

## **Buyer Special U.S. Government Flowdowns**

### **DOTC 19-04-INIT4091 Flowdowns**

As appropriate throughout, replace “Ordnance Technology Initiative Agreement”, “OTIA” or “DOTC OTA” with “AGREEMENT”; “Agreement Officer”, “Agreements Officer’s Representative”, “AO”, “AOR”, “Consortium Member Firm”, “CMF”, or “Government” with “Buyer”; “NAC Member” with “Seller”

### **INCREMENTAL FUNDING (applicable to cost plus efforts)**

If at any time the Seller has reason to believe that the Total Estimated Cost which will accrue in the performance of this AGREEMENT in the next succeeding thirty (30) days, when added to all other payments previously accrued, will exceed seventy-five percent (75%) of the then current total authorized funding, the Seller shall notify the Buyer to that effect, advising the estimate of additional funds required for the period specified. The Seller is not obligated to continue performance under this AGREEMENT (including actions under the Termination clause of the AGREEMENT) or otherwise incur costs in excess of the amount allotted to the AGREEMENT by the Buyer.

### **MARKING OF DELIVERABLES**

Any Data delivered under this AGREEMENT, by the Seller, shall be marked with a suitable legend.

### **REPORTS**

The Seller shall assist the Buyer by providing information, as requested, to create reports for submittal to the end user. The information and reports shall include records of activities performed, and if cost plus effort, funds expended under this AGREEMENT.

### **TERMINATION PROVISIONS (supersedes Article 14d of the Day & Zimmermann Standard General Terms and Conditions for Goods & Services)**

Subject to a reasonable determination that the program, or a project funded under the program, will not produce beneficial results commensurate with the expenditure of resources, the Government, in its sole discretion, may terminate performance of work under the DOTC OTA or a specific project, in whole or in part, if the AO determines that a termination is in the Government’s best interest. The CMF shall terminate by delivering to the NAC Member a Notice of Termination specifying the extent of the termination and the effective date.

After receipt of a Notice of Termination, and except as directed by the CMF, the NAC Member, shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due:

1. Stop work and direct the subrecipients stop work as specified in the notice.
2. Place no further orders for materials, services, or facilities, except as necessary to complete the continued portion of the OTIA.
3. Terminate all orders to the extent they relate to the work terminated.
4. Assign to the Government, as directed by the AO through the CMF, all right, title, and interest of the NAC Member under the orders terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.
5. With approval or ratification to the extent required by the AO, settle all outstanding liabilities and termination settlement proposals arising from the termination of orders; the approval or ratification will be final for purposes of this clause.
6. As directed by the AO through the CMF, the NAC Member under the terminated portion of the OTIA must provide a transfer of title to the following where applicable and deliver to the Government:
  - a. The fabricated or un-fabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated; and
  - b. The completed or partially completed plans, drawings, information, and other property that, if the order had been completed, would have been required to be furnished to the Government.
7. Complete performance of any work not terminated, if applicable.
8. Take any action that may be necessary, or that the AO through the CMF may direct, for the protection and preservation of the property related to this project that is in the possession of the NAC Member and in which the Government has or may acquire an interest.
9. Use its best efforts to sell, as directed or authorized by the AO through CMF, any property of the types referred to under Termination Provisions, (6)(a) and (b); provided, however, that the NAC Member:
  - a. Is not required to extend credit to any purchaser, and
  - b. May arrange to acquire the property under the conditions prescribed by, and at prices approved by, the AO.

The proceeds of any transfer or disposition of project property will be applied to reduce any payments to be made by the CMF under that particular project, including credited to the price or cost of the work, or paid in any other manner directed by the CMF.

In the event of a termination of the Agreement, the Government shall retain or assume all patent rights as described in Patent Rights, and all rights in data as described in Data Rights and Copyrights.

### Termination Costs

The CMF shall negotiate with the Government and the NAC Member in good faith an equitable reimbursement for appropriate work performed under the OTIA. Costs incurred by the NAC Member awarded an OTIA after receipt of a Notice of Termination are not allowable unless the CMF expressly authorizes them as part of the termination activities.

## Stop Work Order

As directed by the Agreements Officer, the CMF may, at any time, by written order to the NAC Member, require the NAC Member awarded an OTIA to stop all, or any part, of the work called for under any OTIA for a period of ninety (90) calendar days after the written order is delivered to the NAC Member, and for any further period to which the parties may agree. The order shall be specifically identified as a stop work order issued under this Section. Upon receipt of the Stop Work Order, the NAC Member 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 to the NAC Member, or within any extension of that period to which the parties have agreed, the CMF shall either:

1. Cancel the stop work order, or
2. Terminate, in whole or in part, the work covered by the OTIA.

If a Stop Work Order issued under this clause is canceled, the NAC Member awarded the OTIA shall resume work. The Government through the CMF shall make an equitable adjustment in the delivery schedule or OTIA cost or price, or both. The Government through the CMF will modify the OTIA accordingly if:

1. The Stop Work Order results in an increase in the time required for, or in the NAC Member's cost properly allocable to, the performance of any part of the OTIA; and
2. The NAC Member awarded the OTIA asserts its right to the adjustment within thirty (30) calendar days after the end of the period of work stoppage; provided that, if the Government decides the facts justify the action, the Government through the CMF may receive and act upon a proposal submitted at any time before final payment under the OTIA.

If a Stop Work Order is not canceled and the work covered by the OTIA is terminated in accordance with Termination Provisions, the CMF shall work with the NAC Member to negotiate an equitable reimbursement in accordance with Termination Costs.

