditional competitive contracting procedures require NSF to evaluate multiple approaches to the work at different price points and make tradeoffs between the two. This could be because the length of the proposed agreement makes future year cost estimating uncertain and imprecise. It may also be a situation where NSF lacks a full understanding of what future work will entail.

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<sup>1</sup> While NSF’s OA/Ts are generally not used to procure supplies and services but to advance knowledge consistent with the distinctions of FAR 35.002, they may lawfully have as a purpose federal assistance or acquisition, or some combination of all of these purposes. *E.g., Oracle America, Inc.*, B-416061, May 31, 2018, 2018 CPD ¶ 180.

<sup>2</sup> See the 2006 letter from the Procurement Roundtable to the Office Federal Procurement Policy for a description, which is attached to this OA Guide. (*See discussion infra* Appendix C.)



Alternatively, the S&E activity may evolve so quickly that future costs are nearly impossible to predict.

Another OA/T use case is when NSF wants to attract non-traditional performers and/or leverage commercial technology investments where flexibility in the terms and conditions may be needed. This need may not be immediately obvious to the OA/T team; rather, this indicator may depend on market intelligence.<sup>3</sup> There are, however, questions the OA/T team can ask itself to ascertain the need for non-traditional performers, such as:

- How has NSF secured this S&E activity previously?
- What performers were involved in the previous effort?
- Do a small number of large contractors or universities dominate the market for the S&E activity?
- What is the state of technology that is required?
- Is it commercially available?
- How have other agencies secured this S&E activity?

There are no hard and fast rules about how many indicators need be present to pursue an OA/T. The OA/T team should use their best judgment when making the decision. Documentation standards for these decisions can be found in Section B. Planning, below.

## B. Planning

### a. OA/T Authority Approval

The triggering event for DACS's formal OA/T planning is an initial recommendation for an OA/T instrument from the responsible Program Office. The initial recommendation, inclusive of the documents below, should be submitted to DACS as soon as the agency need, or problem is clearly identified.

A request for approval to pursue an OA/T transaction should be submitted using the Recommendation and Request for Approval and Delegation of Authority Memorandum (reference Appendix D for a sample). The memorandum must include, at a minimum,

- Introductory statement that summarizes the purpose of the proposed arrangement or transaction;
- Considerations supporting the use of OA/T authority;
- Initial market intelligence gathered and broader market intelligence plan once authorization is received (reference the Market Intelligence section below);
- Rationale for Requesting OA/T Authority; and
- Determination, Designation and Delegation of Authority for signature of the Division Director, DACS or designee.

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<sup>3</sup> Market intelligence is described further in subsection three below.

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 10 of 97**

Once the Recommendation and Request for Approval and Delegation Memorandum is received, a DACS OA/T agreement officer will review the OA/T request in consultation with DACS leadership to determine if an OA/T transaction is well suited for the proposed initiative. Upon review and concurrence, an OA/T agreement officer will then submit the OA/T request to the DACS Division Director for final approval.

b. Forming the OA/T Team

Once approved by the Division Director, DACS, the request will be assigned to an OA/T agreement officer in DACS. The OA/T agreement officer is responsible for the planning and OA/T execution effort, including forming the OA/T team who will be responsible for the OA/T transaction.

The best way to execute OA/T projects is with a small, dedicated team. The OA/T agreement officer should assemble a cross-functional group, that includes the core execution team and, as necessary, other stakeholders (see table below) to support the award and administration of the OA/T. This team should work together, not operate on separate parts independently. Early, continuous communication and collaboration among all team members will increase the likelihood of project success.

The core OA/T team typically consists of a program manager/officer, contracting support, and legal support.

Team Member	Role
OA/T Awarding Officer: Contracting Support	Responsible for establishing the OA/T team and for ensuring inclusion of necessary terms in the solicitation, ensuring all necessary actions for effective execution, ensuring compliance with the terms of the contract, and safeguarding the interests of the National Science Foundation in its contractual relationships.  The OA/T agreement officer leads the planning, soliciting, negotiating, and awarding the OA/T. This includes determining appropriate terms and conditions that address the risk to be undertaken by all parties on a project.
Program Manager/Officer	Subject matter expert in technical and programmatic areas. Often this is someone from the office who submitted the initial OA/T request.
Legal Counsel	OGC serves as legal counsel for the OA/T team.
Other	Examples of other offices that may need to be engaged in the extended OA/T team include: Division of Financial Management,

	especially where unusual payment or financing terms may be involved; and Division of Institution and Award Support, where NSF may be the cognizant auditing agency for a particular OA/T recipient.
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The team leader is the OA/T agreement officer, with significant support coming from the program manager/officer. The team leader acts as the primary negotiator and signs the agreement on behalf of NSF. The OA/T agreement officer should be familiar with this guide in its entirety, including the sections where the Review and Approval thresholds are found. The OA/T agreement officer should work closely with the program manager/officer on technical issues such as milestones, payments, deliverables, and scheduling.

The Division Director, DACS, will select and warrant OA/T agreement officers. Any DACS contracting officer or grants and agreements officer is eligible to receive an OA/T warrant and may sign an OA/T, if the required approvals are received. OA/T agreement officers are individuals who have demonstrated expertise in executing, managing, or administering complex instruments. The OA/T agreement officer is expected to possess a level of responsibility, business acumen, and judgement that enables them to operate in the relatively unstructured OA/T environment.

c. Market Intelligence

Market intelligence is strategic information gathering and is an integral part of the design and formation of the transaction. A goal of market intelligence is to validate the chosen transaction structure and ensure the broadest participation in the OA/T as practicable by groups that may not have done business with NSF before. Ideally, market intelligence will help NSF personnel recommend or select an appropriate instrument type and design an optimal formation process. Market intelligence is a shared responsibility of the OA/T team. NSF also has a network of academic organizations that can be used to help explore available market resources.

Market intelligence is a multi-modal process and can be done online or in person. Online research can assist in finding companies actively involved in specific technology areas and scientific/trade publications. Existing databases like the [Federal Procurement Data System](#) and [USA Spending](#) can identify organizations that have experience working with the Federal government. Research and outreach activities can include, but are not limited to, researching trade publications; attending technology demonstrations, conferences, conventions, seminars, and trade shows; compiling a capabilities database; conducting reverse industry days; and participating in standards committees and communities of interest. In some cases, the team may find the following efforts beneficial: conducting crowdsourcing events; publishing surveys; participating in technology focused social media groups; conducting industry events; leveraging chambers of commerce, Procurement Technical Assistance Centers, technology consortia, and

trade associations. The team should endeavor to leverage all existing sources in the pursuit of market intelligence.

The team should consider and employ a variety of marketing activities geared toward advertising potential opportunities to as wide a forum as possible. The OA/T team should keep in mind that potential resources, especially those representing non-traditional performers (entities that are not traditional recipients of NSF contracts, grants, or cooperative agreements), may not know that their company or technology are relevant to NSF. They may also be new to government transactions. In this environment, the traditional methods of advertising, (e.g., [www.sam.gov](http://www.sam.gov)), may not reach the broad breadth of potential participants working in a particular technology or industry segment. Therefore, NSF needs to market opportunities outside of, in addition to, standard channels, and the OA/T team should avoid jargon in their public communications. Acronyms should be avoided or, if necessary, clearly defined. An excessive use of jargon is likely to dissuade the organizations the market intelligence is attempting to reach.

The OA/T team members, especially program managers/officers, are subject matter experts and should have a good sense of how and where practitioners in identified fields would look for opportunities. The team's efforts can be organized into intelligent and effective marketing. Industry-specific websites, subject matter organizations, and trade organizations can all be leveraged for additional contacts and marketing channels. In coordination with the Office of Legislative and Public Affairs, the OA/T team may seek to leverage NSF social media accounts to broadly publicize potential opportunities and connect with interested parties or stand up an NSF program-specific website.

The team should also consider if, and to what extent, foreign participation will be permitted for each opportunity. Market Intelligence may show where market conditions warrant the use of foreign providers for key supplies that are not otherwise available domestically. The team should engage with OGC and other stakeholders to determine if legal or other restrictions would limit or prohibit foreign involvement.<sup>4</sup>

When making a determination of what contractual instrument to pursue for an initiative, the Program Office should conduct some initial market intelligence information to assist in the determination. The market intelligence gathered should provide support for the instrument type selected, especially when a determination is made to pursue an OA/T. In addition, the program

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<sup>4</sup> DACS' authority to form binding OA/Ts with organizations or individuals in foreign countries and with agencies of foreign countries requires proper coordination of several issues, including potential coordination with other federal agencies. Any OA/T team contemplating such S&E activities should discuss such matters with the Office of International Science and Engineering and OGC, and allow ample time in the schedule for the vetting of such matters. (*See also* discussion *infra* at Appendix A.)

office should also use the initial market intelligence information to help identify where further market intelligence will be needed in formulating the solicitation and eventual agreement. Program offices should use this information to formulate a Market Intelligence Plan to help guide future market intelligence efforts.

Once an authorization is received to pursue an OA/T, further market intelligence should be conducted in accordance with this section. The results of any market intelligence gathered should be summarized and documented in a memorandum maintained by the OA/T agreement officer. The market intelligence summary should provide support for future decisions pertaining to the solicitation and eventual award of an OA/T.

d. Defining the Problem

The most important part of the team's planning activities is to define the problem to be solved. This is critical to the design of the OA/T transaction. When issuing a solicitation for an OA/T, the NSF provides a problem statement, area of need or interest, or capability gap and industry submits a proposed solution. Depending on industry norms, the solutions proposed for a given problem may vary significantly in technical approach, schedule, and/or cost. The team is responsible for understanding and clearly articulating to offerors the problem, area of need, or capability gap to allow for innovative trade space for a wide range of solutions. A clearly defined problem allows for purpose-driven design, including greater strategic collaboration between government, industry, academia, and other stakeholders. Innovation does not always come about when navigating systemic rules; in part, it often comes from the freedom to vary the design for solutions to identified problems.

e. Understanding the Constraints and Opportunities of Law

Select laws that apply to NSF's OA/Ts are set forth in Appendix A as guidance, along with NSF's interpretation of the applicability or non-applicability of other authorities. In addition, any OA-specific conditions identified by the National Science Board pursuant to the publication and reporting requirements of 42 U.S.C. 1864(e)(2) are set forth in Appendix B. NSF staff should rely on the source authorities themselves, in coordination with OGC, rather than any summary references found in this OA/T Guide.

In addition to consulting Appendices A and B, OA/T agreement officers must ensure each OA/T provides notice to NSF's OA/T partner that it must comply with all applicable laws, regulations, and government policies that affect or are related to performance of the OA/T. Appropriate clauses and certifications should be included stating the laws regulating and/or promoting safety, security, export control, the environment, and suspension and debarment. Violations or non-compliance with these laws may result in civil or criminal penalties. The OA/T language should also mention non-discrimination statutes and policies, including but not limited to NSF's policy on Sexual Harassment, other forms of harassment, or Sexual Assault; laws or policies that involve the protection of living organisms; NSF's security policy and guidelines, including standards on badging and facility access; Controlled Unclassified Information (CUI) standards;

and other relevant laws and policies. OA/T agreement officers should review Appendix D, which provides a sample set of OA/T clauses and certifications that OA/T agreement officers are expected to incorporate by reference into all OA/T awards.

f. Other Arrangement / Transaction Plan

To facilitate attainment of the OA/T objectives, a plan must be created to identify the milestones at which decisions should be made. The plan must address all the technical, business, management, and other significant considerations that will control the award of the OA/T. The specific content of plans will vary, depending on the nature, circumstances, and stage of the OA/T. At a minimum the plan should include the following:

- Background and Objectives
  - Statement of Need – An introductory statement that summarizes the need for an OA/T.
  - Applicable Conditions – Any conditions that may impact the award/administration of the OA/T, including dependencies on other programs, awards, or agency resources.
  - Cost – The total estimated cost or price of the OA/T. Cost sharing, if contemplated and appropriate for the award, should be described in this section.
  - Capability or Performance – The required capabilities or performance characteristics required to support the problem, area of need, or capability gap identified by the planning team. The planning team should minimize burdensome requirements to not constrain or impede solutions.
  - Risks – A discussion of the technical, cost, and schedule risks and description of efforts are planned to reduce risk and the consequences of failure to achieve goals.
- Plan of Action
  - Sources – A brief synopsis of market intelligence efforts and prospective sources that were identified through those efforts.
  - Competition – A discussion of how competition will be sought. If competition is not contemplated, a discussion on why competition will not be sought.
  - Award Type – The type of award contemplated (e.g., single/multiple award, pricing type (fixed price, cost reimbursable, etc.)).
  - Source Selection Procedures – A brief explanation of how the selection of an awardee or awardees will be made.
  - Conflict(s) of Interest – If necessary, a brief discussion of potential conflicts and potential mitigations
  - Government Furnished Item – A brief description of property or information that NSF may furnish to the awardee.
  - Fiscal Considerations - The obligating event for an OA/T is the signing of the OA/T by the cognizant OA/T agreement officer. Similar to the NSF process for contracts, grants, and cooperative agreements the requesting program should create a commitment of funds in the accounting system which the OA/T agreement officer will use to enter into the OA/T.

- Identification of participants in the process
- Milestone Schedule

See Appendix E for a template of the OA/T Plan.

### C. Competition

The Competition in Contracting Act does not apply to the formation of NSF's OA/Ts. Further, the Foundation may, within its statutory powers, form an OA/T without legal consideration, without performance or other bonds, and without regard to the competitive bidding and advertising requirements of [section 6101 of Title 41](#). See 42 U.S.C. § 1870(c). Nevertheless, the OA/T team should embrace competitive procedures to the maximum extent practicable.

### D. Drafting the Solicitation

The OA/T team has significant leeway in creating the solicitation document and the solicitation and evaluation process. All solicitations must be fair and transparent, provide for a competitive procedure to the maximum extent practicable, and document the rationale to be used when making the award decision. The OA/T agreement officer will tailor the solicitation documents and approach to the complexity and potential value of the problem, as well as industry norms. The solicitation process should be fast, flexible, and collaborative. It may borrow from practices used in the solicitation and award of grants, cooperative agreements, and procurement contracts. However, there is no requirement to do so.

An OA/T solicitation should include the following sections at a minimum:

- **Scope of the Agreement** – This section provides background for the proposed agreement, the challenges or scope of the problem the NSF is seeking to solve with a resulting award, the goals and objectives of the NSF in any resulting award, and other pertinent information.
- **Proposal Instructions** – This section provides instructions to offerors regarding the submission of proposals (e.g., date, time, and format) as well as information to be included in the proposal that will be considered in the evaluation of the submission.
- **Evaluation Criteria** – This section provides information on the process by which NSF will review proposals to determine if the proposal submission is compliant with the solicitation instructions, the offeror is eligible for award, and the basis for selection.
- **Terms and Conditions** – This section includes any non-negotiable terms and conditions (See, e.g., Appendix D). It may include any and all other terms and conditions that can be included in the resultant award. Other than terms and conditions identified as non-negotiable, the negotiation of the other terms and conditions should be considered a task for post selection negotiations.

OA/T agreement officers must ensure that all solicitations include language that addresses how the proposed project reflects the statutory mission of the Foundation and clearly identifies the goals of the OA/T.

In addition, OA/T agreement officers must ensure that all offerors are registered in the System for Award Management (“SAM”) and have a valid Unique Entity Identification (UEI) number to receive an award. Further, OA/T offerors must maintain an active and current SAM registration throughout the OA/T award process, should they be selected and register in Research.gov prior to award.

#### E. Review and Approval

##### a. DACS Leadership

All contemplated OA/Ts shall be approved by the Division Director, DACS. For awards with a total estimated value of less than \$10 million, approval authority may be redelegated no lower than the Deputy Division Director, DACS. Approval is required at each of the following steps:

- Prior to entry into the market intelligence phase. This requires a program’s initial OA/T choice-of-instrument recommendation and a market intelligence plan.
- Prior to solicitation. This requires a recommendation and request memorandum/delegation of authority, a draft OA/T solicitation, and a draft OA/T plan. The draft OA/T solicitation shall include the information required by D above.
- Prior to entry into negotiations. This should include a summary of any initial evaluation and ranking.
- Prior to award of any OA/Ts. This should include a copy of the negotiated terms and conditions of the proposed OA/T(s).

##### b. Office of the Director

The Office of the Director (“OD”) may request to review an OA/T draft solicitation or any other sensitive OA/T materials. Any such request(s) shall be submitted to and reviewed by DACS’s Division Director, prior to releasing any OA/T materials consistent with the OA/T Integrity safeguards discussed above.

If the DACS’s Division Director approves document release to the OD, the OA/T agreement officer shall use the Contract Review Board process to complete the review and approval process. The OA/T agreement officer must exercise due caution to route materials only to those authorized by the DACS Division Director to receive them, along with clear instructions not to disseminate further.

##### c. Other NSF Organizational Entities

Other NSF organizational entities may similarly request an opportunity to review OA/T draft solicitations or other sensitive OA/T materials. Such requests will be processed subject to the same OD safeguards described above.



If more than one Directorate/Office request access, approvals by all of the cognizant Assistant Directors/Office Heads must be documented.

d. Office of International Science and Engineering (OISE)

If the OA/T activity involves a clearly defined international dimension/component, the Office Head of the OISE must review and provide concurrence prior to submitting to DACS for approval. (See also discussion *infra* Appendix A.) The OA/T agreement officer should coordinate this review with careful consideration of appropriate disclosure/dissemination safeguards.

e. National Science Board

The National Science Board must provide prior authorization before any OA above a certain threshold can be solicited and formed by the NSF Director or their designee. In accordance with the applicable Delegation of Award Approval Authority to the Director (See Appendix B):

“The Director of the National Science Foundation may make no award involving an anticipated average annual amount of the greater of either 1 percent or more of the awarding Directorate’s or Office’s prior year current plan or 0.1 percent or more of the prior year total NSF budget without the prior approval of the National Science Board.”

As a result, when an “above-the-threshold” OA is contemplated, the NSB must authorize the OA prior to DACS’s issuance of the solicitation.

The OA/T team must plan and schedule accordingly to allow for the NSB’s participation in the process, taking special consideration of the NSB quarterly meeting schedule. This requires coordinating with the OD at least six (6) months prior to the planned release of a solicitation and three (3) months prior to a scheduled NSB meeting to be added to the meeting schedule. At the NSB session, the request will be submitted as an action item to request formal approval of the release of a solicitation.

F. Identify Funding Sources

NSF has several available funding sources. The OA/T team should consult with the Budget Division and, if necessary, OGC to determine if there are any prohibitions on the use of funds for certain activities or items. The determination of appropriateness of available funds and fund type are independent of the choice of award instrument. (See also discussion *infra* Appendix A.)

G. Publicizing the OA/T Opportunity

OA/Ts not only permit “freedom of contract,” they also offer the “freedom of solicitation.” As noted earlier, the team should design solicitation procedures that are fair, transparent, and tailored to the problem. The solicitation procedures should be designed to attract new and

innovative solutions and performers. Actively engage the networks built during market intelligence, create distribution lists of interested performers, and coordinate with the Office of Legislative and Public Affairs to use social media to publicize the solicitation. The solicitation should be released through appropriate channels to make both traditional and non-traditional offerors aware of the OA/T opportunity, this can include posting to SAM.gov and/or the use of a Dear Colleague Letter.

#### H. Evaluating OA/T Proposals

The complexity of the problem to be solved should be reflected in the solicitation's evaluation terms. When an OA/T involves multipart agreements arrangements, it may require more complex evaluation procedures. In addition, the OA/T agreement officer should comply with all applicable laws, regulations, and government policies that affect or are related to evaluation of the OA/T.

