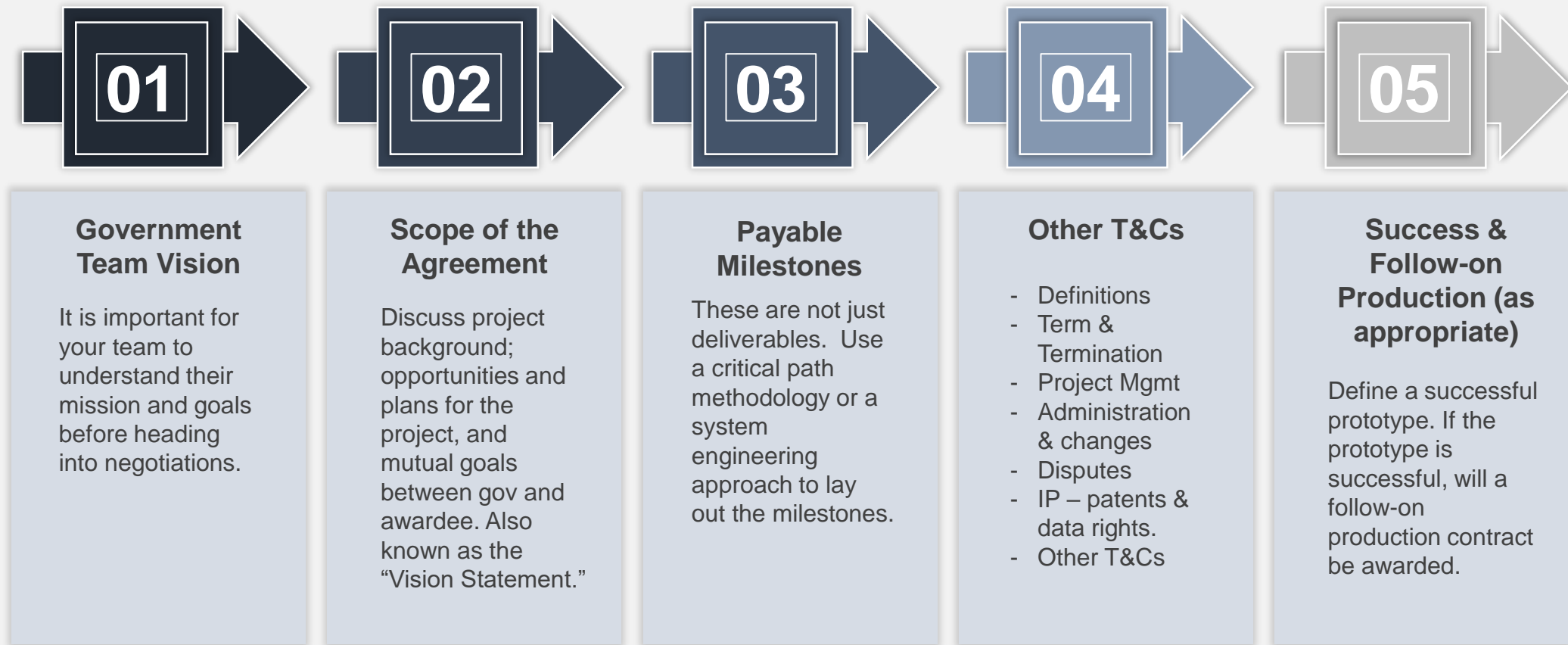


Contract Negotiations & Common Terms and Conditions



Sequence of Negotiations



Key Questions for Developing the Scope of the Agreement

- 1 What is the purpose of this agreement?
- 2 What is the current technological situation?
- 3 What qualities does the performer bring to the table?
- 4 Why is it necessary for the government to develop the project and what is its potential impact on the military and commercial sector?
- 5 Is there a potential or requirement for cost sharing?
- 6 What are the issues of particular importance to each party?
- 7 If the program is successful, then what? Will there be opportunity for follow-on production/fielding?
- 8 If the collaboration is successful, will the party's goals have been accomplished?