## Material Breach

If a NAC Member materially fails to comply with the provisions of this Agreement or its OTIA, the Agreements Officer through the CMF, 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 NAC Member;
2. Disallow all or part of the cost of the activity or action causing the breach;
3. Terminate the OTIA in whole or in part; or
4. Take any other legally available remedies.

## **CONFIDENTIAL INFORMATION**

### A. Definitions

“Confidential Information” means information and materials which are designated as Confidential or as a Trade Secret in writing, whether by letter or by use of an appropriate stamp

or legend, prior to or at the same time any such information or materials are disclosed by such Disclosing Party to the Receiving Party. Notwithstanding the foregoing, materials and other information which are orally, visually, or electronically disclosed by a Disclosing Party, or are disclosed in writing without an appropriate letter, stamp, or legend, shall constitute Confidential Information or a Trade Secret if the Disclosing Party, within thirty (30) calendar days after such disclosure, delivers to the Receiving Party a written document or documents describing the material or information and indicating that it is confidential or a Trade Secret, provided that any disclosure of information by the Receiving Party prior to receipt of such notice shall not constitute a breach by the Receiving Party of its obligations under this Paragraph. "Confidential Information" also includes any information and materials considered a Trade Secret by the NAC on its own behalf or on behalf of the CMF or NAC Members, or their subcontractors or suppliers.

"Trade Secret" means all forms and types of financial, business, scientific, technical, economic, engineering or otherwise proprietary information, including, but not limited to, patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, regardless of how it is stored, compiled, or memorialized, including physically, electronically, graphically, photographically, or in writing if:

1. The owner has taken reasonable measures to keep such information secret; and
2. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by the public.

## B. Exchange of Information

The Government may from time to time disclose Government Confidential Information to the NAC for use by the CMF or NAC Members awarded OTIAs, their subcontractors or suppliers, in connection with the Annual Technology Plan and similar processes or particular projects. The CMF, on behalf of the NAC, NAC Members, their subcontractors or suppliers, may from time to time disclose information that is Trade Secret or Confidential Information to the Government in connection with this Agreement, a project proposal, DOTC Base Agreements, or performance under an OTIA. Neither Party shall be obligated to transfer Confidential Information or Trade Secrets independently developed by the Parties, absent an express written agreement between the Parties providing the terms and conditions for the disclosure.

## C. Confidentiality and Authorized Disclosure

The Receiving Party agrees, to the extent permitted by law, that Confidential Information and Trade Secrets shall remain the property of the Disclosing Party, and that, unless otherwise agreed by the Disclosing Party, Confidential Information and Trade Secrets shall not be disclosed, divulged, or otherwise communicated to third parties or used by for any purposes other than in connection with specified project efforts and the licenses granted in Patent Rights, and Data Rights and Copyrights. The aforementioned shall not extend to information or materials that:

1. Are received or become available without restriction to the Receiving Party under a proper, separate agreement;
2. Are not identified with a suitable notice or legend;
3. Are lawfully in possession of the Receiving Party without such restriction to the Receiving Party at the time of disclosure, as demonstrated by prior written records;
4. Are or later become part of the public domain through no fault of the Receiving Party;
5. Are received by the Receiving Party from a third party having no obligation of confidentiality to the Disclosing Party that made the disclosure;
6. Are developed independently by the Receiving Party without use of Confidential Information or Trade Secrets, as evidenced by written records; or
7. Are required by law or regulation to be disclosed, provided, however, that the Receiving Party has given written notice to the Disclosing Party promptly so as to enable such Disclosing Party to seek a protective order or otherwise prevent further disclosure of such information.

#### D. Return of Proprietary Information

Upon the request of either Party, the other Party shall promptly return all copies and other tangible manifestations of the Confidential Information or Trade Secrets that were disclosed. As used in this section, tangible manifestations include human readable media as well as magnetic and digital storage media.

#### E. Term

Except to the extent covered by and subject to other provisions of this Agreement or the specific OTIA, the obligations of the Receiving Party under this Article shall continue for a period of five (5) years after the expiration or termination of the OTIA under which the information was provided.

The NAC Member, shall flow down the requirements of this Article to their respective personnel, member entities, and agents at all levels.

### **PUBLICATION AND ACADEMIC RIGHTS**

#### A. Use of Information

Subject to the provisions of Confidential Information, and other applicable provisions of this Agreement, the Government and the NAC Members awarded OTIAs shall have the right to publish or otherwise disclose information or data developed by the Government or the respective NAC Members under OTIAs. The NAC Members awarded OTIAs shall include an appropriate acknowledgement of the sponsorship of the projects by the Government in any such publications or disclosures.

#### B. Classified Research Projects

If a desired publication includes information relating to a Classified project, the provisions of the

DoD Security Agreement (DD Form 441), Certificate Pertaining to Foreign Interests (SF 328), and the DoD Contract Security Classification Specification (DD Form 254) apply.

### C. Review or Approval of Technical Information for Public Release

At least thirty (30) calendar days prior to the scheduled release date, the NAC Member awarded an OTIA, shall submit to the AOR at least one (1) copy of the information to be released along with the required public release form. The AOR will route the information to the cognizant Public Affairs Office for review and approval. The AOR is hereby designated as the approval authority for the Agreements Officer for such releases.

Where an Academic Research Institution is awarded an OTIA, who is performing fundamental research on campus the CMF shall require such NAC Member to provide papers and publications to the AOR for review and comment at least thirty (30) calendar days prior to the formal paper or publication submission. However, if that Academic Research Institution incorporates into its research results or publications artifacts produced by and provided to these institutions by other (non-educational institution) NAC Members (or has authors listed on the paper who are not employees or students of the Academic Research Institution), then the procedures in the preceding paragraph shall be followed.