Capability or qualifications-based evaluation terms should be used to the maximum extent practicable. (See also discussion *infra* Appendix A (discussing NSF's discretion under 42 U.S.C. § 1873 to rely on qualifications-based evaluation criteria in forming S&E OA/Ts).) For example, the solicitation may assess only the relevant capability of the potential OA/T entities to accomplish the research or task at hand. Long lists of evaluation criteria reminiscent of FAR-based solicitations are not necessarily required for the OA/T solicitation. The OA/T team should fit the evaluation process to the needs of the project.

When the OA/T team has completed its capabilities-based assessment, it can design a process that rank orders the prospective OA/T entities, and then enters into negotiations with the most highly qualified entity or entities.<sup>5</sup>

#### I. Negotiation of Terms and Conditions

The OA/T team is responsible for ensuring that the terms and conditions negotiated are appropriate for the project and legally allowable in coordination with OGC. Nearly all terms and conditions are open for negotiation subject to the limitations associated with applicable laws or policy found in the Appendices.

It may be prudent to have the top ranked firm submit proposed terms and conditions that iterate on the negotiable terms and conditions NSF has proposed for the agreement and any other terms

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<sup>5</sup> An initial focus on qualifications-based evaluation criteria does not leave the Government open to price gouging. Although the entity may be selected for negotiations based on qualifications, the prospective OA/T entity must offer a price that NSF finds fair and reasonable in order to receive an OA/T award.

and conditions they believe are necessary to successfully execute the agreement. This will allow for iteration between the parties. Further, at this point NSF should also request an estimated total cost or price for the OA/T from the offeror. NSF should conduct frank and honest discussions with the offeror around costs, future costs, and appropriations. NSF may even choose to adopt a joint management of the budget approach, rather than a fixed-price or estimated cost type arrangement. If the team cannot come to a win-win agreement with the top ranked firm, it shall close negotiations and move to the second most highly qualified entity.

It is important to note that terms and conditions can generally evolve during contract administration as a project proceeds through multiple phases. In negotiating the initial set of terms and conditions, the NSF team should generally consider the following:<sup>6</sup>

- **Term.** The Agreement must state when it becomes effective (e.g., the date of the last signature on the document), the initial duration of the agreement (e.g., one year, five years), and if the term can be extended at the mutual agreement of the parties.
- **Management of the Project.** The Agreement must specify the parties, roles, and individuals responsible for the duration of the agreement.
- **Agreement Administration.** The Agreement must specify the manner(s) in which the Agreement will be administered (e.g., Annual Program Plan).
- **Performance Monitoring.** The agreement should specify how performance will be monitored throughout the life of the project. Monitoring activities may include actions such as review of reports, milestone checks, inspections, site visits, and audits.
- **Modifications.** Modifications of OA/T projects are common. The OA/T terms and conditions should address how modifications will be handled. OA/T agreement officers are encouraged to be flexible and use good judgment to make modifications that will enable successful project outcomes. However, projects should not go on indefinitely and in the event a change occurs from the original intent, the Government team should determine the fairness of such a change. The terms and conditions should also address the Government's authority to make unilateral changes and scope of those changes. The NSF may need the ability to make a unilateral change to the arrangement to ensure that critical requirements are met, or when the availability of Government funding for the project shifts. If contemplating unilateral changes, however, consider that unilateral changes may lead to disputes and claims.
- **Termination.** The NSF team should consider termination clauses based on the circumstances of the particular project. In cases where there is an apportionment of risk allocation and cost sharing, it could be appropriate to allow an awardee the right to terminate. Termination clauses should identify the conditions that would permit terminations and include the procedures for notifying the other party and deciding termination settlements.

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<sup>6</sup> Note that this list is not comprehensive or exhaustive. Each OA/T may have a specific set of terms and conditions.

- **Transition/Follow-On Arrangements.** The NSF team should consider how transition and/or follow-on arrangements will be handled upon expiration and/or termination of the OA/T, including staffing, extensions of time, and other considerations.
- **Obligation.** The OA/T team must identify the amount of funding to be obligated to the Agreement and the account(s) the funds will be obligated from. The team should take risk of performance into account when determining how much to obligate, and if incremental funding obligations are appropriate based on the structure of the resulting agreement.
- **Price Reasonableness.** The OA/T team shall determine price reasonableness. The OA/T team may need data to do so, including commercial pricing data, market data, parametric data, or cost information. However, the OA/T agreement officer should exhaust other means to establish price reasonableness<sup>7</sup> before resorting to requesting cost information.
- **Accounting Systems.** When structuring the OA/T, the NSF team should consider the capability of the awardee's accounting system. Arrangements that impose requirements requiring awardees to change their existing accounting system are discouraged. However, the NSF should not enter into a cost reimbursement-type OA/T with an awardee that does not have an accounting system capable of allocating amounts/costs to individual arrangements/contracts.
- **Payments.** The NSF team shall utilize the Invoice Payment Platform (IPP) to the maximum extent possible. However, other methods of payment are possible, and when those are contemplated the NSF team should include the Division of Financial Management in those discussions.
- **Disputes.** Although OA/Ts are not subject to the Contract Disputes Act, an OA/T dispute can potentially be the subject of a claim in the Court of Federal Claims or other cognizant judicial forum. The NSF team should ensure each OA/T addresses the basis and procedures for resolving disputes. The Government team should seek to reduce the risk of litigation by negotiating disputes clauses that maximize the use of Alternate Dispute Resolution ("ADR") procedures when possible. Incorporating language that allows disputes to be handled at the lowest level possible is generally a best practice.
- **Remedies.** When arrangements provide for the NSF's and/or awardee's right to terminate for convenience, default, or cause, the arrangement must also address potential remedies.
- **Patent Rights/Intellectual Property ("IP").** The NSF team should have a baseline understanding of the allocation of IP rights under the Bayh-Dole Act (35 U.S.C. §§ 201-204 and also the relevant regulations at 37 CFR 401) for patents and technical data (See 10 U.S.C. §§ 2320-21). NSF will generally not apply the provisions of Bayh-Dole to OA/Ts. The NSF team will take into account inventions and data that may result from the project and future needs the Government may have for rights in them and define them in

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<sup>7</sup> To the extent a qualifications-based evaluation process is used, the OA/T agreement officer must consider whether concealment of any independent government cost estimates is in the best interests of NSF during negotiations.

the OA/T. Should a potential OA/T participant seek to negotiate patent IP rights or where the OA/T team deems IP flexibility desirable, the OA/T agreement officer should consult with OGC.

- Data Rights. The requirements at 2 CFR 910.362(d), Rights in data-general rule, can be used as a starting point.
- Foreign Access to Technology.
- Information Security and Privacy, including Privacy Act of 1974, Federal Information Security Management Act (FISMA), Safeguarding Controlled Unclassified Information (CUI) (e.g., Controlled Technical Information), Confidential Information Protection and Statistical Efficiency Act (CIPSEA), E-Government Act of 2002, and Cyber Incident Reporting.
- Approval of Information Collection Activities (Paperwork Reduction Act) and Records Management and Disposition (Federal Records Act)
- Title to and Disposition of Property. The NSF is not required to, and generally should not, take title to physical property acquired or produced by a private party signatory to an OA/T, except property identified as a deliverable. In deciding whether to take title to property under an OA/T, the NSF should consider whether known or future efforts may be fostered by NSF ownership of the property. If the NSF takes title to property or furnishes NSF property, then the property may be subject to the Federal Property and Administrative Services Act and/or the NSF Act. At a minimum, the Arrangement terms should include the following:
  - A list of property to which the NSF will obtain title and when title will transfer to the NSF.
  - Whether the awardee or the NSF is responsible for maintenance, repair, or replacement.
  - Whether the awardee or the NSF is liable for loss or damage resulting from use of the property.
  - The procedures for accounting for, controlling, and disposing of the property. Generally, when the OA/T awardee is a company that does not traditionally do business with the Government, the company's commercial property control system should be used to account for Government property.
  - What guarantees, if any, NSF makes regarding the property's suitability for its intended use, the condition in which the property should be returned, and any limitations on how and when the property may be used.
  - A list of property NSF will furnish for the performance of the arrangement.
- Standard Civil Rights Act clause
- Prevention of Sexual Harassment/Sexual Assault
- Order of Precedence
- Execution
- Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment

- Other Terms and Conditions. See, e.g., Appendix D.
- Flow Down Provisions. The NSF team should consider which OA/T terms and conditions the awardee should flow down to sub-awardees. In developing this negotiation position, the NSF team should consider both the needs of the NSF (e.g. audits) and the protections (e.g., IP) afforded to all participants.
- Procurement Standards. The NSF team should consider any procurement standards that recipients should try to uphold during performance. Such standards may include, but are not limited to: competition requirements, use of small business, domestic sourcing preferences, etc.

#### J. OA/T Award

The NSF team should ensure that the OA/T is entered into with an entity that is identifiable by their Unique Entity Identifier (UEI) available through sam.gov that can execute the arrangement and legally bind the necessary parties. The entity receiving the agreement may then execute the agreement as a single company, or enter into joint ventures, partnerships, consortiums, teams (through its members or authorized agent), or as a prime contractor with subcontract relationships. The entity may also structure Consortia in a wide variety of ways. Consortia members may be technical performers, financial contributors, potential end users of products, services and/or technologies developed by the consortia, or individuals who are otherwise interested in the project(s) being funded. NSF shall avoid any situation where there is ambiguity as to the identity of the OA/T awardee.

#### K. Protests & Litigation

Judicial rules regarding OA/Ts are evolving. As a result, the OA/T team should discuss with OGC the litigation risks of forming and/or administering OA/Ts and the options available to mitigate them.

#### L. The OA/T Framework's Integrity & Anti-Corruption Safeguards

The formation and administration of OA/Ts shall be conducted with complete impartiality and preferential treatment for none. OA/T transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct and integrity. Consequently, OA/T formation and administration processes must be designed in a manner that prevents, detects, and mitigates corruption risks.

In this regard, OA/T agreement officers forming or administering OA/Ts must ensure that the following minimum elements are addressed and documented:

a. OA/T Integrity Access & Disclosure Safeguards

While the Procurement Integrity Act does not apply to OA/Ts, there are similar safeguards that do apply to protect the integrity of the OA/T process, including 18 U.S.C. § 641 (“Public money, property or records”) and 18 U.S.C. § 1905 (“Disclosure of confidential information generally”). Further, DACS requires staff to comply with the Procurement Integrity Act to the maximum extent practicable within the OA/T framework. This includes its prohibitions on disclosing and obtaining sensitive information, such as source selection information and/or OA/T bid or proposal information.

Accordingly, any individual(s) requiring access to source selection or OA/T bid or proposal information shall not obtain or disclose such information until properly authorized in writing by the OA/T agreement officer to do so. At minimum, the cognizant OA/T agreement officer shall not authorize such access until they have documented in the file that the individual received appropriate training<sup>8</sup>, and signed an appropriate Certification and Nondisclosure Agreement (Appendix G).

NSF federal employees serving in the following positions are authorized to access OA/T sensitive information without written authorization from the OA/T agreement officer or the Division Director DACS, including source selection information and OA/T bid or proposal information, but only to the extent necessary to perform their official duties:

- Personnel assigned to DACS;
- Personnel Assigned to the Office of Small and Disadvantaged Business Utilization;
- Personnel assigned to OGC; and
- Personnel evaluating litigation or anticipated litigation matters, such as OA/T claims or bid protests, as requested by OGC, the OA/T agreement officer, and/or DACS’s Division Director or Deputy Division Director.

On a case-by-case basis and with appropriate safeguards, the Division Director, DACS may grant other individuals access to OA/T sensitive information, including source selection and offeror bid or proposal information. For example, the Division Director may grant access to supervisors of OA/T evaluation panel members, NSF senior management, or members of the National Science Board for reasonable business purposes.

If an OA/T agreement officer receives or obtains information of a violation or possible violation of the integrity of the OA/T solicitation/award process, they must consider if it has any impact on the pending award or awardee selection. The OA/T agreement officer’s assessment shall be

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<sup>8</sup> Such training includes both OA/T agreement officer instruction and the LearnNSF training module entitled the “Government-Contractor Relationship at NSF.”

forwarded to the head of contracting activity in OGC for review and a determination of appropriate action consistent with FAR 3.104-7.

b. Organizational Conflicts of Interest

Possible violations of the above-referenced laws and guidance may raise potential Organizational Conflict of Interest (OCI) issues. As a result, if an OA/T agreement officer obtains information of a possible integrity violation, they should consider further analyzing and documenting the matter as an OCI issue. While the OCI rules set forth in FAR Subpart 9.5 do not apply to OA/Ts, DACS nevertheless requires OA/T agreement officers to follow those rules to the maximum extent practicable within the OA/T framework.

OCIs are generally separated into three categories:

- Impaired Objectivity – may arise where an OA/T entity’s outside business relationships create an economic incentive to provide biased advice under an OA/T transaction;
- Biased Ground Rules – may occur when, as part of its work under one transaction, the OA/T entity has helped set the ground rules, such as writing the statement of work or developing specifications, for an OA/T;
- Unequal Access to Information – may occur when an OA/T entity obtains access to nonpublic information as part of its performance under another transaction which gives it an advantage in a later competition for an OA/T.

As further explained in FAR Subpart 9.5, OA/T agreement officers must identify and evaluate potential OCIs as early as possible, and avoid, neutralize, or mitigate significant potential conflicts before contract award. To fulfill this obligation, OA/T agreement officers should design an OA/T process that requires OA/T contractors to appropriately disclose relevant information.

As with procurement contracts (described in FAR Subpart 9.5), if an OA/T agreement officer becomes aware of an actual or potential OCI, they should immediately seek advice from OGC and assistance from technical specialists familiar with OCIs. Working together, they should evaluate potential conflicts and develop any necessary solicitation provisions and OA/T terms and conditions to mitigate the conflict. The program office must stay involved in the process to ensure that any proposed resolution will still allow them to meet their mission requirements. The Division Director, DACS, is authorized to waive OCIs when such action is in the Government’s interest. The waiver request will be drafted by the OA/T agreement officer, then reviewed by OGC, and finally submitted to the Division Director, DACS for a final decision. Each request shall include: (1) an analysis of the facts involving the potential or actual OCI, including advantages and disadvantages to the Government and prospective awardee(s); and (2) a discussion of the factors which preclude avoiding, neutralizing, or mitigating the OCI.



c. Ethics & Personal Conflicts of Interest

Employees are responsible for ensuring any OA/T transaction they are assigned to does not create a potential ethics violation and/or a conflict of interest. Employees are expected to be familiar with [NSF Manual Number 15, Conflicts of Interest and Standards of Ethical Conduct](#), and its law, rules, and regulations.

Employees who become aware of a potential ethics violation and/or personal conflict of interest during participation in an OA/T transaction shall seek immediate guidance from an OGC ethics official about their ability to continue work on the assignment or how to manage the conflict of interest.

d. OA/T Ethics & Compliance Programs

OA/T contractors are required to have a corporate ethics and compliance program tailored to the anticipated transaction. At a minimum, the compliance program must contain the same elements required of applicants to participate in NSF Financial Assistance Awards. The required elements can be found in Chapter IX-Grantee Standards of the NSF Proposal and Award Policies and Procedures Guide.

When otherwise appropriate, OA/T agreement officers shall consider requiring a more robust compliance program modeled after FAR 52.203-13, including but not limited to requiring OA/T contractors to (1) adopt a written code of business ethics and conduct which must be made available to each employee engaged in performance of the contract; (2) maintain an ongoing business ethics awareness and compliance program; and (3) develop an internal control system.

## ADMINISTRATION OF OA/T AWARDS

As in all other areas of acquisition and financial assistance, administrative requirements will vary from OA/T to OA/T. OA/T teams and officers shall consider OA/T administration during its formation, inclusive of the following.

A. Federal Reporting

NSF will/will not report OA/Ts in the Federal Procurement Data System-Next Generation. For DATA Act identification purposes, OA/Ts must identify the seventh position of the award number as a "Z." The other positions of the award number and modifications will be assigned using the same naming convention as procurement contracts.

B. Performance Monitoring

Effective performance monitoring tracks cost, schedule, and technical progress. Monitoring activities keep track of the work accomplished and compares actual cost to the work planned and estimated and explains any variances between the two. There is not a one-size-fits-all approach

to performance monitoring. The submission of performance and/or financial reports should be considered to assist with monitoring activities.

The awardee is responsible for managing and monitoring each project and all sub-awardees. The solicitation and resulting OA/T arrangement should identify the frequency and type of performance reports necessary to support effective management. If an awardee is teaming with other sub-awardees (e.g. consortium, joint venture) for the project, the NSF team should consider if performance reporting on all sub-awardees would be appropriate.

The NSF team should consider whether reports required of the OA/T awardee are important enough to warrant establishment of line items or separate payable milestones, or if reporting requirements should be incorporated as a part of a larger line item or payable milestone. In either case, an appropriate amount should be withheld if a report is not delivered.

#### C. Freedom of Information Act

The NSF OGC Freedom of Information Act (“FOIA”) office will notify the awardee of a FOIA request related to an OA/T. If the records requested are not described in sufficient detail to permit processing, the NSF FOIA office will send a clarification request to the requester. The OGC FOIA office will assign a case number and provide a copy of the FOIA request via email to the Procurement and Cooperative Support Policy Branch FOIA point of contact (“POC”) who will forward the FOIA request for records to the applicable OA/T agreement officer for action.

Where the request implicates documents that could contain the awardee’s proprietary information, the OA/T agreement officer will provide the awardee with an opportunity to review the material prior to release. This is done by emailing the awardee a Notification Letter with documents which have been marked or indicated to be confidential information. If the record contains sensitive information protected under a FOIA exemption, that information is redacted. The awardee shall provide written comments clearly supporting why the information in question should or should not be released.

#### D. OA/T Close-Out

OA/T close-out should occur in accordance with the consider the following, terms and conditions of the award, audit requirements, cost sharing, payments, property, patents, and OA/T awardee reports.

#### E. Allowable Costs

Where an OA/T uses amounts generated from an awardee’s financial or cost records as basis of payment (e.g. cost-reimbursement), the OA/T should stipulate that Federal funds and the OA/T

awardee's funds are to be used for costs that a reasonable and prudent person would incur in carrying out the project.

#### F. Audit

Audits and access to financial records are subject to negotiation. Generally, fixed amount arrangements should not require any type of audit provisions. When audits become necessary, the Government team has the flexibility to use outside independent auditors in certain situations and determine the scope of the audits.

#### G. Payments

Project payment structures are negotiable. The arrangement must clearly identify the basis and procedures for payment. NSF may also consider advance payments within limits set by applicable law.

#### H. Payable Milestones

Well-structured, payable milestones can serve the dual purpose of meeting cash flow needs of the awardee and as a management tool to verify observable achievements on the path to project success. Payable milestone procedures vary, depending on the inherent nature of the arrangement 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, that are appropriate under the circumstances. Optional milestones do not become part of the project arrangement terms unless exercised and funded by the Government.

Appendices

Appendix A – Applicability of General Law to OA/Ts

Appendix B – NSB Imposition of OA Formation Policy Conditions

Appendix C – Procurement Round Table, A Proposal for A New Approach to Performance-Based Services Acquisition (Mar. 13, 2006)

Appendix D – Recommendation and Request for Approval and Delegation of Authority

Appendix E – OA/T Plan

Appendix F – Sample OA/T Award Document, Clauses, Representations, and Certifications

Appendix G – Sample NDA

Appendix H – Sample OA/T Solicitation

Appendix I – AOR Appointment Letter

## Appendix A – Applicability of General Law to OA/Ts

In assessing the applicability of any given law to OA/Ts, it is often helpful to examine the meaning of the term “contract.” In some statutes, “contract” is intended to mean procurement contract. In other cases, it has a broader meaning. Relying on this distinction, the key is to understand that relatively few laws and regulations mandatorily apply to OA/Ts. Rather, OA/Ts are generally formed as non-procurement, non-assistance contracts, and that they are more akin to common law or commercial contracts than Government procurement contracts or financial assistance agreements.