Parties to this Agreement are responsible for assuring that an acknowledgment of Government support will appear in any publication of any material based on or developed under the awarded OTIA, using the following acknowledgement terms:

“This effort was sponsored by the U.S. Government under the DoD Ordnance Technology Consortium (DOTC) Other Transaction Agreement (OTA) (W15QKN-18-9-1008) with the National Armaments Consortium (NAC). The U.S. Government is authorized to reproduce and distribute reprints for Government purposes notwithstanding any copyright notation herein.”

Parties to this Agreement are also responsible for assuring that every publication of material based on or developed under an OTIA contains the following disclaimer:

“The views and conclusions contained herein are those of the authors and should not be interpreted as necessarily representing the official policies or endorsements, either expressed or implied, of the U.S. Government.”

The NAC Member shall flow down these requirements to its subcontractors at all tiers.

### D. Notices

To avoid disclosure of Confidential Information or Trade Secrets belonging to the Government or a NAC Member, or the loss of patent rights as a result of premature public disclosure of patentable information, the NAC Member that is proposing to publish or disclose such information provide advance notice to the CMF and identify such other parties, including the Government, as may have an interest in the information. The CMF shall notify such parties at least thirty (30) calendar days prior to any NAC Member’s submission for publication or disclosure, together with any and all materials intended for publication or disclosure relating to

technical reports, data, or information developed by the parties during the term of and pursuant to this Agreement. The Government must notify the CMF of any objection to disclosure within the thirty (30) day period, or the NAC Member shall be deemed authorized to make the disclosure.

#### E. Filing of Patent Applications

During the course of the aforementioned thirty (30) calendar day period, the NAC Member or the Government shall provide notice to the Agreements Officer if either desires that a patent application be filed on any invention potentially disclosed in the materials. In the event that the NAC Member or the Government desires that such a patent be filed, the NAC shall ensure that the publication of the materials is withheld until the occurrence of the first of the following:

1. Filing of a patent application covering the invention;
2. Written agreement, from the Agreements Officer and the CMF, with the authorization of the cognizant NAC Member, that no patentable invention is disclosed in such materials; or
3. Written agreement, from the Agreements Officer and the CMF, with the authorization of the cognizant NAC Member, that all potentially patentable information is removed from the proposed publication.

### **PATENT RIGHTS**

#### A. Allocation of Principal Rights

Patent Rights under this Agreement or subsequent OTIAs shall be determined in accordance with FAR 52.227-11 (Patent Rights—Ownership by the Contractor (May 2014)), which is hereby incorporated by reference with the following modifications:

1. As appropriate, replace “Contractor” with “NAC Member”; “the agency” and “the Federal Agency” with “Government”; “contract” with “Agreement”; and “Contracting Officer” with “Agreements Officer”.
2. The Government shall have the initial option to retain title to each subject invention made only by Government employees or made jointly by the NAC Member and Government employees. The Government shall promptly notify the NAC Member upon making this election, and agrees to timely file patent applications at its own expense and agrees to grant to the NAC Member a non-exclusive, irrevocable paid-up license to practice the subject invention throughout the world.
3. The NAC Member shall elect in writing whether or not to retain ownership of any subject invention by notifying the Agreements Officer within six (6) months of disclosure. In any case where publication, on sale, or public use has initiated the one (1) year statutory period during which valid patent protection can be obtained in the United States, the period of election of title shall no later than sixty (60) calendar days prior to the end of the statutory period.
4. The CMF, on behalf of the NAC Member, may request an extension to the six (6) month period for ownership election. The Agreements Officer may, in their discretion,

extend the ownership election period, but the ownership election period shall not exceed two (2) years from the disclosure of the subject invention.

FAR 52.227-1 (Authorization and Consent (Dec 2007)) and Alternate I (Apr 1984) and FAR 52.227-2 (Notice and Assistance Regarding Patent and Copyright Infringement (Dec 2007)) are also incorporated by reference under this Agreement. If FAR 52.227-3 3 (Patent Indemnity (Apr 1984)) is applicable, it shall be incorporated into the OTIA. Notwithstanding anything herein to the contrary, nothing herein shall limit Buyer's rights to the intellectual property rights denoted in Buyer's Standard General Terms and Conditions for Goods & Services. Further, nothing herein shall amend or omit Buyer's rights in intellectual property owned or licensed prior to this agreement.

#### B. Patent Reports

All DOTC Base Agreements shall require the use of DD Form 882, Report of Inventions and Subcontracts, to file an invention report for every OTIA. Negative reports are also required. The NAC Member shall provide the CMF, with an Annual Invention Report at the close of each performance year of each OTIA and at the end of the term of each OTIA.

#### C. Final Payment

Final payment of an OTIA cannot be made until the NAC Member delivers to the CMF all disclosures of subject inventions and confirmatory instruments required by this Agreement.

#### D. Lower Tier Agreements

The NAC Member shall include this Article, suitably modified in all lower tier agreements, regardless of tier, for experimental, developmental, or research work performed under the OTIAs awarded pursuant to this Agreement.

The provisions of this Article shall survive termination of this Agreement.

### **DATA RIGHTS AND COPYRIGHTS**

Although this Article shall serve as the default and overarching terms and conditions for the handling of Data Rights and Copyrights, every OTIA is individually negotiated, and any specific Data Rights or Copyright terms and conditions in the OTIA Statement of Work will control over this Article. Notwithstanding anything herein to the contrary, nothing herein shall limit Buyer's rights to the intellectual property rights denoted in Buyer's Standard General Terms and Conditions for Goods & Services. Further, nothing herein shall amend or omit Buyer's rights in intellectual property owned or licensed prior to this agreement.

Technical Data and Computer Software Rights under this Agreement shall be determined in accordance with DFARS 252-227-7013 (Rights in Technical Data—Noncommercial Items (Feb 2014)) and DFARS 252.227-7014 (Rights in Noncommercial Computer Software and



Noncommercial Computer Software Documentation (Feb 2014)), except at otherwise specified in this Article or the OTIA. The definitions included in this Article shall replace the definitions found in the referenced DFARS clauses.

#### A. Definitions

“Government Purpose” means any activity in which the Government is a party. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

“Government Purpose Rights” means the right to use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; and to release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for Government purposes. This is a middle path unique to defense contracts that allows contractors to have the exclusive right to use the technical data in the commercial market. Unless otherwise agreed, Government Purpose Rights convert to Unlimited Rights five years after execution of the OTIA.

“Limited Rights” means the right to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party. However, the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if it is necessary for emergency repair and overhaul, or a release or disclosure to a covered Government support contractor in performance of its covered Government support contract (management and administrative support). The recipient of the technical data is subject to prohibition on the further reproduction, release, disclosure, or use of the technical data, and the contractor or subcontractor asserting the restriction shall be notified of such reproduction, release, disclosure, or use.

“Restricted Rights” applies only to noncommercial computer software and means the Government’s right to use a computer program on a limited number of computers, and make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes. However, the Government may allow the use of the noncommercial computer software outside of the Government under a limited set of circumstances, including use by a covered Government support contractor in performance of its covered Government support contract (management and administrative support), and after the contractor or subcontractor asserting the restriction is notified.

“SBIR Data Rights” refers to a Small Business Innovation Research contract and applies to both technical data and computer software. The contractor is entitled the SBIR data protection to all technical data and computer software developed during performance of a SBIR Phase III

agreement, regardless of the funding source. SBIR Data Rights are generally equivalent to Limited Rights for technical data and Restricted Rights for computer software. In the DOD, SBIR Data Rights survive for five years from the completion of the project, at which point they will convert to Unlimited Rights. SBIR efforts are divided into three successive phases (I, II, III), with the ultimate goal of commercializing the technology in question. The Government can award an unlimited number of SBIR Phase III agreements as long as they are a logical follow-on to the technology being developed, and with the understanding that the five-year clock restarts with every award.

“Specifically Negotiated License Rights” means any modification by mutual agreement to the standard DFARS noncommercial data rights categories (Unlimited Rights, Government Purpose Rights, Limited/Restricted Rights) laid out in this Article that the Government and NAC Member consider appropriate to the specific contract action, but shall not provide rights less than that provided by Limited Rights. Any rights so negotiated shall be identified in a license agreement written into or made part of the OTIA.

“Technical Data” means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial or management information.

“Unlimited Rights” means the right to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

## B. Allocation of Principle Rights

The Government shall receive a Government Purpose Rights license or an Unlimited Rights license to all technical data and computer software developed and delivered under this Agreement, except for the technical data and computer software that was previously developed exclusively at private expense and identified in the OTIA Statement of Work. To the maximum extent practicable, segregable portions of deliverables that will be restricted shall be clearly identified and labeled by the NAC Member.

The Government and the NAC Member can negotiate for a specific level of rights to all, or a distinct subset of the technical data and computer software that is developed and delivered for a specific OTIA, which will have the full force and effect of an executed license.

If the Government and the NAC Member agree to engage in a Cost Share OTIA, and the NAC Member desires to contribute more than 50% of the total costs of the project, the Government may agree to a Limited or Restricted Rights license to all technical data and computer software developed and delivered under the OTIA, or any other mutually agreed upon level of rights to a distinct subset of the technical data and computer software developed and delivered under the OTIA.

## C. Copyrights

The NAC Member reserves the right to protect by copyright original works developed under this Agreement and any subsequent OTIA, pursuant to 17 U.S.C. §§ 401 and 402. All such copyrights will be in the name of the individual NAC Member. The NAC Member, hereby grants to the Government a non-exclusive, non-transferable, royalty-free, fully paid-up license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, for Governmental purposes, any copyrighted materials developed under this Agreement, and to authorize others to do so.

In the event that information is exchanged with a notice indicating that it is protected under copyright as a published, copyrighted work, and it is also indicated that such information existed prior to, or was produced outside of this Agreement or any subsequent OTIA, the Government, the CMF or the NAC Member receiving the information and others acting on its behalf may reproduce, distribute, and prepare derivative works for the sole purpose of carrying out its responsibilities under this Agreement.

#### D. Handling of Data

The NAC Member shall clearly identify, prior to award, the technical data and computer software (and the items, components or processes to which they pertain) that will have asserted restrictions in each OTIA Statement of Work. If, after award, the NAC Member wishes to use any other internally developed technical data or computer software, or any other pre-existing proprietary information not previously identified in the OTIA Statement of Work, then the NAC Member shall disclose its intent in writing the CMF prior to its use, and shall receive written approval from the Agreements Officer through the CMF prior to its use or incorporation. The asserted restrictions in the OTIA Statement of Work are the unilateral claims of the NAC Member, and the inclusion of those restrictions in the OTIA Statement of Work does not equate to the Government's agreement to those claims. At any time, the Government has the right to request substantiating information supporting those claims, and can challenge or reject those claims if they are unsupported.

**Technical Data and Computer Software Provided by the Government:** Technical data and computer software provided by the Government under this Agreement shall be appropriately marked with a suitable notice or legend and maintained in confidence and disclosed and used by the NAC Member only for the purpose of carrying out their responsibilities under a specific OTIA.

At no time will technical data and computer software provided by the Government under this Agreement become the property of the NAC Member, nor does its use in carrying out their responsibilities grant any form of license to the NAC Member to disclose or use that technical data or computer software for any other purpose, unless specifically agreed to in writing by the Agreements Officer. This includes all technical data and computer software first produced by the Government under this Agreement. All OTIAs that contain technical data or computer software provided by the Government shall have appropriate non-disclosure agreements signed by the NAC Member. Upon completion of an OTIA, the aforementioned technical data and computer software shall be disposed of as requested by the Government.