DACS views the relative lack of statute, regulation, and other guidance surrounding OA/Ts as a significant strength of the OA/T instrument type. It allows an OA/T team to establish the terms and conditions for OA/Ts through collaboration and negotiation between the parties. This provides both parties with flexibility to accept or alter some of the terms and conditions proposed, which is drastically different than the Government’s traditional contracting processes.

Nevertheless, these distinctions should not be construed to mean that NSF’s OA/T “freedom of contract” is entirely unfettered. The OA/T framework is constrained (i) by NSF’s organic act itself, (ii) by applicable law (e.g., statutes and/or executive orders of general applicability), and (iii) by the imposition of any NSB or SPE conditions. Moreover, NSF considers such laws and conditions as applicable regardless of whether or not the OA/Ts explicitly reference them. Each of these categories will be discussed in turn and are illustrated with a few non-exhaustive examples.

In addition, NSF’s OA/Ts are not completely unstructured or inconsistent. NSF has developed model OA/T agreements that help inform planning. NSF’s position is that there are only a handful of non-negotiable provisions, such as the Civil Rights Act clause. Most of the other provisions are subject to negotiation. OA/T teams may also consider incorporating by reference the large number of procurement or assistance laws that do not apply to OA/Ts, but may nevertheless provide important guidance. For example, while the Competition in Contracting Act does not mandatorily apply to OA/Ts, this Guide states that OA/Ts are nevertheless to be awarded using competitive procedures consistent with that Act to the maximum extent practicable. The OA/T team should think and consider what makes sense for the particular transaction.

### 1. Organic Act OA Statutory Compliance

In all cases, DACS’s formation of an OA must comply with NSF’s statutory OA authority. Failure to reasonably document this compliance may lead to a potential violation of law, which warrants careful attention as an important step in OA planning.

- i. 42 U.S.C. § 1870(c): “Science or Engineering Activities”

Under 42 U.S.C. § 1870(c), DACS may not lawfully form an OA entirely disconnected from NSF's scientific or engineering ("S&E") activities. NSF interprets its underlying statutory authority to require some nexus to "such scientific or engineering activities as the Foundation deems necessary to carry out the purposes of this chapter." NSF construes these words in the broadest possible sense. For example, NSF does not construe the term "engineering" as limited to civil engineering. Engineering may also include a broad range of other forms of engineering, such as software engineering, architectural engineering, infrastructure engineering, aeronautical engineering, marine engineering, technology engineering, and other services of a logistical or operational engineering nature. OA officers must nevertheless ensure that the nexus is carefully documented in the OA Plan by explaining how the activity relates to science or engineering (or both).

The OA plan must also address why the Foundation should deem the proposed S&E OA activity as necessary to carry out one or more of the purposes of the organic act, such as the enumerated functions listed at 42 U.S.C. § 1862, or a purpose identified elsewhere in the organic act.

ii. 42 U.S.C. § 1872: International cooperation and coordination with foreign policy

If an OA contemplates any form of international activity (e.g., the formation of an OA with organizations or individuals in foreign countries, or with agencies of foreign countries), then the OA Officer must coordinate timely review of the OA plan by the Office Head of the Office of International Science and Engineering and OGC. OA Officers are cautioned that these OAs may require work with other federal agencies and are encouraged to initiate early coordination to avoid any schedule delays.

iii. 42 U.S.C. § 1871: Disposition of Invention Provisions

Each OA involving scientific or engineering research must contain provisions governing the disposition of inventions produced under it. As a matter of guidance, NSF will generally apply the provisions of Bayh-Dole Act, 35 U.S.C. §§ 200-212 to OAs to fulfill this statutory obligation. If more flexibility is needed, OA officers may consult with the SPE or OGC as to how it could be pursued. In all circumstances, the disposition of inventions should be addressed in a manner calculated by the OA team to protect both the public interest and the equities of the OA awardee.

iv. 42 U.S.C. § 1864(e): NSB Approval

DACS may form OAs for S&E activities pursuant to 42 U.S.C. § 1870(c) only with the prior approval of the National Science Board or under authority delegated by the NSB, and subject to such conditions that the Board specifies pursuant to the publication and reporting requirements of 42 U.S.C. § 1864(e)(2). (See discussion *infra* Appendix B.)

v. 42 U.S.C. § 1873

NSF's organic act requires NSF to "utilize appropriations available therefor in such manner as will in its discretion best realize the objectives of (1) having the work performed by

organizations, agencies, and institutions, or individuals in the United States or foreign countries, including Government agencies of the United States and of foreign countries, qualified by training and experience to achieve the results desired, (2) strengthening the research staff of organizations, particularly nonprofit organizations, in the United States, (3) adding institutions, agencies, or organizations which, if aided, will advance scientific or engineering research, and (4) encouraging independent scientific or engineering research by individuals.”

This subsection gives the Foundation discretion to decide how it can best use appropriations when forming OAs to realize the objectives stated. For example, OA officers might consider whether a qualifications-based approach to OA evaluation procedures can meet the statutory objective of having the work performed by entities, “qualified by training and experience to achieve the results desired.”

## 2. Origins of NSF OA Authority

There are two key aspects of NSF’s genesis and evolution that inform its understanding of the Foundation’s underlying OA authority today.

First, Congress provided NSF extremely broad and flexible OA authority, codified in Section 11(c) of the NSF Act, which in setting forth the “General Authority of Foundation” states as follows:

SEC. 11. The Foundation shall have the authority, within the limits of available appropriations, to do all things necessary to carry out the provisions of this Act, including, but without being limited thereto, the authority . . .  
(c) to enter into contracts or other arrangements, or modifications thereof, for the carrying on, . . .of such basic scientific research activities as the Foundation deems necessary to carry out the purposes of this Act, and, at the request of the Secretary of Defense, specific scientific research activities in connection with matters relating to the national defense, and, when deemed appropriate by the Foundation, such contracts or other arrangements, or modifications thereof, may be entered into without legal consideration, without performance or other bonds, and without regard to section 3709 of the Revised Statutes.

Second, per the NSF Organic Act, the Foundation’s original authority to form OAs required a nexus to “basic scientific research activities” (or a “scientific research activit[y]” in the case of a request from the Secretary of Defense). This OA requirement was substantially modified in 1968 and 1985 when Congress further broadened and ratified NSF’s OA authority. In 1968, Congress modified the NSF act by substituting “scientific activities” for “basic scientific research activities” and “scientific research activities” (see Pub. L. 90-407). In 1985, the language was further changed with the insertion of, “or engineering” after “scientific” in each place it appears (see Pub. L. 99-159). As a result, the key statutory language presently reads:

The Foundation shall have the authority, within the limits of available appropriations, to do all things necessary to carry out the provisions of this chapter, including, but without being limited thereto, the authority—

(c) to enter into contracts or other arrangements, or modifications thereof, for the carrying on, of such scientific or engineering activities as the Foundation deems necessary to carry out the purposes of this chapter, and, at the request of the Secretary of State or Secretary of Defense, specific scientific or engineering activities in connection with matters relating to international cooperation or national security, and, when deemed appropriate by the Foundation, such contracts or other arrangements, or modifications thereof may be entered into without legal consideration, without performance or other bonds, and without regard to [section 6101 of Title 41](#). (See 42 U.S.C. § 1870(c))

With these revisions, Congress removed the previous requirement that NSF demonstrate a nexus to a “basic scientific research activity” (or to “specific scientific research” in the case of a request from the Secretary of Defense) when forming OAs. Instead, the present statutory language provides NSF with broad discretion to form OAs “of such scientific or engineering activities as the Foundation deems necessary to carry out the purposes of this chapter.” (See discussion *infra* Appendix A.)

### 3. Origins of NSF’s OT Authority

In August 2022, NSF received OT authority via the CHIPS and Science Act (P.L. 117-167). The Act strengthens domestic semiconductor manufacturing, design, and research to reinforce America’s chip supply chains. Section 10396 of the CHIPS Act states:

**SEC. 10396. AUTHORITIES.** In addition to existing authorities available to the Foundation, the Director may exercise the following authorities in carrying out the activities under this subtitle:

(1) **AWARDS.**—In carrying out this subtitle, the Director may provide awards in the form of grants, contracts, cooperative agreements, cash prizes, and other transactions.

NSF may form OTs only when carrying out the activities of the Directorate for Technology, Innovation, and Partnerships (“TIP”) (See the CHIPS and Science Act (P.L. 117-167), Section 10396 (42 U.S.C. § 19116)). Appropriate uses of OTs include the same uses as OAs with a particular focus on TIP’s activities, including use-inspired and translational research and acceleration of the development and use of federally funded research. 42 U.S.C. § 19101.

In all cases, DACS’s formation of an OT must comply with NSF’s statutory OT authority. Failure to reasonably document this compliance may lead to a potential violation of law and warrants careful attention as an important step in OT planning.



**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 33 of 97**

4. Other Applicable and Inapplicable Laws

In consultation with OGC, DACS must ensure that the formation of its OA/Ts comply with applicable law (e.g., statutes of general applicability). For example, statutes (and regulations based on statutes) that are specific to the procurement and/or financial assistance systems generally do not necessarily apply to OA/Ts. The table below is not an exhaustive list of laws, regulations, and statutes. The OA/T agreement officer shall carefully consider applicability based on the specific fact sets unique to each OA/T award. The following table displays which laws, regulations, and statutes apply/do not apply to OA/Ts.

LAW/REGULATION/STATUTE	APPLICABLE TO OA/Ts	INAPPLICABLE TO OA/Ts
Limitations on expending and obligating amounts (Fiscal laws that apply generally to obligations, expenditures, or contracting in whatever form they take, including the Anti-Deficiency Act), 31 U.S.C. § 1341	X	
Public money, property, or records, 18 U.S.C. § 641	X	
Trade Secrets Act, 18 U.S.C. § 1905	X	
Title VI of the Civil Rights Act	X	
Non-Discrimination in Federal Programs, 42 U.S.C. § 2000d et seq.	X	
Freedom of Information Act, 5 U.S.C. § 552	X	
Privacy Act of 1974, 5 U.S.C. § 552a	X	
Paperwork Reduction Act (PRA), 44 U.S.C. § 3501 et seq.	X	
Federal Records Act, 44 U.S.C. § 3101 et seq.	X	
Federal Information Security Management Act (FISMA), 44 U.S.C. § 3551 et seq.	X	

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 34 of 97**

False Claims Act, 31 U.S.C. § 3801	X	
Service Contract Act, 41 U.S.C § 351	X	
Fair Labor Standards Act, 29 U.S.C §§ 201-219	X	
Tucker Act, 28 U.S.C § 1491	X	
Title 41, U.S. Code (“Public Contracts”)		X
Subchapter 5, Title 31, U.S. Code (“Procurement Protest System”)		X
Competition in Contracting Act, Pub. L No 98-369		X
Disputes Act, 41 U.S.C. § 6041		X
Procurement Protest System, 31 U.S.C § 3552		X
Procurement Integrity Act, 41 U.S.C § 423		X
Bayh-Dole Act, 35 U.S.C. §§ 200-121		X
Truth in Negotiations Act, 10 U.S.C. § 2306a		X
Cost Accounting Standards, 41 U.S.C. § 422		X
E-Government Act of 2002	X	
Confidential Information Protection and Statistical Efficiency Act (CIPSEA)	X	

## Appendix B – NSB Imposition of Other Arrangement Formation Policy Conditions

The NSF Director has delegated to DACS’s Division Director overall authority and responsibility for the Foundation’s OA activities. This includes but is not limited to managing the direction of OA policy for NSF, and the development and implementation of unique contracting policies, guidance, or similar materials regarding such transactions. However, that delegation was subject to certain limitations. For example, the Division Director may form OAs for scientific or engineering activities pursuant to 42 U.S.C. 1870(c) only with the prior approval of the National Science Board or under authority delegated to the Director by the NSB, and, where applicable, subject to such conditions that the Board specifies pursuant to the publication and reporting requirements of 42 U.S.C. 1864(e)(2).<sup>9</sup>

To date, the NSB has published in the Federal Register and reported the following formation condition applicable to the exercise of the DACS Division Director’s OA authority:

### NSB-11-2, Delegation of Award-Approval Authority to the Director

DACS’s Division Director must secure the prior approval of the NSB in coordination with the cognizant program office and the Office of the Director before soliciting OAs above the following thresholds:

“The Director of the National Science Foundation may make no award involving an anticipated average annual amount of the greater of either 1 percent or more of the awarding Directorate's or Office's prior year current plan or 0.1 percent or more of the prior year total NSF budget without the prior approval of the National Science Board.”

As a result, when an “above-the-threshold” OA is contemplated, the NSB must formally approve some version of the OA plan in advance of DACS’s issuance of the solicitation.

In addition, under paragraph three (3) of the NSB-11-2 delegation, OAs that contemplate funding from the Major Research and Facilities (MREFC) account require prior approval from the NSB.

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<sup>9</sup> The statutory constraints at 42 U.S.C. 1864(e) do not encompass Other Transactions.

Appendix C – Procurement Round Table Paper

Other Arrangements/Transactions Guide  
(Effective April 22, 2024)  
Page 37 of 97

**PROCUREMENT ROUND TABLE**  
3524 Woodburn Road  
Annandale, VA 22003

March 13, 2006

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Eleanor Spector  
Angela Styles  
Dennis H. Trosch  
Lenn Vincent  
Robert Welch  
Karen Wilson

Laura Auletta  
Designated Federal Officer  
Acquisition Advisory Panel

Dear Ms. Auletta:

The Procurement Round Table (PRT) is a nonprofit organization chartered in 1984 whose members promote a Federal acquisition process that delivers best value to the agency missions it serves and demonstrates high standards of integrity. As part of its current agenda, the PRT has been following the Acquisition Advisory Panel work on performance-based contracting.

Attached for consideration, as the AAP develops its recommendations, is a white paper entitled "A Proposal for a New Approach to Performance-Based Services Acquisition". In this paper the PRT concludes that the system for conducting performance-based service acquisition (PBSA) is not working -- particularly with respect to long-term, complex service requirements. After a discussion of current PBSA problems, the paper recommends a new approach called *Relational Contracting* which emphasizes the need to establish solid working relationships between the Government and its complex service support contractors. The paper concludes with a recommendation that the Office of Federal Procurement Policy (OFPP) obtain statutory authority for pilot program application of the Relational Contracting concept.

The PRT requests that the AAP consider our proposed Relational Contracting concept as it develops recommendations for the future use of PBSA. I may be contacted at 703-764-3881 for further discussion of this matter. A copy of the attached white paper is being provided to OFPP.

Sincerely,

(signed)

William G.T. Tuttle, Jr.  
General, USA (Ret.)  
Chairman

Copy to: OFPP Administrator

Attachment

## PROCUREMENT ROUND TABLE POSITION PAPER

### A PROPOSAL FOR A NEW APPROACH TO PERFORMANCE-BASED SERVICES ACQUISITION

#### INTRODUCTION

Since the publication of the Office of Federal Procurement Policy's (OFPP) policy letter 91-2, *Service Contracting*, on April 15, 1991, Performance-Based Services Acquisition (PBSA, formerly called "Performance-Based Contracting") has been the Government's preferred approach to service contracting. It requires specification of the results that contractors must produce instead of the processes that they must use.<sup>i</sup>

Agency acquisition managers and working-level agency acquisition personnel have devoted a lot of energy to PBSA since 1991. But despite goal-setting, the publication of numerous guidebooks, the development of an informational website, and significant investments in training and in the services of consultants, PBSA has not been as successful as hoped and agencies still struggle to apply it. Even when agencies claim to have adopted PBSA, close examination of their contracts often shows that those documents do not entirely satisfy the criteria in the Federal Acquisition Regulation (FAR).<sup>ii</sup> Moreover, despite occasional agency "success stories," the policy has not produced verified quality improvements or costs savings.<sup>iii</sup>

We think that there are two categories of services, and that PBSA as we know it at the beginning of 2006 works for one, but not the other. The first category includes many common, routine, and relatively simple services that can be acquired through PBSA as it is currently defined, including many housekeeping services, simple equipment maintenance and repair services, and the like. The second category includes services that are too long-term and complex to permit complete specification of results and competitive pricing at the outset of contracting. These include many long-term information technology services, services to operate government-owned facilities, and long-term and multi-function or multi-task professional, administrative, and management support services. These are the services for which the Government spends the most money. In this paper we propose a new approach to contracting for this second category of services.

#### I. DESCRIPTION AND HISTORY OF PBSA

FAR provides that when using PBSA agencies must specify the service results (outputs, outcomes) they want in "clear, specific, and objective terms with measurable outcomes." They must prepare performance work statements and quality assurance surveillance plans, use per-

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Other Arrangements/Transactions Guide  
(Effective April 22, 2024)  
Page 39 of 97

PROCUREMENT ROUND TABLE POSITION PAPER  
A PROPOSAL FOR A NEW APPROACH TO PERFORMANCE-BASED SERVICES ACQUISITION

formance incentives when appropriate, and inspect and compensate contractors on the basis of their work products, rather than their work processes.

PBSA, in various manifestations, has a long history. During 1969-1971, the Office of Economic Opportunity (OEO) in the Department of Health, Education, and Welfare experimented with an outcomes-based approach to contracting for educational services. The results were mixed and the program was dropped.<sup>iv</sup> In September 1979, the Air Force adopted a comprehensive performance-based approach to contracting for base support services, which OFPP adopted for government-wide use in October 1980. The efforts of the Air Force and OFPP produced few if any positive results.<sup>v</sup>

The 1991 OFPP policy letter was a response to growing concerns about the amounts that agencies were spending to buy services and the quality of the services they were receiving.<sup>vi</sup> However agencies were slow to respond to the policy letter, and, although the letter called for FAR implementation before the end of 1991, it was not until 1997 that the FAR was amended to include rules for PBSA.<sup>vii</sup> Since then agencies have tried to use the technique, but with disappointing results. Implementation goals were established, but not achieved. Government acquisition officials and industry representatives have expressed doubts about the success of PBSA, independent reviews have not validated predictions and anecdotal claims of improvements in quality and reductions in cost, and people at the working level are frustrated. In 2001 and 2002, the Honorable Angela Styles, then Administrator of OFPP, told Congress that performance-based services acquisition had not been more successful because the concept had not been adequately defined.<sup>viii</sup> In July 2003, an interagency team assembled by OFPP recommended minor changes to the FAR, which were published in December 2005.<sup>ix</sup>

## II. WHY HAS PBSA NOT BEEN MORE SUCCESSFUL?

We believe that the main reason PBSA has not been more successful is that it is not a practical approach to buying long-term and complex services. We think that agencies have been unable to implement PBSA as hoped because it requires them to do something that is too often impracticable.

We think it is unrealistic to ask agencies to specify services at the time of contract award in clear, specific, objective, and measurable terms when future needs are not fully known or understood, requirements and priorities are expected to change during performance, and the circumstances and conditions of performance are not reliably foreseeable. Yet those are the difficulties faced by agencies and their contractors when they negotiate long-term and complex service contracts.