Oral and Visual Information: If information which the NAC or any NAC Member considers to embody trade secrets or to comprise commercial or financial information which is privileged or confidential is disclosed orally or visually to the Government, the exchange of such information must be reduced to a tangible, recorded form and marked with a suitable notice or legend, and furnished to the Government within ten (10) calendar days after such oral or visual disclosure, or the Government shall have no duty to limit or restrict, and shall not incur any liability for any disclosure and use of such information.

Disclaimer of Liability: Notwithstanding the above, the Government shall not be restricted in, nor incur any liability for, the disclosure and use of:

1. Data or software not identified with a suitable notice or legend as set forth in this Article;

Nor

2. Information contained in any data or software for which disclosure and use is restricted under Confidential Information, if such information is or becomes generally known without breach of the above, is known to or is generated by the Government independently of carrying out responsibilities under this Agreement, is rightfully received from a third party without restriction, or is included in data or software which the NAC Member have or is required to furnish to the Government without restriction on disclosure and use.

#### E. Marking of Data

Except for technical data and computer software developed or delivered with Unlimited Rights, all technical data and computer software developed and delivered under this Agreement shall have appropriate Data Rights Markings in accordance with DFARS 252.227-7013(f) and 252.227- 7014(f). The Government will have Unlimited Rights to all unmarked technical data or computer software. In the event that unmarked technical data or computer software should have contained a restrictive legend, the CMF, on behalf of the NAC Member, can cure the omission by providing written notice to the Agreements Officer within thirty (30) calendar days of the erroneous disclosure. The Government will not be responsible for any additional disclosures of the inappropriately marked technical data or computer software prior to that written notice.

#### F. Lower Tier Agreements

The NAC Member shall include this Article, suitably modified, in all lower tier agreements, regardless of tier, for work performed under the OTIAs awarded pursuant to this Agreement. The provisions of this Article shall survive termination of this Agreement.

### **EXPORT CONTROL**

#### A. Export Control

The Parties shall comply with U.S. Export regulations including, but not limited to, the requirements of the Arms Export Control Act, 22 U.S.C. § § 2751-2794, including the International Traffic in Arms Regulation (ITAR), 22 C.F.R. § 120 et seq.; and the Export Administration Act, 50 U.S.C. app. § 2401-2420. Each party is responsible for obtaining from the Government export licenses or other authorizations/approvals, if required, for information or materials provided from one party to another under this Agreement. Accordingly, the Parties shall not export, directly or indirectly, any products or technology, Confidential Information, Trade Secrets, or Classified and Unclassified Technical Data in violation of any U.S. Export laws or regulations.

## B. Lower Tier Agreements

The NAC Member shall include this Article, suitably modified in all lower tier agreements, regardless of tier, for work performed under the OTIAs awarded pursuant to this Agreement. The provisions of this Article shall survive termination of this Agreement.

## SECURITY

The highest security classification level for the DOTC Base Agreement is Unclassified. However, individual OTIAs may require access to Classified Information, including but not limited to information classified as Controlled Unclassified Information (CUI), Confidential, Secret, or Top Secret. As such, DoD Manual 5200.01 (DoD Information Security Program: Protection of Classified Information) shall apply and all appropriate measures shall be followed. The NAC Member shall also comply with DD Form 254 (Contract Security Classification Specification), DD Form 441 (DoD Security Agreement), DoD 5220.22-M (National Industrial Security Program Operating Manual), and all other security requirements including but not limited to OPSEC requirements.

The NAC Member shall comply with Distribution Statements, as mandated by DoDI 5230.24 (Distribution Statements on Technical Documents).

Covered Defense Information (CDI) will be identified at the OTIA level. The NAC Member shall comply with DFARS 252.204-7012 (Oct 2016): Safeguarding Covered Defense Information and Cyber Incident Reporting, which includes implementing on its covered contractor information systems the security requirements specified by DFARS 252.204-7012. Nothing in this paragraph shall be interpreted to foreclose the NAC Member's right to seek alternate means of complying with the security requirements in National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171 (as contemplated in DFARS 252.204-7008 (Compliance with Safeguarding Covered Defense Information Controls) (Oct 2016) and DFARS 252.204-7012 (Safeguarding Covered Defense Information and Cyber Incident Reporting (Oct 2016))).

*The following is effective for all Initiatives issued on and after 16 March 2020.*

1. **For Contracts That Require Handling or Access to Classified Information. Requires the addition of:** “The contractor shall comply with FAR 52.204-2, Security Requirements. This clause involves access to information classified “Confidential,” “Secret,” or “Top Secret”

and requires contractors to comply with (1) the Security Agreement (DD Form 441), including the National Industrial Security Program Operating Manual (DoD 5220.22-M), and (2) any revisions to DoD 5220.22-M, notice of which has been furnished to the contractor.”

2. **For contracts that require access to potential Critical Program Information (PCPI)/ Critical Program Information (CPI): Requires the addition of:** “All contractor employees, including subcontractor employees, shall comply with the applicable Interim Program Protection Plan (IPPP)/ Program Protection Plan (PPP)/ or Technology Protection Plan (TPP). The contractor shall comply with DOD, DA, and AMC technology protection requirements in DODI 5200.39, AR 70-1, DA PAM 70-3, and AMC-R-380-13.”

- a. DoD 5200.01 DoD Information Security Regulation, 24 Feb 12, volumes 1 through 4
- b. DoD Manual 5200.02 Procedures for the DoD Personnel Security Program, effective April 3, 2017
- c. DoDD 5220.22 National Industrial Security Program, 28 Feb 06
- d. DoD 5400.7-R, DOD Freedom of Information Act, Sept 98
- e. ARDEC Clause 18, Physical Security Standards for Sensitive Items (Required when AA&E apply)
- f. ARDEC Clause 70, (FOUO) Release of Information Research and Development (reference FAR 2.101)
- g. FAR Clause 4.402, Safeguarding Classified Information Within Industry
- h. FAR Clause 52.204-2, Security Requirements, Aug 1996
- i. Army Regulation, 380-5, Army Information Security Program, 22 October 2019
- j. Army Regulation, 380-49, Industrial Security Program, 20 March 2013
- k. Army Regulation, 380-67, Personnel Security Program, 24 January 2014

## **SAFETY AND ENVIRONMENTAL**

OTIAs that involve the handling of Arms, Ammunition and Explosives (AA&E) shall be subject to all appropriate FAR and DFARS clauses, as well as all Federal, State and local rules and regulations required in order to maintain a safe and non-hazardous occupational environment. A Safety Survey will be conducted by the Government prior to handling of explosives, production of any hardware or fire testing under the OTIAs.

If an OTIA will involve AA&E or other Hazardous Material, the following clauses with their prescribed usages MUST be reviewed for applicability to the procurement action. The following Federal Acquisition Regulation Supplement (FARS), Defense Federal Acquisition Regulation Supplement (DFARS) clauses by reference, and local clauses with the same force and effect as if they were given in full text shall be incorporated into the OTIAs if applicable. Upon request, the CMF will make their full text available.

- DFARS 252.223-7001 Hazard Warning Labels
- DFARS 252.223-7002 Safety Precautions for Ammunition and Explosives
- DFARS 252.223-7003 Change in Place of Performance
- DFARS 252.223-7006 Prohibition on Storage and Disposal of Toxic and Hazardous Materials
- DFARS 252.223-7007 Safeguarding Sensitive Conventional Arms, Ammunition and Explosives
- FAR 52.223-3 Identification and Material Safety Data

FAR 52.247-29 F.O.B. Origin  
ARDEC 18 Physical Security Standards for Sensitive Items  
ARDEC 169 Explosive Material Handling  
ARDEC 66 Safety Requirements for Hazardous Items  
ARDEC 77 Material Safety Data Sheets

At a minimum, The NAC Member shall provide the following reports and materials on an as needed basis:

1. Accident/Incident Report: The NAC Member shall report immediately any major accident/incident (including fire) resulting in any one or more of the following: causing one or more fatalities or one or more disabling injuries; damage of Government property exceeding \$10,000; affecting program planning or production schedules; degrading the safety of equipment under initiative, such as personnel injury or property damage may be involved; and identifying a potential hazard requiring corrective action. The NAC Member shall prepare a DI-SAFT-81563 report for each incident.
2. Material Safety Data Sheets (MSDS): The NAC Member shall prepare and maintain MSDS for all materials used and generated under this Agreement.
3. Explosive Hazard Classification Report: The NAC Member shall submit an explosive hazard classification report (DI-SAFT-81299A) for each item that requires utilizing ARDEC capabilities to obtain Interim Hazard Classification (IHC) for shipment of R&D quantities of energetic materials and items in support of this Agreement. The NAC Member shall utilize the capability of ARDEC to obtain IHC for shipment of R&D quantities of energetic materials and items only on an as needed basis. In order to use this support, the NAC Member shall provide technical data (Explosive Hazard Classification Data) to ARDEC System Safety Group at least sixty (60) calendar days prior to shipment of the energetic materials or items. This will include the necessary data explained in Army Technical Bulletin (TB) 700-2 and DI-SAFT-81299A. DOT and UN Serial number information, along with packaging methods, will be based on Title 49, Code of Federal regulations (CFR). The NAC Member shall determine the explosive weight for quantity distance determination in accordance with the guidance of paragraph 15.4C of AMC-R 385-100.
4. Pollution Prevention: Consideration should be given to alternative materials and processes in order to eliminate, reduce, or minimize hazardous waste being generated. This is to be accomplished while minimizing item cost and risk to item performance.
5. Environmental Compliance: All activities must be in compliance with Federal, State, and local environmental laws and regulations, Executive orders, treaties, and agreements. The NAC Member shall evaluate the environmental consequences and identify the specific types and amounts of hazardous waste being generated during projects under this Agreement.

6. Hazardous Waste Report: The NAC Member shall evaluate the environmental consequences and identify the specific types and amounts of hazardous waste being generated during this Agreement. NAC Members shall submit a Hazardous Waste Report in accordance with DI-MGMT-80899.
7. Disposal Instructions for Residual/Scrap Materials: The NAC Member shall dispose of all residual and scrap materials generated from this Agreement, including high explosives. The NAC Member shall specify the anticipated quantities, methods, and disposal costs.

## **OPSEC**

Antiterrorism (AT) Level I Training. If a project requires the NAC Member employees to perform technical activities, e.g., activities other than administrative tasks, program reviews, demonstrations, or meetings, under this Agreement in a designated area of performance within a DoD installation, facility or area (herein referred to as “an area of performance”), then all the NAC Member employees, to include subcontractor employees, requiring access to DOD installation, facilities and controlled access areas shall complete AT Level I awareness training within thirty (30) calendar days after effective date of the award. The NAC Member shall submit certificates of completion for each affected NAC Member employee and subcontractor employee, to the AOR, within fifteen (15) calendar days after completion of training by all employees and subcontractor personnel. AT level I awareness training is available at the following website: <https://securityawareness.usalearning.gov/opsec/index.htm>.