In real life, parties to long-term and complex service contracts do not specify all requirements at the time of contract award in clear, specific, objective, and measurable terms; instead, they engage in ad hoc decision making in response to emerging and changing requirements, shifting priorities, and unexpected circumstances. They make it up as they go along, developing and adjusting expectations and agreements accordingly. Reality is never the same as expectations and projections, and plans and agreements go awry. No matter how long and hard we think about what the future will be like and about what we will need, we will include things that we will not



Other Arrangements/Transactions Guide  
(Effective April 22, 2024)  
Page 40 of 97

PROCUREMENT ROUND TABLE POSITION PAPER  
A PROPOSAL FOR A NEW APPROACH TO PERFORMANCE-BASED SERVICES ACQUISITION

need and leave out things that we will, and so we will have to adjust our specifications and expectations in the course of time.<sup>x</sup>

Thus, in requiring that agencies fully specify results at the outset of contracting, PBSA often requires them to do something that is too hard to do, and sets them up to fail. We do not think that more training can make PBSA as we know it now appropriate for long-term and complex service acquisitions.

### III. THE CHALLENGES OF SERVICE CONTRACTING

When contracting for services, agencies must follow regulations and use practices that were developed for the procurement of supplies. Supplies are always specified based on known design or performance requirements. PBSA is an attempt to buy services like we buy supplies. But this attempt ignores key differences between supplies and services.

Service Quality. Unlike most supply purchases, long-term service contracts entail close human relationships that enable the parties to deal with dynamic complexity and respond to emerging and changing needs and circumstances. Relationships are crucial, and it is well established in service marketing literature that subjective “customer satisfaction” is as important and sometimes more important than technical success.<sup>xi</sup> The importance of subjective factors in Government service contracting is confirmed by the fact that subjective incentives—award fee and award term—are the most popular of all incentives used in performance-based contracts.<sup>xii</sup>

Services confront agencies with quality specification problems unlike those associated with contracts for supplies. Services are always rendered in response to actual circumstances and conditions. It is often impossible and even unwise to try to fix specifications of service quality at the outset of contract performance, because quality often “depends.” What is good service in one set of circumstances might be poor service in another, and the standard contract modification process is not nimble enough for the realities and demands of a high speed electronic world.

We think that the PBSA requirement for ex ante specification and objective and measurable standards ignores the nature of long-term and complex service relationships.<sup>xiii</sup>

Contractor Selection and Contract Pricing. A lynchpin of PBSA is competitive contractor selection based on price and other factors in compliance with the Competition in Contracting Act (CICA) and FAR Part 15. In theory, PBSA allows competing firms to devise their own ways to produce the results sought by the Government, which supposedly lets the Government enjoy the benefits of vigorous price competition. But when an agency cannot describe its requirements and the circumstances and conditions of performance, competing firms cannot do so either. So when an agency evaluates a proposal for a service contract it evaluates the product of the marketing imagination, which describes something that does not yet exist and cannot be examined or tested before purchase.<sup>xiv</sup>

An agency proposal evaluation team cannot be sure whether the firm selected for contract award will truly be the best value or that it just produced the best proposal document. In the absence of specific knowledge about future needs, firms cannot propose specific solutions, and strict enforcement of vague commitments is an unlikely prospect. In the absence of clear and binding promises, prices or estimated costs are not very meaningful. Comparative evaluation of



Other Arrangements/Transactions Guide  
(Effective April 22, 2024)  
Page 41 of 97

PROCUREMENT ROUND TABLE POSITION PAPER  
A PROPOSAL FOR A NEW APPROACH TO PERFORMANCE-BASED SERVICES ACQUISITION

competing proposals of service quality and prices is thus a dubious undertaking, because an agency cannot be sure about what it will actually get or be entitled to get from a contractor for its price.

Contractor selection under FAR Part 15 procedures does not readily permit a full and frank airing of issues and resolution of concerns between the Government and its contractor before contract award. Industry responses to draft solicitations and participation in preproposal conferences are constrained by competitive strategy and tactics and Government reticence. After proposal submission, agencies either award contracts without discussions or conduct discussions that are constrained by issues of fairness and procedure and fear of protests. The result is that the parties to a new contract are often virtual strangers to one another, who learn of gaps and disconnects in their understanding of the work and their expectations only after contract award.

We believe that CICA price competition and FAR Part 15 source selection are ill-fitted to the procurement of long-term and complex services.

Contract Enforcement: Price Reductions, Damages, And Terminations. FAR tells contracting officers to inspect service results and make price or fee reductions when services are not acceptable. However, long-term and complex services confront agencies with unique quality assurance problems. Inspection can be difficult because many service results are intangible and many tangible results are ephemeral. One hundred percent inspection is usually impracticable, but acceptance sampling is not always appropriate. The quality of some results, like the results of observational or analytical work, may depend on the quality of unobservable mental processes. It is easy enough to verify that a floor is “clean” in the morning, that wastebaskets have been emptied, that grass has been cut to a prescribed length, and that an item of equipment has been repaired. But the results produced by security guards who must check the identities and possessions of the hundreds of persons seeking entry to a Federal office building on a daily basis are not easily inspected or verified.

Reviews of decisions by boards of contract appeals and by courts about price reductions under long-term and complex performance-based contracts show that price reductions generally are not a satisfactory remedy for poor performance. Under long-term and complex contracts such reductions are administrative nuisances to both the agency and to its contractor, and reductions for minor technical flaws in performance sour a business relationship. Moreover, price reductions and money damages cannot adequately compensate the Government for poor performance of critical operations.

Termination is truly a last resort when a contract is for long-term and complex services because it takes a lot of time and effort to award a replacement contract, and award might be delayed by a protest. So an agency might choose to live with marginal performance, or be forced to exercise an option to extend a contractor that is performing marginally so it can buy time to find a replacement. In sum, contract law and court enforcement cannot ensure satisfactory service and cannot remedy poor performance. The only way for the Government to get the service results that it needs is by choosing good contractors and by establishing and maintaining effective working relationships with them. Relationship management, not contract administration, is the key to success.

We believe that contract law and court enforcement cannot guarantee satisfactory service or adequate remedies for poor performance.

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 42 of 97**

PROCUREMENT ROUND TABLE POSITION PAPER  
A PROPOSAL FOR A NEW APPROACH TO PERFORMANCE-BASED SERVICES ACQUISITION

**IV. HOW THE GOVERNMENT SHOULD BUY LONG-TERM AND COMPLEX SERVICES:  
AN EMPHASIS ON RELATIONSHIPS**

While we think that the Government should usually focus on service results instead of processes, we think that the realities of long-term and complex service contracting require a new approach to PBSA. In the paragraphs which follow we describe what we call a “relational” approach to PBSA, an approach that emphasizes the need to establish a solid working relationship between the Government and its contractor and that will allow the two of them to engage in ad hoc specification and adjustment of expectations throughout the life of the contract.

We call our proposed approach to PBSA *Relational Contracting* or *Relational PBSA*. The key features of this approach are:

- competency-based contractor selection;
- in-depth, one-on-one negotiations with the contractor selectee before contract award to jointly develop a contract work statement;
- joint management to budget instead of to a fixed-price or estimated costs;
- advanced agreement on specified direct and indirect cost limitations;
- ad hoc specification of results and adjustment of expectations during performance;
- fair and reasonable fee arrangements; and
- mandatory use of alternative dispute resolution procedures.

An agency would use the relational approach to PBSA only when:

- 1) the contract will be of at least two years duration, including options;
- 2) the contract will have a total value of at least \$10 million, including options;
- 3) the agency cannot fully specify key requirements or describe key performance circumstances at the time of contract award;
- 4) the head of the contracting activity approves its use; and
- 5) the head of the contracting activity makes provision for periodic independent review of the management of the contract by neutral officials.

We will now address each of the elements of Relational PBSA in greater detail.

• *Competency-Based Contractor Selection.* The approach to contractor selection would be similar to the architect-engineer selection approach described in FAR Subpart 36.6. Price would not be a factor in contractor selection. The main factors would be experience, past performance, and key personnel qualifications. An evaluation board would consider candidate firms and recommend two or three highly qualified firms to the selection official, who would select one for contract negotiations.

The contracting officer would solicit an offer from the selectee, disclosing the agency’s budget and objectives, and providing for joint fact-finding about known and anticipated requirements and anticipated performance circumstances and conditions. The parties would

Other Arrangements/Transactions Guide  
(Effective April 22, 2024)  
Page 43 of 97

PROCUREMENT ROUND TABLE POSITION PAPER  
A PROPOSAL FOR A NEW APPROACH TO PERFORMANCE-BASED SERVICES ACQUISITION

then conduct in-depth negotiations to jointly develop a work statement, an advance agreement on small business subcontracting, an advance agreement on cost limitations, and a fee agreement. The contracting officer would award a contract following approval of the negotiations in accordance with agency procedures.

This approach to contractor selection and contract pricing will permit a more full and frank airing of issues and cooperative problem-solving before contract award. It will enable the parties to reach a common understanding of what they can and cannot specify at the outset and what they must set aside for ad hoc resolution during performance. We think this approach will lay a better foundation for a successful working relationship than source selection under CICA and FAR Part 15.

- *Advanced Cost Limitation Agreements/Joint Management To Budget.* The resultant contract would be a modified cost-reimbursement type, with Government risk mitigated by advance cost limitation agreements. The contract would provide for the parties to jointly manage performance within the Government's operation or project budget, but with the Government having the final say on all requirements. The parties would work together to prioritize and schedule activities, set standards, establish work package budgets, and monitor performance. They would use earned value management techniques when appropriate.

- *Ad Hoc Specification Of Requirements During Performance.* A key feature of relational PBSA would be ad hoc specification of service requirements as they emerge or become more fully understood in the course of performance. The parties would specify requirements in terms of results whenever possible, unless they agree that specification of process would be better. In order to remain within budget, the parties would make tradeoffs, adjusting expectations, reordering priorities, and modifying performance standards as necessary. If requirements change, the parties would bargain to make adjustments to stay within the budget.

Adjustments within budget would not require formal contract modifications and equitable adjustments, and would be within the authority of the Government's program manager as long as they do not require fund obligations or deobligations. But all transactions would be documented to reflect the agreement and expectations of the parties.

- *Fair and Reasonable Fee Arrangements.* The contract would provide for payment of fee in accordance with the agreement negotiated prior to contract award. The maximum available fee would be fixed and would not change during the course of performance unless the Government increases or decreases its budget due to the addition or deletion of requirements. Changes in budget due to cost overruns would not entitle the contractor to additional fee. The contractor would be guaranteed a fair and reasonable fee for acceptable performance within budget, and could earn additional fee for excellent performance, based on objective and subjective considerations to which the parties agreed in advance.

- *Mandatory Use Of Alternative Dispute Resolution.* The contract would require the parties to engage in alternative dispute resolution before resorting to the FAR disputes procedures. Each party would name one senior official outside the immediate program organization as its principal, and they would jointly hear the dispute and work to resolve it with the assistance of a neutral. Only if the two principals cannot agree on a resolution within a reasonable period of time would the parties be permitted to resort to the dispute procedures described in FAR Subpart 33.2.



**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 44 of 97**

PROCUREMENT ROUND TABLE POSITION PAPER  
A PROPOSAL FOR A NEW APPROACH TO PERFORMANCE-BASED SERVICES ACQUISITION

• *Prerequisites To Use.* Because relational PBSA would permit the award of contracts without price competition, and because it would grant very broad discretion to Government program managers and contractor personnel, it is essential that it be used only when appropriate and only as approved by higher level agency officials. It is also essential that relational contracts be subjected to periodic independent review in order to maintain the integrity of the acquisition system and public confidence. We recommend that relational PBSA be approved for use only for complex contracts of two years duration or longer and with a total value of \$10 million or more, including options. We also recommend that the use of relational PBSA require approval of the Head of the Contracting Activity subject to arrangements for periodic independent review of each relational contract by neutral agency officials.

**CONCLUSION**

We think the time has come to try something new. We propose that OFPP obtain statutory approval for a pilot program to conduct a number of controlled experiments in Relational Contracting by selected agencies. We propose that OFPP set criteria for evaluating the effectiveness of Relational Contracting, establish a preparatory training program for participants, and appoint a panel which includes Executive Branch officials, representatives of the Government Accountability Office, working level acquisition personnel, members of academia, members of the Bar, and industry representatives, and a support staff, to monitor, evaluate, and report the results, and make recommendations for further action.

Other Arrangements/Transactions Guide  
(Effective April 22, 2024)  
Page 45 of 97

PROCUREMENT ROUND TABLE POSITION PAPER  
A PROPOSAL FOR A NEW APPROACH TO PERFORMANCE-BASED SERVICES ACQUISITION

NOTES

<sup>i</sup> Office of Federal Procurement Policy, *Policy Letter on Service Contracting*, 56 FR 15110, April 15, 1991.

<sup>ii</sup> U. S. General Accounting Office, *Contract Management: Guidance Needed for Using Performance-Based Service Contracting*, GAO-02-1049 (Washington, D.C., U. S. General Accounting Office, 2002).

<sup>iii</sup> “There is little current data to support monetary savings, and if such data did exist, it would be extremely difficult to isolate the exact reasons the savings occurred.” Interagency Task Force On Performance-Based Service Acquisition, *Performance-Based Service Acquisition: Contracting For The Future* (Washington, D.C.: Office of Federal Procurement Policy, July 2003), p. 10. “The effect of PBSA practices on contract prices is hard to assess for the contracts we studied because (1) the work scopes relevant to the contracts we examined changed with the new contracts, and (2) the Air Force has no simple way to adjust costs for the changes observed in work scopes... In most cases, we could not clearly attribute price changes to a move toward PBSA.” J. Ausink, F. Camm, and C. Cannon, *Performance-Based Contracting In The Air Force: A Report On Experiences In The Field* (Santa Monica: Rand, 2001), p. 34.

<sup>iv</sup> D. M. Levine, ed., *Performance Contracting In Education—An Appraisal* (Englewood Cliffs, N.J.: Educational Technology Publications, 1971). J. P. Stucker and G. R. Hall, *The Performance Contracting Concept In Education*, R-699/1-HEW (Santa Monica: Rand, 1971). Performance contracting in education was controversial. Some state and foreign governments still use the technique in secondary and higher education, and although the results are unclear, the technique still has supporters. Performance contracting in education should not be confused with energy performance contracting.

<sup>v</sup> The approach was described in Air Force Regulation (AFR) 400-28, *Base Level Service Contracts*, a detailed, multi-volume guide to the preparation of performance work statements and quality assurance surveillance plans. Supplementary Air Force publications, such as AFR 70-9, *Base Level Service Contract Administration*, provided instructions to quality assurance evaluators (inspectors). OFPP adopted the first volume of that regulation for government-wide use in October 1980, dubbing it OFPP Pamphlet No. 4, *A Guide For Writing And Administering Performance Statements Of Work For Service Contracts*. The Air Force withdrew AFR 400-28 in 1994, replacing it and other guidance with Air Force Manual (AFMAN) 64-108, *Service Contracts*, a 63-page document which still included fairly detailed guidance for the preparation of performance work statements and quality assurance surveillance plans. But in 1999 the Air Force replaced AFMAN 64-108 with Air Force Instruction 63-124, *Performance-Based Service Contracts* (PBSC), an 11-page document which contains a statement of policy but virtually no practical guidance and which remains in effect today. OFPP withdrew Pamphlet No. 4 in the mid-1990s, but in October 1998 it issued *A Guide To Best Practices For Performance-Based Service Contracting*, a severely edited version of Pamphlet No. 4 which contains less detailed guidance. In December 2000, the Department of Defense issued its current *Guidebook for Performance-Based Services Acquisition (PBSA) in the Department of Defense*, a 54-page document which contains sparse practical guidance. Several other agencies have issued similar guidance of their own. Much of this guidance can be accessed through the website, SEVEN STEPS TO PERFORMANCE-BASED SERVICES ACQUISITION,

Other Arrangements/Transactions Guide  
(Effective April 22, 2024)  
Page 46 of 97

PROCUREMENT ROUND TABLE POSITION PAPER  
A PROPOSAL FOR A NEW APPROACH TO PERFORMANCE-BASED SERVICES ACQUISITION

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<http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/home.html>. For a fascinating first-hand account of an attempt to develop a performance work statement in accordance with OFPP Pamphlet No. 4, see Paddock, C. D., *PERFORMANCE WORK STATEMENTS: SIGNIFICANT PROBLEMS IN THE PREPARATION PROCESS*, Master's Thesis, Naval Postgraduate School, June 1987, DTIC No. AD-A184 897.

<sup>vi</sup> “Each year the Government contracts for a significant amount of services. Such services range from the routine maintenance of facilities or equipment to highly sophisticated technical and management assistance such as the design, development and furnishing of systems, or expert assistance for management and program activities. Attempts to apply contracting methods which are inappropriate to the services being acquired have often resulted in unsatisfactory performance and contract administration problems, as reflected in several internal agency investigations and evaluations, General Accounting Office Reports, and OFPP studies. These reports criticized unnecessarily vague statements of work, insufficient use of firmer pricing arrangements, the lack of quantifiable performance standards, and the inadequacy of quality assurance surveillance. In addition, there is concern that the Government underemphasizes quality vs. price in the acquisition of services.” Office of Federal Procurement Policy, *Policy Letter on Service Contracting*, 56 FR 15110, 15113, April 15, 1991.

<sup>vii</sup> Federal Acquisition Circular 97-01, 62 FR 44802, August 27, 1997.

<sup>viii</sup> “In part, I believe the problem centers on a lack of clarity regarding the definition of what constitutes a performance-based service contract. Based on my experience, there is considerable disagreement among agencies regarding the requirements to qualify a contract as performance-based. Previous attempts by OFPP to clarify the definition, including a ‘checklist’ of minimum required elements for an acquisition to be considered performance-based, have been unsuccessful.” Angela B. Styles, *Statement of Angela B. Styles, Administrator for Federal Procurement Policy, Before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, United States House of Representatives*, November 1, 2001, p. 11, <http://www.acqnet.gov/Notes/sarafinal.doc>. See, too, Styles, *Statement of Angela B. Styles, Administrator for Federal Procurement Policy, Before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, United States House of Representatives*, March 7, 2002, p. <http://www.acqnet.gov/Notes/saratestimony37.doc>.

<sup>ix</sup> Interagency Task Force On Performance-Based Service Acquisition, *Performance-Based Service Acquisition: Contracting For The Future* (Washington, D.C.: Office of Federal Procurement Policy, July 2003). Federal Acquisition Circular 2005-07, 71 FR 198, 211, January 3, 2006.

<sup>x</sup> This has long been recognized in economic and legal scholarship. See R. H. Coase, “The Nature of the Firm,” in *The Firm the Market and the Law* (Chicago: The University of Chicago Press, 1988), pp. 33-56; F. Knight, *Risk, Uncertainty and Profit* (Chicago: The University of Chicago Press, 1971); and I. R. MacNeil, “Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law,” in *Northwestern University Law Review*, Vol. 72, No. 6 (1978), p. 854; and O. E. Williamson, *The Economic Institutions of Capitalism* (New York: The Free Press, 1988).

<sup>xi</sup> “Of course, it is possible to measure service quality with more objective criteria, such as in the technical approach to quality. Services could be compared to a checklist of quality indicators, such as whether calls are answered in three rings or whether employees remember to smile and



Other Arrangements/Transactions Guide  
(Effective April 22, 2024)  
Page 47 of 97

PROCUREMENT ROUND TABLE POSITION PAPER  
A PROPOSAL FOR A NEW APPROACH TO PERFORMANCE-BASED SERVICES ACQUISITION

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say “thank you” to customers at least 99% of the time. However, in setting specific goals for particular aspects of service might narrow the vision of employees so that they will achieve these goals by lowering quality in areas for which no goals have been set. For example, service representatives might start answering all customer calls within three rings by terminating other customer calls or placing people on hold. This situation would not be an overall improvement in service quality, even though the objective, technical approach to quality might indicate that it was. Thus a user-based approach, rather than an objective checklist approach, has been found to be superior for evaluation the quality of intangible services.” B. Schneider and S. S. White, *Service Quality: Research Perspectives* (Thousand Oaks, CA: Sage Publications, 2004), p.11. See, too, discussions of service quality in several articles in R. T. Rust and R. L. Oliver, eds., *Service Quality: New Directions in Theory and Practice* (Thousand Oaks, CA: Sage Publications, 1994).