Access and General Protection/Security Policy and Procedures. If a project requires the NAC Member employees to have an area of performance within a DoD installation, facility or area, the NAC Member employees and all associated sub-contractor employees shall comply with applicable installation, facility and area commander installation/facility access and local security policies and procedures (provided by Government representatives). The NAC Member shall also provide all information required for background checks to meet installation access requirements to be accomplished by installation Provost Marshal Office, Director of Emergency Services or Security Office. The NAC Member employees must comply with all personal identity verification requirements as directed by DOD, HQDA and/or local policy. In addition to the changes otherwise authorized, should the Force Protection Condition (FPCON) at any individual facility or installation change, the Government may require changes in the NAC Member’s security matters or processes.

AT Awareness Training for the project NAC Member personnel traveling overseas. If a project requires NAC Member employees or associated subcontractor employees to travel overseas, then NAC Member personnel and the NAC Member’s United States based NAC Member employees and associated sub-contractor employees shall be made available to receive Government provided area of responsibility specific AT awareness training as directed by AR 525-13. Specific area of responsibility training content is directed by the combatant commander with the unit ATO being the local point of contact.

iWATCH Training. If a project requires the NAC Member employees to have an area of



performance within a DoD installation, facility or area, all of the employees of the NAC Member and all associated sub-contractors shall be briefed on the local iWATCH program (training standards provided by the requiring activity ATO). This locally developed training will be used to inform employees of the types of behavior to watch for and to instruct employees to report suspicious activity to the AOR. This training shall be completed within thirty (30) calendar days of project award and within thirty (30) calendar days of new employees commencing performance with the results reported to the AOR NLT fifteen (15) calendar days after project award.

**Project Recipient Employees Who Require Access to Government Information Systems.** All NAC Member employees with access to a Government information system must be registered in the ATCTS (Army Training Certification Tracking System) at commencement of services, and must successfully complete the DoD Information Assurance Awareness training prior to access to the IS, and then annually thereafter.

If a project requires an OPSEC Standard Operating Procedure/Plan, the NAC Member shall develop an OPSEC Standard Operating Procedure (SOP)/Plan within ninety (90) calendar days of project award, to be reviewed and approved by the responsible Government OPSEC officer, per AR 530-1, Operations Security. This SOP/Plan will include the Government's critical information, why it needs to be protected, where it is located, who is responsible for it, and how to protect it. In addition, the NAC Member shall identify an individual within its organization who will be an OPSEC Coordinator. The NAC Member will ensure this individual becomes OPSEC Level II certified per AR 530-1.

If a project requires OPSEC Training, per AR 530-1, Operations Security, the NAC Member employees must complete Level I OPSEC training within thirty (30) calendar days of their reporting for duty. All the NAC Member employees must complete annual OPSEC awareness training.

If a project requires Information Assurance (IA)/information technology (IT) training, all NAC Member employees and associated sub-contractor employees must complete the DoD IA awareness training before issuance of network access and annually thereafter. All NAC Member employees working IA/IT functions must comply with DoD and Army training requirements in DoD 8570.01, DoD 8570.01-M and AR 25-2 within six (6) months of employment.

If a project requires information assurance (IA)/information technology (IT) certification, per DoD 8570.01-M, DFARS 252.239.7001 and AR 25-2, the NAC Member employees supporting IA/IT functions shall be appropriately certified upon contract award. The baseline certification as stipulated in DoD 8570.01-M must be completed upon project award.

If a project requires authorizing the NAC Member's personnel to accompany United States Armed Forces deployed outside the United States in contingency operations; humanitarian or peacekeeping operations; or other military operations or exercises, when designated by the combatant commander, DFARS Clause 252.225-7040, Contractor Personnel Authorized to Accompany US Armed Forces Deployed Outside the United States is applicable.

If a project requires Performance or Delivery in a Foreign Country, DFARS Clause 252.225-7043, Antiterrorism/Force Protection for Defense Contractors outside the United States is applicable.

This clause applies to both contingencies and non-contingency support. The key AT requirement is for non-local national personnel to comply with theater clearance requirements and allows the combatant commander to exercise oversight to ensure the NAC Member's compliance with combatant commander and subordinate task force commander policies and directives.

## **TITLE AND DISPOSITION OF PROPERTY**

In this Article, "property" means any tangible property other than property actually consumed during the execution of work under this Agreement.

### **A. Title to Property**

No significant items of property are expected to be acquired under this Agreement or subsequent OTIA by the NAC Member. Title to any item of property valued at \$10,000 or less or property with an acquisition value greater than \$10,000 that was included in the final proposal selected by the Government and that is acquired by the NAC Member pursuant to performance under an OTIA shall remain with the NAC Member upon acquisition with no further obligation of the Parties unless otherwise determined by the Agreements Officer. If an item of property with an acquisition value greater than \$10,000 is required after award, the NAC Member shall obtain prior written approval, if not included in the final proposal selected by the Government, from the Agreements Officer prior to acquisition. Title to this property shall remain with the Government unless the Agreements Officer grants title to the NAC Member prior to acquisition. The NAC Member shall be responsible for the maintenance, repair, protection, and preservation of all property acquired under this Agreement at its own expense. Property acquired pursuant to this Article shall not be considered as in exchange for services in performance of the project, but shall be considered a Government contribution to the project.

### **B. Government Furnished Property**

The Government may provide the NAC Member with Government Furnished Property (GFP) to facilitate the performance of individual projects under this Agreement. The GFP will be specifically identified and contractually inserted into a particular OTIA. The GFP shall be utilized only for performance of that individual OTIA unless a specific exception is made in writing by the Agreements Officer.