<sup>xiii</sup> FAR 16.404(a) and 16.405-2(b) say that award fee incentives are to be used only when it is not possible develop objective incentive criteria. Their use in performance-based contracts is inconsistent with the PBSA requirement for objective, measurable performance standards.

<sup>xiii</sup> “The feasibility requirement in contracting for results is that the product must lend itself to clear definition. Whether he is contemplating a fixed [price] or a performance contract [a contract with incentives], the buyer must be able to specify the desired results in simple, straightforward terms to a prospective seller. These terms must also be meaningful to a knowledgeable third party so that, if a dispute arises, he can determine whether the contract terms have been fulfilled or not. In purchasing books or equipment or even buildings, the school is usually able to describe exactly the product it is after. Such procurements as the purchase of administrative services is not so easy.” Stucker and Hall, *The Performance Contracting Concept in Education*, p. 6.

<sup>xiv</sup> V. J. Edwards, “Streamlining Source Selection By Improving The Quality Of Evaluation Factors,” *The Nash & Cibinic Report*, 8 N&CR 56, October 1994.

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 48 of 97**

Appendix D – Recommendation and Request for Approval and Delegation of Authority

To: Division Director, Division of Acquisition and Cooperative Support

From: Contracting Officer, Division of Acquisition and Cooperative Support  
Program Office Leadership

Dated: Month XX, XXXX

Subject: Recommendation and Request for Approval Regarding the Use of [Other Arrangement or Other Transactions] Authority and Delegation of Authority in Support of [Insert Program Name]

Pursuant to the authorities cited, and information provided, below, this memorandum seeks approval to form an [Other Transaction (OT) OR Other Arrangement] establishing [Insert Program Name] a requirement developed by [Insert Directorate or Office Name].

**Purpose**

The National Science Foundation intends to enter into an [OT or OA] to [Insert information related to the purpose of the award. This section can be 1 or 2 sentences or a couple of paragraphs depending on the ultimate purpose of the proposed award and the amount of information necessary to convey that purpose.]

The proposed [OT or OA] will have a period of performance of [XX years and/or YY months]. The estimated total cost is \$[Insert Estimated Total].

**CONSIDERATION SUPPORTING THE USE OF OTHER ARRANGEMENTS / TRANSACTIONS AUTHORITY**

1. NSF Other Transactions Authority OR Other Arrangements Authority

Insert the statutory authority that is being requested to form the agreement.

2. Market Intelligence Plan

Insert a synopsis of the initial market intelligence that was conducted and how it supports the requested authority, and what additional market intelligence will be pursued upon receiving OA/T authorization.

3. Rational for Requesting Other Transaction Authority



Selection of the appropriate type of funding instrument has taken into account statutory and legal requirements, the nature of the proposed project and the manner in which it will be performed, the nature and extent of expected interaction between and among NSF and the agreement participants, and the degree of Federal technical oversight of the project to facilitate and enable success.

A FAR-based contract is not the best funding instrument choice due to [Insert rationale here, including statements regarding the relational nature of the requirement, inapplicability of traditional competitive contracting procedures, and the necessity to attract non-traditional performers for these services.]

Grants or cooperative agreements (Federal financial assistance (FFA) instruments) are typically used when the principal purpose of the award is to stimulate or support research and development for general public interest, with the two instruments differing in the level of public involvement by an agency of the Federal Government. FFA is not the best funding instrument choice due to [Insert rationale here, including statements regarding access to information, level of NSF involvement, use of end products.]

An Other Arrangement/Transaction is the best funding instrument choice due to [Insert rationale here.]

### **PROGRAM CONCURRENCE**

Based on the aforementioned, I concur with the request to the use of [Other Arrangements or Other Transactions Authority] for the purposes of forming an arrangement for the NSF [Insert program name].

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Program Representative Name  
Title  
Division/Directorate

---

Date

### **DETERMINATION, DESIGNATION, AND DELEGATION OF AUTHORITY**

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 50 of 97**

Based on the aforementioned, I approve the use of [**Other Arrangements or Other Transactions Authority**] for the purposes of forming an arrangement for the NSF [**Insert program name**].

Further, I designate [Insert name of OA/T agreement officer] to the authority to enter into and administer the resulting [**Other Arrangements or Other Transactions Authority**] from the solicitation supporting [**Insert program name**].

\_\_\_\_\_  
Patrick K. Breen  
Senior Procurement Executive and  
Division Director  
Division of Acquisition and Cooperative Support

\_\_\_\_\_  
Date

Appendix E – OA/T Plan Template

**OTHER ARRANGEMENT/TRANSACTIONS PLAN**

National Science Foundation Directorate **[Insert Name of Directorate]**

**PART I- BACKGROUND AND OBJECTIVES**

**A. STATEMENT OF NEED**

The National Science Foundation’s (NSF) Directorate **[Insert Name of Directorate]**

**[Introduce the plan by a brief statement of need. Summarize the technical and contractual history of the program/transaction. Discuss feasible alternatives, the impact of prior acquisitions or transactions on those alternatives, and any related in-house effort.]**

**B. APPLICABLE CONDITIONS**

**[ Address 1) requirements for compatibility with existing or future systems or programs and 2) any known cost, schedule, and capability or performance constraints.]**

**C. COST**

**[Set forth the established cost goals for the arrangement/transaction and the rationale supporting them and discuss related cost concepts to be employed.]**

**For example:**

**The resultant award will be issued on a fixed price milestone-based payments schedule. These milestones will be proposed by the contractor and are subject to negotiation with NSF prior to award. Presently, the estimated cost to support this requirement for a performance period of three years three-year base is \$10 million. It is anticipated that multi-year appropriations will be used to fund all activities under the resultant award.**

**D. CAPABILITY OR PERFORMANCE**

**[Specify the required capabilities or performance characteristics required to support the problem, area of need, or capability gap identified by the planning team. This should minimize and burdensome requirements to not constrain or impede solutions.]**

**E. DELIVERY OR PERFORMANCE-PERIOD REQUIREMENTS**

[Describe the basis for establishing delivery or performance-period requirements. Explain and provide reasons for any urgency if it results in concurrency of development and production or constitutes justification for not providing competition.]

## **F. EVALUATION**

[Describe how proposals will be evaluated to allow for justifiable award decisions.]

For example: This competition will be conducted in accordance with the procedures stated in the solicitation. This solicitation occurs in two phases, 1) evaluation of written proposals, and 2) evaluation of oral presentations. Based on the evaluation of written proposals, NSF will remove lower ranked firms from further consideration. NSF will invite the firm or firms determined to be the most highly qualified to participate in oral presentations to the technical evaluation team. After the award of one or more OAs, NSF will inform all unsuccessful firms that they will not receive an award.

During both phases of the solicitation, the participating firms will be evaluated on the basis of the following factors: 1) Understanding of the Challenges, and 2) Organizational Experience and Capacity. A comprehensive technical evaluation of all firms participating in both written and oral proposals will be performed on the basis of all information provided to NSF. Price, while not an evaluation factor, will be reviewed for realism and reasonableness.

## **G. RISKS**

[Discuss technical, cost, and schedule risks and describe what efforts are planned or underway to reduce risk and the consequences of failure to achieve goals. If concurrency of development and production is planned, discuss its effects on cost and schedule risks.]

### **TECHNICAL RISK:**

### **COST RISK:**

### **SCHEDULE RISK:**

## **II. PLAN OF ACTION**

### **A. SOURCES**

[This section should describe the following:

- 1) The prospective sources that can meet the need;
  - 2) Participation by Small Business and/or Minority Serving Institutions; and
- Address the extent and results of market surveillance activities and their impact on the various elements of the plan.]

### **B. COMPETITION**

[Describe how competition will be sought, promoted, and sustained throughout the course of the transaction or agreement. If competition is not contemplated, identify the source(s), and discuss why competition is not feasible.]

### **C. AWARD TYPE SELECTION**

NSF anticipates [a single/multiple Other Arrangement/Transaction] award(s). [Describe any pending award characteristics of note and the rationale for that selection.]

### **D. SOURCE SELECTION PROCEDURES**

[Discuss the source selection procedures for the transaction/agreement, including the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the programmatic programs and objectives.]

The anticipated award date is Month Day, Year.

### **E. ACQUISITION CONSIDERATIONS**

[Describe any other considerations that may impact the scope or performance of the resulting agreement/transaction.]

### **F. BUDGETING AND FUNDING**

[Include budget estimates, explain how they were derived, and discuss the schedule for obtaining adequate funds at the time they are required.]

### **G. INHERENTLY GOVERNMENTAL FUNCTIONS**

[Address if any of the functions contain in the resulting arrangement/transaction are inherently governmental.]

### **H. ORGANIZATIONAL CONFLICT OF INTEREST**

[Describe if any actual or potential organizational conflicts of interest exist and mitigation strategies.]

### **I. GOVERNMENT PROPERTY OR DATA**

[Indicate if NSF will furnish any property or data to the awardee for performance. What controls will be put in place?]

### **J. SECURITY CONSIDERATIONS**

[Describe the following:

- 1) The security requirements for classified information, if any;
- 2) If the arrangement/transaction includes information technology or information control requirements, how will the security standards be met; and

- 3) For awards requiring routine physical access to a Federally-controlled facility and/or routine access to a Federally-controlled information system, discuss how agency requirements for personal identity verification of contractors will be met.]

**K. OTHER ARRANGEMENT ADMINISTRATION**

[Describe how the award will be administered.]

**L. IDENTIFICATION OF PARTICIPANTS IN THE ACQUISITION PROCESS**

<b>OA/T Agreement Officer</b>	
<b>Customer Directorate Division Director</b>	
<b>Program Management Officer</b>	
<b>Program Representative</b>	

**M. ATTACHMENTS TO THE ACQUISITION PLAN**

Other Arrangement Instrument Memo  
 Other Arrangement Solicitation

**N. MILESTONE SCHEDULE** [Representative set of milestones only – the Planning Team should add or delete as appropriate]

<b>Solicitation Event</b>	<b>Responsible Office</b>	<b>Planned Date</b>	<b>Actual Date</b>	<b>Time Provided for Event</b>
Finish Draft Research Announcement				
OCIO Review (if IT supplies/services are contemplated)				
Legal Review of Solicitation, OA Plan, Instrument Type Memo				
DACS/DACS DD Review of OA/T Solicitation, OA/T Plan, Instrument Type Memo				
OA/T Plan and Instrument Type Memo Signed				
OA/T Solicitation Released				
Questions Due				
Responses Posted				
Full Proposal Due Date				

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 55 of 97**

Full Proposal Review Begins				
Full Proposal Review Completion				
Firms Contracted for Oral Presentations				
Oral Presentations Occur				
Evaluation of Oral Presentations				
Firm Selected for Award Contacted for Negotiations				
Negotiations Conclude				
Procurement Requisition Approved				
Source Selection Memorandums				
OA/T and Supporting Documentation Reviewed by OGC				
OA/T and Supporting Documentation reviewed by DACS/DACS DD				
Contractor Signature Request				
OA/T Awarded				

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 56 of 97**

Appendix F – Sample OA/T Award Document, Clauses, Representations, and Certifications

Insert Name of Project  
Insert Agreement Number

This Other Arrangement (OA) contract is entered into between the United States National Science Foundation (NSF or Government), a federal agency, acting pursuant to the National Science Foundation Act of 1950, as amended, 42 U.S.C. § 1861 et. seq., and other applicable federal law, and [Entity Name] (EN or Consortium Management Firm or CMF, DUNS number XXXXXX), a non-profit in good standing incorporated in \_\_\_\_\_(together with any affiliates, including specifically, but not limited to, any special purpose or single purpose entity created and controlled by EN for the purpose of consummating any transactions contemplated hereby), hereinafter referred to together as the “Parties.”

**OR**

This Other Transaction (OT) contract is entered into between the United States National Science Foundation (NSF or Government), a federal agency, acting pursuant to the CHIPS and Science Act of 2022 (P.L. 117-167), Section 10396, and other applicable federal law, and [Entity Name] (EN or Consortium Management Firm or CMF, DUNS number XXXXXX), a non-profit in good standing incorporated in \_\_\_\_\_(together with any affiliates, including specifically, but not limited to, any special purpose or single purpose entity created and controlled by EN for the purpose of consummating any transactions contemplated hereby), hereinafter referred to together as the “Parties.”

AGREED TO:

FOR EN:

FOR NSF:

By: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Signature)

Name: \_\_\_\_\_ Name: \_\_\_\_\_

Title: \_\_\_\_\_ Title: \_\_\_\_\_

Dated: \_\_\_\_\_ Dated: \_\_\_\_\_



I. SCOPE OF AGREEMENT

A. Background, Purpose Scope, and Goals/Objectives

1. The purpose of this OA/OT is for the Parties to establish/perform [Insert Program Name] NSF's [Insert Directorate/Office Name]. Once established, the program shall perform [Insert brief description of the program (e.g., a coordinated research and development program to further Directorate/Office's role as/focus on XXXXX)].
2. In this regard, Directorate/Office aims to address a challenging problem regarding [Brief description of the challenge or problem statement and potential outcomes]
3. It is anticipated that the Government will issue projects through the Awardee to the Subcontractor/Partners/Consortium Members to further the [Program Name]'s objectives. Such projects may range in complexity and may involve different tasks and requirements.
4. In forming this Agreement/Transaction, the Parties' mutual goals or objectives include but are not limited to:  

[Insert list of goals]
5. The Government expects to have continuous involvement with the Awardee/Consortium. The Government will also obtain access to work results and certain rights in data and patents pursuant to Sections VII and VIII below. NSF and the Awardee/CMF are bound to each other by a duty of good faith and best efforts in achieving the goals of the project.
6. [If the award results in a consortium include something similar to the following:] This Agreement reflects the collaborative document identified as the Consortium Membership Agreement or CMA, which document shall bind all Consortium Members. The CMF shall form and manage the consortium with qualified academic, for-profit, non-profit, and/or non-traditional entity membership, and will coalesce the [Name of Project Team] quickly, across multiple stakeholder communities, and adapt the consortium over time to meet the needs of relevant stakeholders.
7. This Agreement/Transaction is a contract formed pursuant to NSF's "Other Arrangements" statutory authority under 42 U.S.C. § 1870(c) **OR** NSF's "Other Transactions" statutory authority under the CHIPS and Science Act of 2022 (P.L. 117-167), Section 10396 and other applicable federal law. This Agreement/Transaction is not intended to be, nor shall it be construed as, by implication or otherwise, a partnership, a corporation, or other business organization.

8. The Awardee and NSF will negotiate, annually, costs. The costs for the first year of the consortium shall be/shall not exceed \$XXXXXX.

**B. Definitions**

[The following list of definitions is not exhaustive nor are the definitions below applicable to all other arrangements or other transactions. The Awarding Official must determine if any or all of the definitions below are applicable with or without further tailoring. Additionally, they must add any additional definitions needed for the resulting agreement or transaction.]

“Agreement” means the body of this Other Arrangement and its Attachments, which are expressly incorporated in and made a part of the Other Arrangement. [Do not include this definition if the award results in an Other Transaction]

“Agreements Officer (AO)” means an individual in the Division of Acquisition and Cooperative Support at NSF with authority to enter into, administer, or terminate this Agreement/Transaction or any Project Agreements executed under this Agreement/Transaction on behalf of the Government.

“Agreements Officer’s Representative (AOR)” means an individual designated and authorized in writing by the Agreements Officer to perform specific technical or administrative functions on behalf of the Government. At the Government’s discretion, multiple AORs may be designated in writing at either the Agreement level or on a per-project basis.

[If the Agreement results in the award to a Consortium Management Firm, the following definitions may be applicable and should be tailored appropriately]

“Consortium” means the [Insert Name of Consortium], which is composed of academic, for-profit, non-profit, and/or non-traditional entity membership that are legally bound to operate in accordance with a Consortium Membership Agreement.

“Consortium Management Firm (CMF)” is the organization selected by NSF to act on behalf of the [Insert Name of Consortium] to execute and administer the efforts under this Other Arrangement/Transaction.

“Consortium Members” means academic, for-profit, non-profit, and/or non-traditional entities who have executed the Consortium Membership Agreement.

“Consortium Membership Agreement (CMA)” means the Agreement governing the rights and obligations of the Consortium member entities.

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 59 of 97**

“Data,” means recorded information, regardless of form or method of recording, which includes but is not limited to, technical data, scientific/engineering information, computer software, computer software documentation, and mask works. The term does not include financial, administrative, cost, pricing or management information and does not include subject inventions. NOTE: If any OA/T will need to address NSF's or the Awardee's respective rights in non-recorded data (e.g., streaming data or broadcasts) this definition will be updated to address the specifics of that O/AT.

“Government” means the United States of America, as represented by an NSF Agreements Officer.

“Invention,” as used in this Agreement/Transaction, means any innovation or discovery that is or may be patentable or otherwise protectable under title 35 of the United States Code (U.S.C.).

“Made,” as defined at 48 C.F.R. 52.227-11.

“Non-traditional entity” means an entity (construed in its broadest sense to include qualified large and small businesses, universities, non-profits, philanthropic organizations, partnerships, joint ventures, and other entity forms) that is not currently performing and has not performed, for at least the three-year period preceding the solicitation of sources by NSF for the procurement or arrangement, under any NSF procurement contract or NSF instrument of financial assistance.

“Organizational Conflict of Interest” is defined consistent with FAR Part 9.5.

[Select the one for the type of instrument being used to form the award]

“Other Arrangement” or “OA” for the purposes of this agreement means a contract formed pursuant to NSF's statutory authority at 42 U.S.C. § 1870(c). An Other Arrangement is not a FAR-based procurement contract nor a financial assistance transaction but another system of contracting available to NSF by statute.

**OR**

“Other Transaction” or “OT” for purposes of this agreement means a contract formed pursuant to NSF's statutory authority pursuant to the CHIPS and Science Act of 2022 (P.L. 117-167), Section 10396.

“Property” means any tangible personal property other than property actually consumed during the execution of work under this Agreement/Transaction. For purposes of this Agreement/Transaction, “property” does not include deliverables to NSF under any the agreement or project agreement.

“Project” means an activity proposed by the Awardee/Consortium Member and selected by the Government for a Project Agreement under this OA.

“Project Agreement” or “PA” means any individual project awarded to an Awardee/Consortium Member in accordance with this OA. (Insert this only if project agreements will be utilized or awarded)

“Resource Sharing” means cash or in-kind resources expended during a project award by an Awardee/Consortium Member or lower tier Subcontractors that are necessary and reasonable for accomplishment of the project.

“Sub-agreement” means any agreement or contract executed between an Awardee/Consortium Member and another entity in performance of a Project Agreement.

“Subcontractor” means a business or person that enters into an agreement or contract to carry out work for another entity in performance of a Project Agreement.

“Subject Invention” means those inventions conceived or first actually reduced to practice under this Agreement.

“System for Award Management (SAM)” means the Federal repository into which an entity must provide information required for the conduct of business as the Awardee/Consortium Management Firm. Additional information about registration procedures may be found at the SAM Internet site (<http://www.sam.gov>).

“Technology” means discoveries, innovations, Know-How, and inventions, whether or not tangible, and whether patentable or not, including computer software, recognized under U.S. law as intellectual creations to which rights of ownership accrue, including, but not limited to, patents, trade secrets, Mask Works, and copyrights developed under this Agreement/Transaction.

“Transaction” means the body of this Other Transaction and its Attachments, which are expressly incorporated in and made a part of the Other Transaction. [Do not include this definition if the award results in an Other Arrangement]

## II. TERM, TERMINATION & EXTENSION OF TERM

### A. Term of this Agreement/Transaction

This Agreement/Transaction is effective upon the date of the last signature hereon and continues for five years. Provisions of this Agreement/Transaction, which, by their express terms or by

necessary implication, apply for periods of time other than specified herein, shall be given effect, notwithstanding this Section.

Any PA issued during the Period of Performance for this Agreement/Transaction and not completed within that period shall be completed by the Awardee/Consortium Member within the time specified in the PA. (Insert this statement only if project agreements will be utilized or awarded.)

**B. Termination Provisions**

The Government reserves the right to terminate this Agreement/Transaction, or any PA executed under this Agreement/Transaction, or any part hereof, at any time. In the event of such termination, the Awardee and/or subcontractor awarded a PA shall immediately stop all work thereunder and shall immediately cause any and all of its suppliers and Subcontractors to cease work.

The Awardee may request early Agreement/Transaction termination by giving the Government ninety (90) days written notification of their intent to do so. If the Awardee decides to request termination of this Agreement/Transaction, the Government may, at its discretion, agree to terminate.

The Government and the Awardee should negotiate in good faith a reasonable and timely adjustment of all outstanding issues between the parties as a result of termination, which may include non-cancelable commitments made prior to the termination. In the event of a termination of the Agreement/Transaction, the Government shall have paid-up rights in Data as described in the Data Rights provision of this Agreement/Transaction. Failure of the parties to agree to an equitable adjustment or to resolve an outstanding issue shall be resolved pursuant to the Disputes section of this Agreement/Transaction.

If a Subcontractor awarded a PA fails to comply with the provisions of this Agreement/Transaction or its PA, the Agreements Officer through the Awardee, after the issuance of a cure notice, may take one or more of the following actions:

- (1) Withhold payments until the breach is corrected by the applicable Subcontractor Member;
- (2) Disallow all or part of the cost, including the associated fee or profit, of the activity or action causing the breach;
- (3) Terminate the PA in whole or in part; and/or
- (4) Take any other legally available remedies.

C. Extending the Term

The Parties may extend by mutual written agreement the term of this Agreement/Transaction if funding availability and PA opportunities reasonably warrant. Any extension shall be formalized through modification of the Agreement/Transaction by the Agreements Officer (“AO”) and the Awardee.

III. AWARD MANAGEMENT

A. Management and Program Structure

The Awardee shall be responsible for the overall technical and program management of the [Insert Project Name], and technical planning and execution shall remain with the Awardee, including but not limited to reporting, financial and administrative matters, overall day-to-day management of Government-funded projects and all projects issued to Consortium Members/Subcontractors under this OA/OT. In consultation with NSF, the Awardee shall establish an initial management and program structure in accordance with the terms and conditions of the Agreement/Transaction. In accordance with the Awardee/Consortium’s management agreement, or any other administration agreement between the Awardee/Consortium, its members, and subcontractors that the Awardee will act on behalf of the parties executing this OA/OT, and any future modifications to it. All financial transactions between the Government and the Awardee, including payment, will be made via the Awardee. The Awardee will subsequently disburse funds to the entity awarded a PA.

The NSF Agreements Officer’s Representative (AOR), in consultation with other NSF program representatives, shall provide recommendations on developments and technical collaboration and be responsible for ongoing review and verification of projects.

B. Program Management Planning Process

Program planning will consist of a Program Plan with inputs and reviews from the Awardee and NSF management, containing a schedule of activities and milestones.

C. Modifications to the Agreement/Transaction

As a result of meetings, annual reviews, or at any time during the term of the Agreement, research progress or results may indicate that a change would be beneficial to program objectives. Recommendations for modifications, including justifications to support any changes will be documented and submitted by Awardee to the NSF AOR with a copy to the NSF AO. This documentation will detail the technical, chronological, and financial impact of the proposed

modification to the research program. As to financial impact, any recommended increase in funding is limited by amounts obligated to the award and subject to the availability of funding.

The NSF AOR shall be responsible for the review and verification of any recommendations to revise or otherwise modify the terms and conditions of this Agreement subject to Section IV below.

For minor or administrative Agreement modifications (e.g., changes in the paying office or appropriation data, changes to Government or Awardee personnel identified in the Agreement, etc.), no signature is required by the Awardee.

The NSF AO will be responsible for instituting all non-minor modifications to this Agreement and this Agreement may be substantively revised only by written consent of the Awardee and NSF AO. Again, it is emphasized that only the Agreements Officer has the authority to modify the terms of the Agreement, therefore, in no event will any understanding agreement, modification, change, or other matter deviating from the terms of the Agreement between the Awardee and any other person be effective or binding on the Government. Changes in the terms and conditions of this Agreement, except for minor or administrative corrections, as noted above, may only be made by written agreement between the Awardee and the Agreements Officer.

#### IV. AGREEMENT/TRANSACTION ADMINISTRATION

Unless otherwise provided in this Agreement/Transaction, approvals permitted or required to be made by NSF shall be made only by the NSF Agreements Officer. All matters under this Agreement/Transaction shall be referred to the representatives identified below. Each party may change its representatives named in this Section by written notification to the other party.

##### A. NSF Points of Contact:

Agreements Officer (AO):

Agreements Officer's Representative (AOR):

As needed, the Government may designate additional AORs for projects awarded under this OA. The agreements officer will specify in writing when this is the case.

##### B. AWARDEE Points of Contact:

##### C. Other Agreement/Transaction Administration Provisions

1. Branding, Communication, and Transparency

All Awardee/CMF branding activities and communications for and about the [Insert Program Name] will be subject to NSF's oversight and direction. Any communications that could potentially involve PII or identifiable information will be subject to review by NSF. The AOR will provide the required direction on behalf NSF.

All communications must align with the NSF/[Directorate/Office Name] mission and will be policy-neutral (as interpreted by the AO, AOR and/or other NSF stakeholders).

2. Monitoring

(a) The Government has the right to monitor performance under this Agreement, to the extent practicable at all places and times. Monitoring activities are intended to assist in the achievement of project goals and objectives, improve project outcomes, and to ensure Federal funding is expended in accordance with regulatory and policy requirements. Monitoring activities under this agreement include, but are not limited to: site visits, desktop audits, and review of submitted reports. The Government will also perform inspections and tests of any materials furnished and services performed. The government intends for monitoring activities to be conducted in a manner that will not unduly delay project performance.

(b) When applicable, unless otherwise specified, the Government will accept or reject any delivery of materials as promptly as practicable after delivery.

3. Registration in the System for Award Management

The Awardee shall hold a current, valid registration in the System for Award Management (SAM) throughout the life of this OA/OT. Considering the need to attract non-traditional entities, there is no requirement for a consortium member to be registered in SAM. Nevertheless, consortium members must not be suspended and/or debarred from contracting with or receiving funds from the United States Government, and the Awardee shall check SAM prior to admitting a prospective subcontractors/consortium member and sub-awardees to ensure its status.

4. Stop Work Order

(a) The Government may, at any time, by written order to the Awardee, require the Awardee to stop all, or any part, of the work called for under this agreement. Upon receipt of the Stop Work Order, the Awardee shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the stop work order during the period of work stoppage. Within the period of ninety (90) calendar days after the stop work order is delivered, or within any extension of that period to which the parties have agreed, the Government will either:



- (1) Cancel the stop work order, or
- (2) Terminate, in whole or in part, the work.

(b) If a Stop Work Order issued under this section is canceled, the Awardee shall resume work under the OA. The Government reserves the right to make an equitable adjustment in the delivery schedule or cost or price, or both that result from the stoppage of work. The Awardee shall assert its right to an equitable adjustment as a result of the stop work order within thirty (30) calendar days after the end of the period of work stoppage.

## 5. Organizational Conflicts of Interest

(a) If the Awardee identifies an actual or potential organizational conflict of interest that has not already been adequately disclosed and resolved (or waived in accordance with FAR 9.503), the Awardee shall make a prompt and full disclosure in writing to the OA/T agreement officer. This disclosure shall include a description of the action the Awardee has taken or proposes to take in order to resolve the conflict. This reporting requirement also includes subcontractors actual or potential organizational conflicts of interest not adequately disclosed and resolved prior to award or that may have arisen post-award.

(b) Mitigation plan. If there is a mitigation plan in the agreement, the Awardee shall periodically update the plan, based on changes such as changes to the legal entity, the overall structure of the organization, subcontractor arrangements, contractor management, ownership, ownership relationships, or modification of the work scope.

## V. OBLIGATION AND PAYMENT

### A. Invoicing

(a) The Awardee shall submit payment requests and receiving reports using the Invoice Processing Platform (IPP).

(b) Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) prompt payment regulations at 5 CFR part 1315.

(c) Except as set forth in the Disputes section of this Agreement, the Government's financial liability will not exceed the amount obligated and available for payment under this Agreement.

(d) The Awardee, typically monthly or upon the request of the Government, will prepare a request for payment, which will include the applicable, negotiated payable milestones, unless otherwise negotiated between the Awardee and the Government. This request shall also include a

reconciliation of the previous payments received and milestones completed and be adjusted accordingly. The Awardee shall submit a copy of the request for payment to the AOR or designee for approval. After approval by the AOR, the Awardee shall provide a copy of the approved request for processing to the designated Agreements Officer for payment approval via IPP.

**B. Payments**

(a) The Government's liability to make payments is limited only to those funds obligated under this Agreement. The Government may incrementally fund this agreement in accordance with the Incremental Funding section.

(b) Payments will be made in accordance with the agreed upon milestones via IPP and the procedures in this Section.

(c) Any costs incurred prior to the execution of this agreement are the sole responsibility of the Awardee and will not be used as the basis of a claim against or construed as an obligation to the Government.

**C. Accounting Systems Requirements**

(a) The Awardee shall maintain adequate records to account for the control and expenditure of Government funds received under this OA/OT

(b) The Awardee shall establish and maintain accounting systems that:

(1) Comply with Generally Accepted Accounting Principles

(2) Control and properly document all cash receipts and disbursements.

**D. Allowable Costs**

(a) Federal funds are to be used only for costs that a reasonable and prudent person would incur in carrying out the Agreement.

(b) No award will be made on an expenditure basis unless the entities performing under the PA has an accounting system that:

(1) is capable of identifying and segregating costs to individual agreements/contracts;

(2) provides for an equitable allocation of indirect costs; and

(3) is capable of identifying the amounts/costs, the entity will identify the basis for determining actual costs.

**E. Incremental Funding and Funding Limitations**

If the Government incrementally funds this agreement/transaction, the Government is not obligated to reimburse the awardee, in excess of the total amount allotted by the Government. The awardee is not obligated to continue performance (including actions under the Termination section of this Agreement/Transaction) or otherwise incur costs in excess of --

(a) The amount then allotted to the by the Government or;

(b) If the Government fully funds a period or periods, the Government is not obligated to reimburse the Awardee for costs exceeding the fully funded amount.

If a project is fully funded at the outset, the Government is not obligated to reimburse the entity for costs exceeding the fully funded amount.

**F. Audit and Records**

Awardee relevant financial records, supporting documents (including documentation of personnel expenses), statistical records and other records pertinent to this OA/OT must retained for a period not to exceed six (6) years, three (3) months after the end of the period of performance of the OA/OT and are subject to examination or audit by the Government during this retention period.

**G. Pricing Arrangement for Projects & Project Close-Out**

The Government intends to award this OA/OT on a [fixed-price, expenditure, milestone] basis. However, the Government and Awardee, by mutual agreement, may negotiate other pricing arrangements.

Upon Agreement Close-out, the Agreements Officer and Payment Office shall expedite completion of steps needed to close out the agreement and make prompt final payment, if applicable.

**Payment Schedule**

**[Insert Payment Schedule – Table or Narrative]**

**VI. DISPUTES**

**A. General**

The Parties shall communicate with one another in good faith and in a timely and cooperative manner when raising issues under this Section.

**B. Dispute Resolution Procedures**

- (a) Any disagreement, claim or dispute between NSF and Awardee concerning questions of fact or law arising from or in connection with this Agreement, and, whether or not involving an alleged breach of this Agreement, may be raised only under this Section.
- (b) Whenever disputes, disagreements, or misunderstandings arise, the Parties shall attempt to resolve the issue(s) involved by discussion and mutual agreement as soon as practicable. The parties agree to make reasonable attempts to resolve disputes at the lowest possible organizational level. In no event shall a dispute, disagreement or misunderstanding which arose more than three (3) months prior to the notification made under this section constitute the basis for relief unless the NSF AO in the interests of justice waives this requirement.
- (c) Failing resolution by mutual agreement, the aggrieved Party shall document the dispute, disagreement, or misunderstanding by notifying the other Party (through the NSF AO or Awardee, as the case may be) in writing of the relevant facts, identify unresolved issues, and specify the clarification or remedy sought. Within five (5) working days after providing notice to the other Party, the aggrieved Party may, in writing, request a joint decision by the NSF AO, and a senior executive appointed by awardee. The other Party shall submit a written position on the matter(s) in dispute within thirty (30) calendar days after being notified that a decision has been requested. NSF's AOR, and the Awardee senior executive shall conduct a review of the matter(s) in dispute and render a joint decision in writing within thirty (30) calendar days of receipt of such written position. Any such joint decision is final and binding.
- (d) In the absence of a joint decision, under subparagraph (c) above, the dispute shall be further reviewed. The NSF Division Director, DACS may elect to conduct this review personally or through a designee or jointly with an individual appointed by Awardee. Following the review, the NSF will resolve the issue(s) and notify the Parties in writing. In the absence of an agreement between the NSF the awardee designee to mutually resolve the dispute, within sixty (60) calendar days (or such other period as agreed to by the Parties), either Party may pursue any right or remedy provided by law in a court of competent jurisdiction as authorized by 28 U.S.C. § 1491. Alternatively, the Parties may agree to explore and establish an Alternate Disputes Resolution procedure to resolve the dispute.

Pending resolution of any such dispute by settlement or by final judgment, the Parties shall each proceed diligently with performance, unless otherwise mutually agreed, or the Agreements Officer directs, in writing, to stop performance.

#### C. Limitation of Damages

Claims by either party for damages of any nature whatsoever pursued under this OA shall be limited to direct damages only up to the unpaid balance of the aggregate amount of Government funding as of the time the dispute arises. To the extent permitted by law, with regard to the activities undertaken pursuant to this OA, no Party shall make any claim against the other, employees of the other, the others' related entities (e.g. Contractors, Subcontractors), or employees of the others' related entities for any injury to or death of its own employees or employees of its related entities, or for damage to or loss of its own property or that of its related entities, whether such injury, death, damage or loss arises through negligence or otherwise, except in the case of willful misconduct.

In no event, shall either Party be liable to each other for consequential, punitive, special, and incidental damages or other indirect damages, whether arising in contract (including warranty), tort (whether or not arising from the negligence of a Party) or otherwise, except to the extent such damages are caused by a Party's willful misconduct and otherwise consistent with Federal law.

### VII. PATENT RIGHTS

Standard government patent provisions apply (see 48 C.F.R. (FAR) 52.227-11). The Government may require additional rights in order to comply with treaties or other international agreements. In such case, these rights will be negotiated in good faith by the parties. Alternative rights may be negotiated per project agreement to most successfully promote commercialization of government-funded technology and achieve the shared vision of this Agreement.

### VIII. DATA RIGHTS

Data Rights will be consistent with 48 C.F.R. (FAR) 52.227-14.

All Data shall be properly marked to clearly indicate the proprietary nature of the Data and the Government's rights thereto. Public disclosure of Data delivered under this Agreement shall be agreed to by the parties, and will be withheld by NSF consistent with the law (e.g., 18 U.S.C. §1905; 5 U.S.C. §552(b)) to protect properly marked information (such as trade secrets and commercial or financial information obtained from a person and privileged or confidential information, or Data relating to an invention or software).

All government furnished information obtained during the performance of this Agreement shall belong to NSF and be returned at the conclusion of the Term.

## **IX. SAFEGUARDING CONTROLLED UNCLASSIFIED INFORMATION AND CYBER INCIDENT REPORTING**

### **A. Background**

Protection of Controlled Unclassified Information (CUI) is of paramount importance to NSF and can directly impact the ability of NSF to successfully conduct its mission. Therefore, this Section requires the Awardee protect CUI that resides on the Awardee's information systems. This Section also requires the Awardee to rapidly report any cyber incident involving CUI.

### **B. Safeguarding CUI**

The Awardee shall implement the version of NIST Special Publication (SP) 800-171 in effect at the time the solicitation is issued or as authorized by the Agreements Officer for CUI that resides on the Awardee's information systems. Consistent with NIST SP 800-171, implementation may be tailored to facilitate equivalent safeguarding measures used in the Awardee's systems and organization. Any suspected loss or compromise of CUI that resides on the Awardee's information systems shall be considered a cyber incident and require the Awardee to rapidly report the incident to NSF as below.

### **C. Cyber Incident Reporting**

Upon discovery of a cyber incident involving CUI, the Awardee shall take immediate steps to mitigate any further loss or compromise. The Awardee shall rapidly report the incident to the NSF AO and provide sufficient details of the event—including identification of detected and isolated malicious software—to enable NSF to assess the situation and provide feedback to Awardee regarding further reporting and potential mitigation actions. The Awardee shall preserve and protect images of all known affected information systems and all relevant monitoring/packet capture data for at least 90 days from reporting the cyber incident to enable NSF to assess the cyber incident. The Awardee agrees to rapidly implement security measures as recommended by NSF and to provide to NSF any additionally requested information to help the Parties resolve the cyber incident and to prevent future cyber incidents.

### **D. Lower Tier Agreements**

The Awardee shall include this Section in all sub-agreements, regardless of tier, with labor contracted to perform work in support of this Agreement/Transaction.

E. Definitions

**Compromise:** Disclosure of information to unauthorized persons, or a violation of the security policy of a system, in which unauthorized intentional or unintentional disclosure, modification, destruction, or loss of an object, or the copying of information to unauthorized media may have occurred.

**Controlled Unclassified Information (CUI):** Unclassified information that requires safeguarding or dissemination controls, pursuant to and consistent with applicable law, regulations, and Government-wide policies.

**Cyber Incident:** Actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

**Information System:** A discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

**Rapidly Report:** Report to NSF within 72 hours of discovery of any cyber incident.

X. DATA PROTECTION, DISCLOSURE OF INFORMATION, AND OTHER SECURITY REQUIREMENTS

1. Data Protection and Confidentiality

As applicable to its work using NSF information, the Awardee shall be responsible for protecting the confidentiality of data about individuals, as required by the Privacy Act of 1974, the National Science Foundation (NSF) Act of 1950 as amended, and the title III of the Foundations for Evidence-Based Policy-making Act of 2018 (i.e., Confidentiality Information Protection and Statistical Protection Act (CIPSEA)). The Awardee shall also be subject to all federal and NSF policies on confidentiality protections regarding data collection, data storage and access, and data dissemination and analysis, as made known to the Awardee. These policies may change during the period of the Agreement.

2. Disclosure of Information

(a) The Awardee shall not release Government information to anyone outside the Government regardless of medium (e.g., film, tape, document), pertaining to any part of performance under this OA/OT, unless—

- (1) The Agreements Officer has given prior written approval;

(2) The information is otherwise in the public domain before the date of release; or

(3) The information results from or arises during the performance of a project that involves no controlled unclassified information and has been scoped and negotiated by the parties and research performer and determined in writing by the Agreements Officer to be fundamental research.

(4) [Insert other disclosure conditions as appropriate.]

(b) Requests for approval under paragraph (a)(1) above or of this section shall identify the specific information to be released, the medium to be used, and the purpose for the release. The party requesting the disclosure shall submit a request for public release to the Agreements Officer via the Awardee at least 30 business days before the proposed date for release.