Except for NAC Members who have an adequate property management system as defined in FAR 52.245-1 (Jan 2017) and are using this system to manage the GFP provided in this Agreement, NAC Members who receive GFP for an OTIA shall assume the risk of and be responsible for any loss or destruction of, or damage to, any GFP while in its possession or control, with the exception of reasonable wear and tear or reasonable and proper consumption. All property shall be returned at the end of the OTIA in as good as condition as when received with the exception of said reasonable wear and tear or in accordance with the provisions of the

OTIA regarding its use. The NAC Member shall obtain explicit written authorization by the Agreement Officer for any transfer or disposition of GFP.

As applicable, the following clauses may be incorporated into OTIAs that utilizes GFP: FAR 52.245-1 Government Property; FAR 52.245-9 Use and Charges; DFARS 252.211-7007 Reporting of Government-Furnished Property; DFARS 252.245-7001 Tagging, Labeling, and Marking of Government-Furnished Property; DFARS 252.245-7002 Reporting Loss of Government Property; DFARS 252.245-7003 Contractor Property Management System Administration; and DFARS 252.245-7004 Reporting, Reutilization, and Disposal.

## **ANTITRUST**

The NAC and all NAC Members agree to comply with all applicable U.S. laws, including U.S. antitrust laws. The NAC's CMF, ATI, files periodic updates on behalf of NAC under the National Cooperative Research and Production Act of 1993.

## **DUTY-FREE ENTRY**

Unless supplies were imported into the customs territory of the United States prior to execution of an OTIA, NAC Members shall not include any amount for duty on (1) end products or qualifying country end products delivered under this Agreement; (2) components (including, without limitation, raw materials and intermediate assemblies) produced or made in qualifying countries that are to be incorporated into domestic end products delivered under this Agreement; or (3) other supplies for which the NAC Member estimates that duty will exceed \$200 per shipment into the customs territory of the United States. The definitions in DFARS 252.225-7013 Duty-Free Entry (May 2016) are incorporated by reference. NAC Members shall notify the CMF in writing of any items which are to be accorded duty-free entry. The Government will execute duty-free entry certificates and afford appropriate assistance, but the NAC Member is responsible for preparation of customs forms. NAC Members shall claim duty-free entry only for supplies that the will be delivered under this Agreement.

## **LIABILITY OF THE PARTIES**

### A. Waiver of Liability

With regard to the activities undertaken pursuant to this Agreement, 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.

### B. Damages

The Parties shall not 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. Notwithstanding the foregoing, claims for contribution toward third-party injury, damage, or loss are not limited, waived, released, or disclaimed.

#### C. Extension of Waiver of Liability

The NAC Member agrees to extend the waiver of liability as set forth above to subcontractors or sub entities at any tier under the DOTC Base Agreement by requiring them, by contract or otherwise, to agree to waive all claims against the Parties to this Agreement.

#### D. Applicability

Notwithstanding the other provisions of this Article, this Waiver of Liability shall not be applicable to (1) claims between the NAC Member, Government and the CMF regarding a material breach of contract or nonpayment of funds; (2) claims for damage caused by willful misconduct; and (3) intellectual property claims.

#### E. Limitation of Liability

In no case shall the CMF's or the NAC Member awarded an OTIA's financial liability exceed the amount obligated by the Government through the CMF or committed as a Cash Contribution or In-Kind Contribution by a NAC Member under an OTIA. Nothing in this Article shall be construed to create the basis of a claim or suit where none would otherwise exist.

### **ARMS, AMMUNITION, & EXPLOSIVES (AA&E)**

In accordance with Department of Defense regulations, this effort includes Arms, Ammunition, & Explosives (AA&E) and therefore requires that a safety and security survey be conducted by DCMA on the Ordnance Technology Initiative Recipient.

The DFAR clauses referenced below in effect on the date of this Ordnance Technology Initiative Agreement are incorporated herein. In all such clauses, unless the context of the clause required otherwise, the term "Contract" shall mean this Ordnance Technology Initiative Agreement and the term "Contractor" shall mean Ordnance Technology Initiate Recipient.

DFARS 252-223-7002 – Safety Precautions for Ammunitions and Explosives

DFARS 252-223-7003 – Change in Place of Performance

DFARS 252-223-7006 – Prohibition on Storage and Disposable of Toxic and Hazardous Materials

252.223-7007 Safeguarding Sensitive Conventional Arms, Ammunition, and Explosives.

As prescribed in 223.7203, use the following clause:

**SAFEGUARDING SENSITIVE CONVENTIONAL ARMS, AMMUNITION,  
AND EXPLOSIVES (SEP 1999)**

(a) Definition. “Arms, ammunition, and explosives (AA&E),” as used in this clause, means those items within the scope (chapter 1, paragraph B) of DoD 5100.76-M, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives.

(b) Reserved

(c) The Contractor shall comply with the requirements of DoD 5100.76-M, as specified in the statement of work. The edition of DoD 5100.76-M in effect on the date of issuance of the solicitation for this contract shall apply.

(d) The Contractor shall allow representatives of the Defense Security Service (DSS), and representatives of other appropriate offices of the Government, access at all reasonable times into its facilities and those of its subcontractors, for the purpose of performing surveys, inspections, and investigations necessary to review compliance with the physical security standards applicable to this contract.

(e) The Contractor shall notify the cognizant DSS field office of any subcontract involving AA&E within 10 days after award of the subcontract.

(f) The Contractor shall ensure that the requirements of this clause are included in all subcontracts, at every tier—

(1) For the development, production, manufacture, or purchase of AA&E; or

(2) When AA&E will be provided to the subcontractor as Government-furnished property.

(g) Nothing in this clause shall relieve the Contractor of its responsibility for complying with applicable Federal, state, and local laws, ordinances, codes, and regulations (including requirements for obtaining licenses and permits) in connection with the performance of this contract.