(c) Sub-agreement holders agree to a similar requirement, including this paragraph (c), in each sub-agreement under this OA. Sub-agreement holders shall submit requests for authorization to release through the Awardee to the Agreements Officer.

### 3. Information Security and Privacy

[ Insert as appropriate]

## XI. TITLE TO AND DISPOSITION OF PROPERTY

### A. Definitions

In this Section “property” means any tangible personal property other than property actually consumed during the execution of work under this agreement.

### B. Title to Property

No significant items of property are expected to be acquired under this Agreement. Title to each item of property acquired under this Agreement with an acquisition value of \$25,000 or less shall vest in the acquirer, upon acquisition with no further obligation of the Parties unless otherwise determined by the AO. Should any item of property with an acquisition value greater than \$25,000 be required, the acquirer shall obtain prior written approval of the AO. The acquirer shall be responsible for the maintenance, repair, protection, and preservation of all property at its own expense.

### C. Disposition of Property



At the completion of the term of this Agreement, items of property with an acquisition value greater than \$25,000 shall be disposed of in accordance with NSF-approved disposition procedures in coordination with NSF's AO.

D. Property Accounting

The Awardee shall account for any real property and personal property acquired with Federal funds or received from the Federal Government in accordance with the terms of the Agreement.

XII. CIVIL RIGHTS ACT & NON-DISCRIMINATION STATUTES

The OA is subject to the compliance requirements of Title VI of the Civil Rights Act of 1964, as amended [42 USC §§ 2000d et seq.].

In addition, this OA is subject to the Rehabilitation Act of 1973 [29 USC § 794], the Age Discrimination Act of 1975 [42 USC §§ 6101 et seq], and Equal Employment Opportunity [E.O. 11246], and all regulations and policies issued by NSF pursuant to these statutes as made known to the Awardee, including NSF's Policy on Sexual Harassment, Other Forms of Harassment, or Sexual Assault. Specifically, in accordance with these statutes, regulations and policies, no person on the basis of race, color, national origin, sex, disability, or age shall be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under the OA.

XIII. ORDER OF PRECEDENCE

In the event of any inconsistency between the terms of this Agreement/Transaction and language set forth in the Consortium's Membership Agreements (if applicable), Project Agreements, Attachments, and/or other documents executed under this Agreement/Transaction, the inconsistency shall be resolved by giving precedence in the following order:

1. This OA/OT Agreement;
2. Attachments to this OA/OT Agreement;
3. Project Agreements (PAs) executed under this Agreement;
4. Any attachments to individual PAs executed under this Agreement;
5. Other documents executed under this OA/OT Agreement.

In any event, specifically negotiated Project Agreement terms will govern over general terms of this Agreement/Transaction.

#### XIV. OTHER TERMS

1. The Parties to this Agreement agree that they jointly have agreed to the terms and language used herein and that no ambiguity will be construed against any Party for having “drafted” this Agreement. Both Parties have participated in the drafting and negotiation of this Agreement, and for all purposes this Agreement shall be deemed to have been drafted by each of the Parties.
2. Force Majeure. No failure or omission by the Awardee in the performance of any obligation of this Agreement shall be deemed a breach of this Agreement or create any liability if the failure or omission arises from a cause beyond the control of the parties, including, but not limited to the following: acts of God; acts of the Government in either its sovereign capacity; changes to any rules, regulations, or orders issued by any Governmental authority or by any officer, department, and agency or instrumentality thereof, unless affected by modification to the Agreement; fire; storm; flood; earthquake; accident; war; rebellion; insurrection; riot; and invasion, provided that such failure or omission resulting from one of the above causes is cured as soon as is practicable.
3. This Agreement constitutes the entire agreement of the Parties and supersedes all prior and contemporaneous agreements, understandings, negotiations, and discussions among the Parties, whether oral or written, with respect to the subject matter hereof.
4. This Agreement, or modifications thereto, may be executed in counterparts each of which shall be deemed as original, but all of which taken together shall constitute one and the same instrument.
5. The individual(s) executing this Agreement warrant that he, she, or they have the authority to execute this Agreement on behalf of their respective Parties.
6. This Agreement is made and entered into voluntarily, and the Parties are free from any duress or influence, and fully understand the terms, conditions, and provisions of this Agreement, and believe its terms to be fair, just, and reasonable.
7. This Agreement, or modifications thereto, may be executed in counterparts each of which shall be deemed as original, but all of which taken together shall constitute one and the same instrument.
8. In the event that any provision of this Other Arrangement (OA) / Other Transaction (OT) becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable, or void, this OA/OT shall continue in full force and effect without said provision, unless applying such remaining portions would frustrate the purpose of this OA/OT.

**XV. PROHIBITION ON CERTAIN SERVICES, EQUIPMENT, AND ENTITIES**

Federal Acquisition Regulation (FAR) 52.204-25, PROHIBITION ON CONTRACTING FOR HARDWARE, SOFTWARE, AND SERVICES DEVELOPED OR PROVIDED BY KAPERSKY LAB COVERED ENTITIES (DEC 2023) is hereby incorporated by reference into this Agreement.

Federal Acquisition Regulation (FAR) 52.204-25, PROHIBITION ON CONTRACTING FOR CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT (AUG 2020) is hereby incorporated by reference into this Agreement.

Federal Acquisition Regulation (FAR) 52.204-27, PROHIBITION ON BYTEDANCE COVERED APPLICATION (JUN 2023) is hereby incorporated by reference into this Agreement.

**ATTACHMENT 1: STATEMENT OF WORK AN TASK DESCRIPTIONS**

[Include detailed descriptions of Tasks]

**ATTACHMENT 2:  
REPORT REQUIREMENTS**

**A. QUARTLY REPORTS**

On or before ninety (90) calendar days after the effective date of the Agreement and quarterly thereafter throughout the term of the Agreement, the Awardee shall submit or otherwise provide a quarterly report. One (1) copy shall be submitted or otherwise provided to the NSF AOR and one (1) copy shall be submitted or otherwise provided to NSF AO. The report will have two (2) major sections.

1. **Technical Status Report.** The technical status report will detail technical progress to date and report on all problems, technical issues, major developments, and the status of external collaborations during the reporting period.
2. **Business Status Report.** The business status report shall provide summarized details of the resource status of this Agreement, inclusive of a summary and accountability of the funds expended during performance of the agreement.

**B. SUBCONTRACTOR/ REPORTING**

Subcontractors executing Project work issued under this Agreement shall provide status reporting as specified in their subcontract. The status reports will be quarterly, unless otherwise specified.

**C. ANNUAL PROGRAM PLAN DOCUMENT**

The Awardee shall submit or otherwise provide to the NSF AOR and NSF AO one (1) copy each of a report which describes the Annual Program Plan, if an Annual Program Plan is a required deliverable.

**D. SPECIAL TECHNICAL REPORTS**

As agreed to by the Awardee and the NSF AOR, the Awardee/shall submit or otherwise provide to the NSF AOR and NSF AO one (1) copy each of special reports on significant events such as significant target accomplishments by parties performing under the OA/OT.

**E. FINAL REPORT**

1. The Awardee shall submit or otherwise provide a Final Report making full disclosure of all major developments by the Awardee/Consortium upon completion of the Agreement or within sixty (60) calendar days of termination of this Agreement. One (1) copy shall be

submitted or otherwise provided to the NSF AOR, and one (1) copy shall be submitted or otherwise provided to NSF AO.

2. Prior to delivery, the Awardee shall consult with the AO to determine the proper distribution statement to be included on the front page of the final report in a conspicuous place.

#### F. ANNUAL REPORTING

On an annual basis, the Awardee shall submit to the AO a report containing the total number of project/task proposals submitted by and the total amount of project/task proposals funded by the Awardee/CMF. Additionally, for each funded project, the Awardee/CMF shall report the project number, project title, funded organization, organization UEI number, date funded, project end date, funded amount, agreement amount, and organization type.

#### G. PROPERTY REPORTING

The Awardee shall submit, annually, a report of all property and transferable non-real property acquired by the Awardee meeting the criteria in section XI above, where title vests with the Government.

#### H. NON-TRADITIONAL ENTITY REPORTING

The Awardee shall submit, annually, a report of the names all non-traditional entities that have participated in the consortium during the reporting year.

Appendix G – Non-Disclosure Agreement

NAME: \_\_\_\_\_

JOB TITLE: \_\_\_\_\_ ORGANIZATION: \_\_\_\_\_

PROJECT: \_\_\_\_\_ DATE: \_\_\_\_\_

**Acknowledgment of Obligations:**

1. I acknowledge I have been assigned to the solicitation/project indicated above.
2. I understand that I may be given access to information that is agreement-specific sensitive regarding the project and belonging to National Science Foundation contractors or their suppliers. Such information regarding the Project may include but is not limited to proprietary information, privileged information, contractor bid and proposal information or source selection information (as those terms are defined at FAR 3.104-1 and FAR 2.101 respectively), and non-public NSF information, (hereinafter referred to as “procurement sensitive information”).
3. I have been briefed by an agreements office and am knowledgeable regarding the requirements regarding unauthorized disclosure of bid and proposal information, as well as source selection information. In addition, I understand that all project procurement sensitive information is for Government use only and may be used only in the performance of work requirements necessary to carry out my duties under this project. I have read and understand the requirements of 5C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.
4. I understand that unauthorized disclosure of project sensitive information could damage the integrity of this agreement and that the transmission or revelation of such information to unauthorized persons could subject me to referral to NSF OIG and/or prosecution under applicable laws.
5. I understand that the project sensitive information I receive will be given only to persons specifically granted access to the project information and may not be further divulged without specific prior written approval from the Agreements Officer or Division Director, DACS. I also agree not to remove proposal or source selection documents (or any copies thereof) from authorized locations without the express approval of the Agreements Officer in charge of this project.

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 80 of 97**

6. I understand that I must comply with the obligations and requirements always contained in this Agreement during the process and after completion of the agreement as well.
7. I will not engage in any personal, business, or professional activity or receive or retain any direct or indirect financial interest, which places me in a position of conflict between my private interest and my duties or responsibilities related to this project. The private interest of my spouse, dependent children, or any household members is considered as my private interest. If, at any time during this project/program, my participation might result in a real, apparent, possible, or potential conflict of interest, I will immediately report the circumstances in writing to the Agreement Officer.
8. I have a continuing obligation to disclose any circumstances that may create an actual or apparent conflict of interest. If I learn of any such conflict, I will report it immediately to the Other Arrangement/Transaction Agreement Officer. I will perform no more duties related to evaluating proposals until I receive instructions on the matter.
9. Please check the applicable block:

- I am required to submit a current OGE 450, Executive Branch Personnel Confidential Financial Disclosure Report, or OGE 278e, Executive Personnel Financial Disclosure Report and have submitted / will submit in accordance with applicable timeframes.
- I am not required to submit a OGE 450 or OGE 278e.
- I take this obligation freely, without any mental reservation or purpose of evasion, in the absence of duress. I acknowledge I am bound by the terms of this Acknowledgment and applicable legal authorities.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

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 or the Office of Special



**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 81 of 97**

Counsel 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.

Appendix H – Sample Solicitation

**OTHER TRANSACTION AGREEMENT SOLUTIONS OFFERING  
(OTASO)**

**Project:** *[INSERT PROJECT NAME]*

**1.0 Purpose:**

The National Science Foundation (NSF) *[insert directorate name and purpose of project the solicitation is supporting]*

**2.0 Scope or Mission:**

*[Insert brief description of the scope]*

**3.0 Period and Place of Performance:**

*[Insert a statement on the period of performance (e.g. XX years and YY option periods and the place of performance (e.g., NSF site, awardee site, etc.)]*

**4.0 Instrument and Approach**

Through this solicitation, NSF contemplates the issuance of *[an Other Transaction Agreement (OTA) contract pursuant to NSF’s statutory authority at 42 U.S.C. § 19116 OR an Other Arrangement pursuant to the National Science Foundation Act of 1950, as amended, 42 U.S.C. § 1861]*. An Other Arrangement /Transaction Agreement is not a FAR-based procurement contract nor a financial assistance transaction, but another system of contracting available to NSF by statute. NSF intends to make *[one OR one or more awards]* resulting from this solicitation. It is anticipated that any award resulting from this solicitation will be an award vehicle under which individual orders *[may OR may not]* be issued. The award resulting from this solicitation is anticipated to be awarded on a *[fixed-price OR reimbursable OR milestone-based schedule]* that will be determined during contract negotiations.

This solicitation contemplates a *[competitive OR non-competitive]* evaluation and award process. *[If competitive]* NSF will receive and evaluate proposals from interested firms and perform a down select based on the evaluation factors identified in this solicitation. Entities that are selected as part of this review may be invited to participate in oral presentations at NSF.

**5.0 Background and Eligibility:**

**5.1 [Provide the background for the program or project being solicited for]**

**5.2 Eligibility [Sample language, this should be tailored to the needs of the solicitation]**

Any responsible entity (excluding foreign entities) may submit proposals for consideration. All offerors must be registered in the Federal Government’s System for Award Management (SAM) prior to submitting a proposal ([www.sam.gov](http://www.sam.gov)). A proposal can involve multiple organizations, but the proposal must be submitted by a lead organization with subawards to other participating organizations. Separately submitted collaborative proposals are not permitted. An eligible organization can submit a maximum of one proposal as a lead organization per solicitation.

**6.0 Performance Objectives/Goals/Tasks**

**[Insert a detailed list of performance objects/goals/tasks for offerors to understand the nature of work requested by NSF and be able to successfully propose.]**

**7.0 Proposal Format [Notional instructions. This should be tailored to the nature and complexity of the solicitation]**

Proposals should be direct, concise, and must not exceed a total of XX single sided pages exclusive of the title page and appendixes. The proposal shall be typed, double-spaced, using 12-point font, and printed on “8 ½” “by 11” paper, with 1” margins on all sides. Tables/graphs may use a smaller font. Proposals that do not meet these format specifications may be removed from consideration.

**7.1 Title Page (does not count toward page limit)**

The title page must include the lead organization’s name, UEI number, point of contact for communications, and the contact information for that point of contact.

**7.2 Body of the Proposal (limited to XX pages)**

The body of the proposal must include concise, comprehensive information and details on how the offeror will support the efforts outlined in this solicitation. The proposal should address the following areas:

**Vision:**

Your firm’s vision and role in the proposed OA/T.

**Operations and Organizational Experience**

Provide a description of your organization’s capacity and how it aligns with the needs of the NSF. This section should convey the track record of your organization and of your leadership team in **[Insert proposal submission requirements that align with the stated the objectives/goals/tasks and will allow for the evaluation of the offeror’s**

**experience].** For subcontractors, please explain why these organizations are necessary to execute on your vision of the proposal and how their involvement might address any gaps your team has. Include an overview of networks, partnerships, and new capital resources your organization has and how they will be deployed in support of proposal.

### **Activities**

Provide a 1) description and 2) timeline for the activities that your team will undertake during the award period. This should include a description of awardee facing activities, NSF facing activities and partner-facing activities (co-funders, talent, industry partners, etc.). While these activities may evolve after contract negotiations and as priorities evolve, NSF would like to gain an understanding of the offeror's proposed [Insert activities]. Additionally, include high-level information on what a robust solution will look like over the life of the agreement or transaction.

## **7.3 Proposal Budget (no page limit)**

A budget and accompanying budget justification which sets forth the amount of funding requested from NSF, by budget category, for the period of performance of this effort. The budget justification provides a detailed breakdown for each category as well as a rationale to support the proposed. The budget justification must contain sufficient information to allow for meaningful evaluation of the proposed level of effort. Please note that NSF will commit no more than \$XX of support over the planned term of the award.

This section shall also specify the requested pricing arrangement (e.g., fixed-price, cost, cost-plus-fixed-fee, etc.) and the rationale for its use. If an organization requests a cost reimbursement type of pricing arrangement, they must have an approved accounting system.

**Direct Labor** – Breakdown of direct labor identifying the individuals, labor categories, pay rates, and projected level of effort devoted to the project, and their associated subtotals.

**Direct Labor Overhead/Fringe Benefits** – Rate(s) and base(s), and the cumulative effect on labor costs.

**Materials, Supplies, and Equipment** – Description and cost of materials, supplies, and equipment, to include the basis of the cost estimate (e.g., historical data, competitive market quotes, and in-house transfers).

**Travel** – Breakdown of travel and transportation costs. Proposed travel must include the following for each trip: the purpose of the trip, origin and destination if known, approximate duration, the number of travelers, and the estimated cost per trip must be justified based on a reasonable basis for estimation.

**Subawards** – For proposals that contain one or more subawards, include a separate subaward budget for each planned subaward that provides a comparable level of detail to the budget submitted for the overall proposal.

**Consultant Services** – Breakdown of each individual’s expertise, primary organizational affiliation, normal daily compensation rate, and number of days of expected service, as well as any expected travel costs. This line item should include funds allocated for mentors, entrepreneurs-in-residence, and coaches (if these individuals will be paid for their role in supporting the proposal).

**Other Direct Costs** - Breakdown of other direct costs not already included elsewhere in the budget.

**Indirect Costs** – For each indirect rate (identified here and elsewhere), indicate if the proposed indirect rate and allocation base have been approved by a government audit or cognizant agency for use in proposals; when the rate(s) was approved; and the name of and telephone number of the cognizant auditor or approving official.

**Profit or fee** - Profit or fee may be proposed, and if proposed, is subject to negotiations and applicable statutory limits.

**7.4 Data Management and Privacy Plan (limited to two pages)**

Proposals shall address within the Data Management and Privacy Plan their plans for data-sharing across their team, with NSF, and with the general public during the award.

**7.5 Letters of Commitment (no page limit)**

Signed one-page letters of collaboration from proposed subcontractors where the subcontractors outline what work they will perform as a part of the effort and why they are uniquely qualified to lead that work.

**7.6 Project Deliverables (three-page limit)**

A comprehensive list of all anticipated deliverables under the award. The deliverables in this document should align with the information provided in the Milestone Payment Schedule.

### **7.7 Milestone Payment Schedule (no page limit)**

The Milestone Payment Schedule should minimize the number of items listed on the schedule. Payments should be scheduled on a monthly/quarterly basis. Offerors shall include a monthly/quarterly report where they describe all items that occurred. These items should be listed not more frequently than monthly, but no less frequently than quarterly.

Payments for milestone will only be paid following successful completion of items that are well documented in progress reports and accepted by NSF.

### **7.8 Conflicts of Interest**

The Offeror must include a statement describing any potential financial interests that the organization(s) may have that could create conflicts of interest with the work to be performed in their proposal. The offeror must also include their plan to resolve the conflicts. This statement applies to the OA/T contractor, its employees, consultants, and subcontractors used to perform work under their proposal.

Given the nature of this requirement, it is possible for a conflict to arise after the award is made that is not otherwise anticipated. Due to this, the OA/T award will include language requiring that the selected organization(s) notify NSF if a conflict arises post award and how the firm intends to address the conflict including a proposed mitigation plan.

## **8.0 Selection Criteria Definitions**

**Breadth**: the percentage of the contract functions or tasks with which an offeror has had at least one experience. The greater the percentage of the functions or tasks that the offeror has performed, the broader their experience with the work of the prospective contract.

**Depth**: the number of times an offeror has performed a particular contract function, activity, or task. The more times an offeror has performed a particular contract function or task, the deeper their experience with that function or task.

**Experience**: demonstration of historical instances of performance of tasks similar in nature to those that will be performed under the prospective contract through which an offeror has had an opportunity to learn about the nature of the work, successful methods, processes, and procedures, and problems and effective solutions.

**Relevance**: the extent to which work done in the past was similar in kind and scope to the work that will be performed under the prospective contract and confronted the offeror with similar

kinds of technical and management challenges and difficulties. The greater the extent, the more relevant the experience.

## **9.0 Written Proposal Selection Criteria**

All written proposals will be evaluated using the selection criteria listed below. Both criteria will be given full consideration during review and as such both must be addressed. When evaluating written proposals, the technical evaluation team will weigh “Organizational Experience” as significantly more important than “Understanding of the Challenges.”

### **Organizational Experience**

- The organization’s (and any subcontractors’) organizational and specialized experience in supporting efforts similar to the program in the solicitation. This experience includes, but is not limited to, [insert details as appropriate].
- The extent to which the key personnel included in the proposal have the necessary experience to support this project.
- The extent to which the lead organization and subcontractors have experience in developing and delivering curriculum and interactive learning experiences that would create value for proposed initiative.
- The extent to which the lead organization and subcontractors have presented sufficient evidence about their experience embedding DEIA values into their organizational structure and work products.

<b><u>Rating Guidelines</u></b>
<b><u>Exceptional:</u></b> The proposal demonstrates that the solicitation requirements are very well understood and the core proposing team has the relevant background, depth, and breadth of experience that will likely result in extremely high-quality performance. The proposal clearly addresses and exceeds requirements with no major weaknesses. The proposal contains outstanding features that meet or exceed the expectations of the Federal Government on multiple dimensions and demonstrate a deep understanding of the needs of program. There is high confidence that the proposing team has the breadth of experience and networks needed to quickly create support structures, partnerships, and curriculum needed for awardees to thrive. DEIA is clearly embedded into the culture of proposing team and their proposed work products. The proposal scope aligns very well with agency objectives and priorities. The risk of poor performance is extremely low.
<b><u>Acceptable:</u></b> The proposal demonstrates that the solicitation requirements are mostly understood and some members of the core proposing team have the relevant background and experience that will likely result in satisfactory performance. The offeror addresses some of the requirements, with some weaknesses. The offeror demonstrates some experience, qualifications, and/or performance capabilities but there are concerns about their relevance, depth and/or breadth. The proposal partially aligns with objectives and priorities described in the solicitation. There is moderate confidence that the proposing

team has the breadth of experience and networks to quickly create support structures, partnerships, and the curriculum needed for awardees to thrive. It may not be sufficiently clear if DEIA is embedded into the culture of proposing team and their proposed work products. The risk of poor performance is moderate.

**Not Acceptable:** The proposal does not meet the solicitation requirements. The proposal scope does not align with objectives and priorities of the solicitation. There are moderate to serious concerns about whether the proposing team’s previous experience is relevant, broad enough to meet the diverse objectives of the federal government, and/or shows a track record of success. The proposal could not satisfy critical requirements without a major revision and/or a rewrite of the proposal or a major redirection effort. DEIA is not discussed or if it is discussed, it is insufficiently embedded into the proposing team’s culture and proposed work products. The risk of poor performance is high.

**Understanding of the Challenges**

- How well does the offeror understand the challenges that the program aims to address and provides a well-developed plan to address these challenges.
- The extent to which the proposal meaningfully addresses all four topic areas (talent, partnerships, sustainability, and DEIA) and provides actionable activities to fill gaps.
- The extent to which the budget and budget justification are comprehensive and reflect a reasonable allocation of resources necessary to successfully complete the proposed activities and a full understanding of the goals of the program.

**Rating Guidelines**

**Exceptional:** The proposal demonstrates that the solicitation requirements are very well understood, and their innovative and nimble approach will likely result in extremely high-quality performance. The proposal clearly addresses and exceeds requirements with very limited weaknesses. The proposal contains outstanding features that meet or exceed the expectations of the Federal Government on multiple dimensions across the topic/task areas. The proposal scope aligns very well with agency objectives, priorities, and vision. The plan clearly articulates what activities will be undertaken at the 3-month, 6-month, 9-month, and 12-month milestones and provides a cohesive strategy for how these activities will contribute to short-term and long-term outcomes. The proposed budget is reasonable and shows funds being allocated in such a way that meets the diverse objectives of the scope of work. The risk of poor performance is extremely low.

**Acceptable:** The proposal demonstrates that the solicitation requirements are mostly understood, and the approach will likely result in satisfactory performance for part of the requirements. The proposal either does not cover all 4 topic areas laid out in the solicitation or its proposed vision and activities for some or all topic areas does not meet the NSF Engine’s standard for exceptional work. The offeror addresses some of the requirements, with some weaknesses. The proposal partially aligns with objectives and priorities described in the solicitation but may not meet the needs of the program. The



proposed budget is reasonable or poor and does not demonstrate a full understanding of the diverse objectives of the scope of work. The risk of poor performance is moderate.

**Not Acceptable:** The proposal does not meet the solicitation requirements. The proposal fails to address many requirements. The proposal could not satisfy critical requirements without a major revision and/or a rewrite of the proposal or a major redirection effort. The proposal scope and budget does not align with objectives and priorities of the solicitation. The risk of poor performance is high.

## **10.0 Oral Presentation Instructions**

### **Oral Presentation Medium**

The Government intends to hold oral presentations virtually via a Zoom meeting. By participating in oral presentations, offerors acknowledge that they are in compliance with all solicitation rules and parameters, in accordance with applicable laws and statutes.

### **Presentation Participants**

No more than six (6) total offeror participants shall attend the oral presentation. The Government desires that the participants be personnel the offeror deemed as Key Personnel and/or the responsible corporate official. Participants must be an employee of the offeror or major subcontractor(s).

### **Oral Presentation Format**

Each oral presentation session shall last no more than ninety minutes. The anticipated schedule for oral presentations is as follows: 1) five minutes devoted to introductions and an overview of the oral presentation format, 2) twenty minutes for the offeror team to make their presentation to the NSF team, 3) twenty-five minutes for questions from NSF to be addressed by the offeror team, 4) fifteen minutes for NSF team to separately discuss, and 5) twenty minutes for additional questions from NSF team to be addressed by the offeror team.

### **Recording of Oral Presentations**

Recording oral presentations by offerors is strictly prohibited, notwithstanding local laws and regulations with regards to virtual meetings or voice-only telephone oral presentations. The Government reserves the right to record oral presentations. If recorded, the recording is source-selection sensitive and will be handled accordingly.

### **Exchanges During Oral Presentations**

The Government intends to engage in interactive dialogue during the oral presentations. These exchanges are viewed as a component of the oral presentation itself and will only be used to clarify elements of the oral presentation.

### **Oral Presentation Selection Criteria**

All oral presentations will be evaluated using the one factor described below.

- The extent to which the offeror demonstrates a clear understanding of the complex, ever-evolving challenges that the program aims to address and shares a compelling vision, methodology, and nimble approach for working with to creatively tackle those challenges.
- The extent to which the offeror’s proposed activities for the short-term and intermediate-term are both appropriate and impactful, given the maturity levels and unique needs of the program.
- The extent to which the offeror can demonstrate that the assembled team and proposed activities represent an integrated plan for executing against this vision, methodology, and overall approach.

<b><u>Rating Guidelines</u></b>
<p><b><u>Exceptional:</u></b> The oral presentation demonstrates that the solicitation requirements are very well understood, and the proposing team has a clear vision and nimble operational plan for developing an innovative and compelling program offering, that will likely result in extremely high-quality performance. The oral presentation clearly addresses and exceeds requirements with no major weaknesses. The oral presentation contains outstanding features that meet or exceed the expectations of the Federal Government on multiple dimensions and demonstrate a deep understanding of the needs of NSF and their needs in both the short-term and intermediate term. There is high confidence that the proposing team has the experience and vision necessary to develop and execute on a cohesive, integrated set of activities that will lead to high-quality experience for all stakeholders including the NSF programmatic team. The proposing team presents a creative vision, methodology, and approach for tackling these challenges while maintaining the needed flexibility to meet the evolving challenges that will emerge. The proposal scope aligns very well with agency objectives and priorities. The risk of poor performance is extremely low.</p>
<p><b><u>Acceptable:</u></b> The oral presentation demonstrates that the solicitation requirements are mostly understood, and the proposed vision and operational plan will likely result in satisfactory performance. The offeror addresses some of the requirements, with some weaknesses. The offeror has some relevant experience and proposes a set of activities that have innovative aspects, which could be implemented successfully in the short-term and intermediate term. However, there may be concerns about the proposed vision and the degree of integration across the program, their relevance, potential impact, and the appropriateness of these activities for NSF stakeholders. The oral presentation partially aligns with objectives and priorities described in the solicitation. There is moderate confidence that the proposing team has the experience and vision necessary to develop and execute on a cohesive, integrated set of activities that will lead to high-quality experience for all stakeholders including the NSF programmatic team. The risk of poor performance is moderate.</p>
<p><b><u>Not Acceptable:</u></b> The oral presentation does not meet the solicitation requirements. The oral presentation’s scope does not align with objectives and priorities of the solicitation. There are moderate to serious concerns about whether the proposing team’s vision is</p>

relevant, compelling, actionable, and broad enough to meet the diverse objectives of the federal government. The proposal could not satisfy critical requirements without a major revision and/or a rewrite of the proposal or a major redirection effort. The proposed activities are unlikely to meet the needs of NSF stakeholders in the short-term and intermediate term. The risk of poor performance is high.

### **11.0 Submission Details**

Questions concerning this solicitation may be accepted by the Government through 5:00 p.m. (Eastern Daylight Time) on **[Insert date questions are due]**. Questions must be submitted via email to the Agency Contact(s) listed in Section 15. The subject line of any submitted questions must include the solicitation title. All questions must be submitted using the provided Q&A template.

Proposals will not be accepted after 5:00 p.m. (Eastern Daylight Time) on **[Insert date questions are due]**. Proposals must be submitted in complete form and comply with the submission requirements in Section 7.0. Proposals must be submitted via email to the Agency Contact(s) listed in Section 15. The subject line of your submission email must include the solicitation title.

### **12.0 Review and Selection Process**

Proposals submitted in response to this solicitation will be reviewed by the technical evaluation team using the selection criteria stated above. NSF will perform a down selection. Organizations with a favorable rating may be invited to participate in virtual oral presentations with the technical evaluation team, currently estimated to occur between the dates of **[Insert dates questions]**. NSF may, along with invitations to participate in oral presentations, distribute a set of questions to all offerors that received a favorable rating on their written proposal. Responses to these questions will be due prior to participation in oral presentations. Oral presentations will be evaluated using the selection criteria stated in Section 12. Following the evaluation of oral presentations, NSF will create a listing, in order of preference, of the prospective organizations most qualified to perform the work based on this evaluation. NSF will enter negotiations with the organization that is most highly rated. If this entity and NSF are unable to reach mutually agreeable terms for award, NSF will enter into negotiations with the next highest rated organization. This process will continue until the Other Transaction Agreement is formed or NSF decides to cancel the solicitation.

### **13.0 Agency Contacts**

**Name**

OA/T agreement officer

Email

Appendix I – Other Arrangement/Transaction Agreement Officer’s Representative Appointment Letter

**AOR APPOINTMENT LETTER**

MEMORANDUM

**FOR:** \_\_\_\_\_, Agreement Officer’s Representative  
**FROM:** \_\_\_\_\_, Agreement Officer  
**DATE:** \_\_\_\_\_  
**SUBJECT:** Appointment of and Instructions to the Agreement Officer’s Representative

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You are hereby appointed the Agreement Officer’s Representative (ARO) for: **Award No.:**  
\_\_\_\_\_

Awardee: \_\_\_\_\_

Description: \_\_\_\_\_

The Period of Performance of this contract is from \_\_\_\_\_ to \_\_\_\_\_. If there are options, you must submit the funding/requisition into iTRAK at least **30 days** before the expiration of the base/option. For this contract, please submit funding into iTRAK \_\_\_\_\_ if you intend to exercise the option.

The Agreement Officer (AO) is the exclusive agent of the Government with authority to enter into and administer Other Arrangements/Transactions. Thus, the AO has the responsibility to see that all requirements of law and regulation are followed. The AOR is responsible for monitoring the performance and delivery of the products and/or services under this award. The AOR’s primary function is to serve as technical liaison between the Awardee and the AO and monitor contract performance.

Other than the AO, you are the only Government employee who may provide technical direction between the Government and the Awardee. The duties delegated in this letter are not redelegable. You are hereby cautioned that you may be personally liable for actions taken or direction given beyond the responsibilities delegated in this memorandum.

You should familiarize yourself with the requirements of the award document and communicate with the Awardee as necessary. You should also understand that your suggestions to the Awardee may be construed as instructions and lead to claims for additional compensation or to a

release of the Awardee from its obligations. Therefore, carefully consider your responsibilities, as well as the limitations upon them, prior to taking contract administration actions.

As the AOR, you SHALL NOT:

- Establish an employer/employee relationship with Awardee personnel by interfering with or directing the Awardee to hire, fire, promote, demote, or reassign Awardee personnel.
- Direct an Awardee to furnish deliverables or services not specified in the award.
- Direct the Awardee as to who is to do work, when, or how.
- Award, agree to, or sign any award document. The AO shall issue all awards, commitments, or modifications.
- Issue Stop-Work Orders. The AOR must inform the CO of the recommendation to stop work, but the CO is the only person authorized to issue the order.
- Impose, place a demand upon, or give direction to the Awardee, or to its employees, to perform any new proposed efforts or permit any substitution not specifically provided in the contract.
- Increase the dollar limit of the award or authorize work beyond the dollar limit of the contract or authorize the expenditure of funds.
- Authorize the purchase of equipment, except as required and permitted under the award.
- Authorize the furnishing of Government property, except as required and permitted under the award.
- Authorize subcontracting or the use of consultants except as specifically authorized by the award.

AOR Standards – AOR's Shall:

- Maintain an arms-length relationship with the Awardee in the interest of the O/AT guidance related to procurement integrity as well as sound award management.
- If you have or may have direct or indirect financial interests which would place you in a position where there is a conflict between your private interests and the public interests of the United States, you shall immediately advise your supervisor and the AO of the conflict so that appropriate action may be taken. You shall avoid the appearance of such conflict to maintain public confidence in the Government's conduct of business with the private sector.

- At all times be guided by the award provisions.
- Contact the AO immediately if you believe anyone has violated any of the restrictions listed in the AOR delegation letter.

Your delegated responsibilities as the AOR are to:

1. Monitor and perform surveillance activities of Awardee performance. Immediately communicate problems with performance to the AO. Maintain communications with the Awardee and the AO regarding performance of the contract.
2. Report any opportunities to improve performance or cost efficiency to the AO.
3. Report any observed fraud or waste to the Office of Inspector General (OIG) and the AO.
4. Immediately alert the AO to any potential Awardee deficiencies, failure to comply with technical requirements of the award, or questionable practices so that corrections can be made before the problem becomes significant.
5. Ensure that all required items, documentation, data, and/or reports are submitted as required by the award.
6. Recommend, in writing, to the AO any changes desired in scope and/or technical provisions of the award with a justification for the proposed action. Only the AO can authorize changes in the award document.
7. Assure compliance with requirements in accordance with the terms, conditions, and specifications of the award. Assist the Awardee and AO in interpreting technical requirements of the award. Differences of opinion shall be referred to the AO for resolution.
8. Ensure all requirements are met for Awardee entrance procedures for access to NSF facilities and IT systems, if applicable. Entrance requirements include background checks, building access, network account creation, security awareness training and any other required clearances. Coordinate site entry for Awardee personnel, if applicable. Assist in obtaining badges, if necessary, and maintain a list of Awardee employees who will be working at the NSF facility. This responsibility includes exit procedures for ensuring the disabling of network account access (e.g. email) and return of badges (i.e. building access card, Federal ID card, and/or Datawatch card (if issued)) to the ID Card office on the 4<sup>th</sup> floor in room E 4420 after the Awardee no longer requires access to NSF facilities.

See [SOP SS-03 SECURITY BADGE PROCEDURE](#) for the NSF process on obtaining

identification badges for contractors. See also the Contractor Onboarding and Separation Guide [here](#).

9. Plan and coordinate NSF workspaces for Awardee personnel, as required, with the Facilities Management Section of the Division of Administrative Services (OIRM/DAS). See [here](#) for OIRM/DAS/FMS points of contact. To request NSF workspaces for, send your request via e-mail to [BuildingServices@nsf.gov](mailto:BuildingServices@nsf.gov).
10. Ensure that Government Furnished Property (GFP), if any, is available when required and report any accountable property to the NSF Property Specialist (OIRM/DAS). Alert the NSF Property Specialist (OIRM/DAS) and the AO to any potential or existing GFP issues. Monitor the Awardee's use, care and return of any GFP. See [here](#) for OIRM/DAS Property Management Section points of contact. Awardees must fill out "Contractor Exit Form 1601" for the return of Government Furnished Equipment. The form can be found [here](#).
11. Inspect all deliverables or monitor services for conformance to the performance standards and accept or reject them. Notify the AO of any rejected deliverables or services.
12. Review Awardee invoices and recommend approval/disapproval for payment. Review all invoices and vouchers in a timely manner in accordance with the Prompt Payment Act to avoid payment of interest penalties. Report any discrepancies in invoices to the AO. Invoices are reviewed/approved/disapproved electronically via the Invoice Processing Platform (IPP) system. To obtain an IPP account at NSF, you must take the "Invoice Processing Platform (IPP) User Training" (online) in LearnNSF and submit an account request to your AO.
13. Create and maintain an official AOR file, and promptly document actions taken and decisions that you make as the AOR. Maintain adequate records to sufficiently describe the performance of your duties as AOR during the life of the contract.

At a minimum, the AOR file should contain copies of the following:

- The signed AOR appointment memorandum and signed acknowledgment.
- The award and any modifications.
- All award-related correspondence.
- Records of AOR inspections and surveillance.
- Records of conversations and correspondence with the Awardee.
- Meeting minutes and attendees.
- Record of all GFP and disposition.
- Invoices/vouchers.
- Trip reports.

**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 96 of 97**

14. Coordinate with the AO to ensure all Awardee (and subawardee/subcontractors as applicable) have signed non-disclosure agreements, if required by the agreement and due to the nature of any information they may receive.
15. Safeguard the Awardee's confidential business and technical information.
16. Ensure all Awardee personnel identify themselves and their company affiliation in all communications (written, telephonic, and electronic) related to the Award.
17. Provide Government-developed cost estimates and other supporting information as required by the AO, when changes to the award are required.
18. Ensure that proper action has been taken to formally modify the award before the Awardee proceeds with any changes in the work or services to be performed.
19. Assist the AO in negotiating supplemental agreements and coordinating with the Awardee.
20. Review and evaluate the Awardee's progress in relation to expenditures and advise the AO of any disparity indicating excessive or deficient funding.
21. Monitor the Awardee's compliance with safety, security, labor, and environmental requirements. Immediately bring to the Awardee's attention any potentially hazardous working conditions.
22. Oversee and monitor the Awardee's performance, records, and transactions for potential fraud, waste, abuse, bribery, theft, conflict of interest, or other improper conduct or offenses showing lack of integrity by the Awardee or Awardee personnel. Promptly notify the AO as this behavior may warrant suspension or debarment.
23. Perform final inspection and acceptance of all work required under the contract, including review and approval of reports, and assist the AO with closeout activities as requested.
24. Seek guidance from the AO for specific situations not covered in the delegation.



**Other Arrangements/Transactions Guide**  
**(Effective April 22, 2024)**  
**Page 97 of 97**

Your designation as AOR shall remain in effect through the closeout of the award unless revoked sooner by the AO in writing. If your designation is revoked for any reason before completion of this contract, turn your records over to the successor AOR or obtain disposition instructions from the AO. If you are reassigned or separated, request termination and relief from your duties from the AO sufficiently in advance of your reassignment or separation to permit timely selection and designation of a successor AOR.

I accept the appointment as an AOR:

\_\_\_\_\_

Signature

\_\_\_\_\_

Print Name

\_\_\_\_\_

Date