Payable Milestones

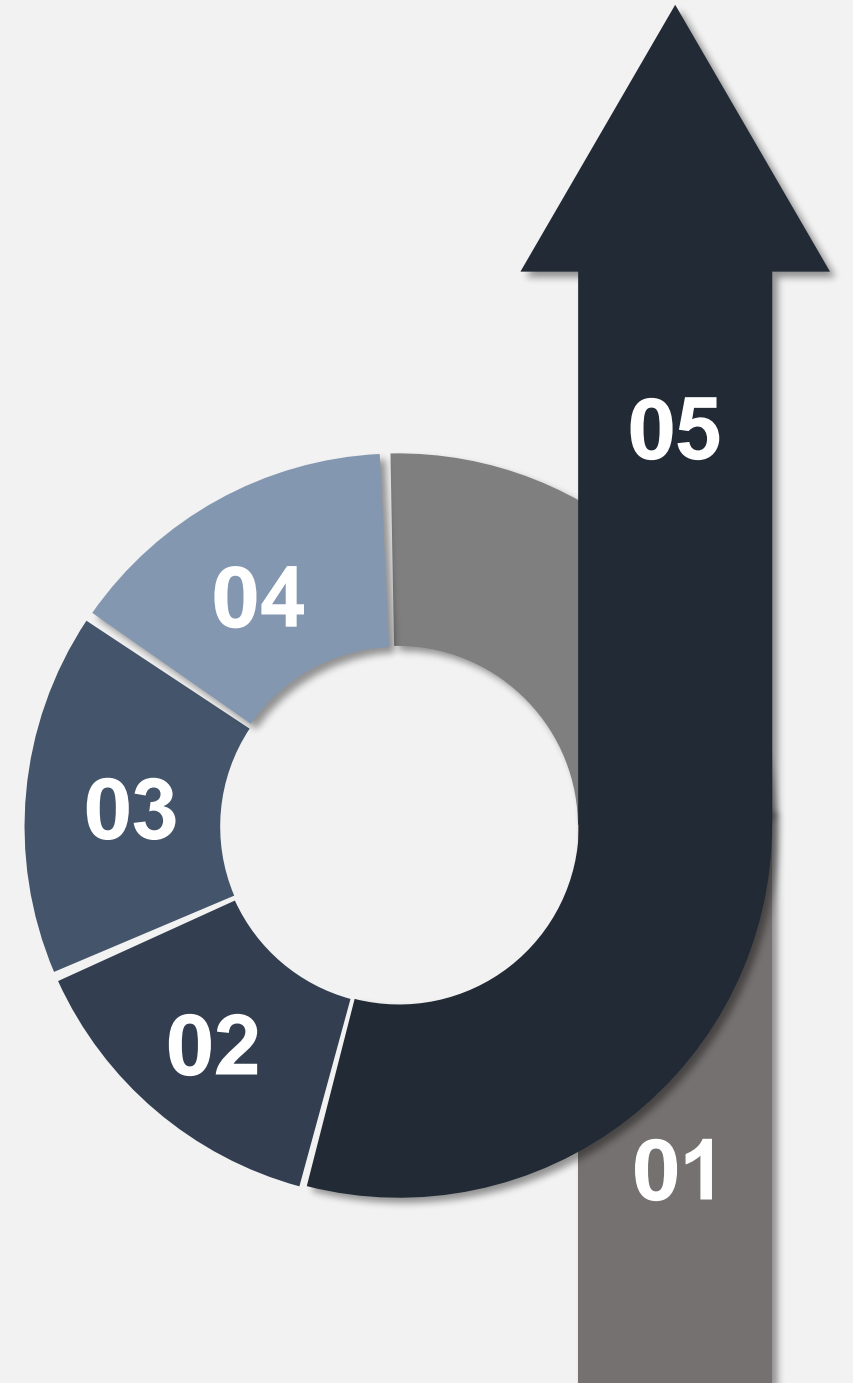
- It may be obvious but the agreement should specify how payments will be made
- Advance payments are permitted but typically “soft” milestones are used to start the infusion of revenue into the project
- Beyond initial soft milestones apply discipline to crafting milestones based on a systems engineering or critical path methodology
- Use milestones as a key management tool (fail early, revise as needed)
- Individual milestone payments may, but need not, correlate to expected expenses and certainly not beyond a ROM
- Define milestones clearly



Structuring Milestone Payments

- Deliverables Method
- Critical Path Method
- Systems Engineering Approach

NOTE: Use the Goldilocks Approach:
Not too few, Not too many, but “JUST RIGHT!”



Example: Space-x Falcon 9



Milestone	Criteria	Date	Amount
1	PM Plan Review	9/2006	\$23,133,133
2	Demo 1: Systems Req. Review	11/2006	\$5,000,000
3	Demo 1: Prelim Design Review	1/2007	\$18,133,133
4	Financing Round 1	3/2007	\$10,000,000
5	Demo 2: System Req. Review	3/2007	\$31,133,133
6	Demo 1: System Critical Design Review	8/2007	\$8,133,133
7	Demo 3: Systems Req. Review	10/2007	\$22,333,333
8	Demo 2: Prelim Design Review	12/2007	\$21,133,133
9	Demo 1: Readiness Review	2/2008	\$5,633,333
10	Financing Round 2	3/2008	\$10,000,000
11	Demo 3: Prelim Design Review	4/2008	\$23,333,333
12	Demo 2: System Critical Design Review	6/2008	\$21,133,333
13	Demo 1 Mission – 1 st launch	9/2008	\$5,633,333

Term & Termination

- The agreement should generally state a fixed term, however, the possibility of extending the term if funding and research opportunities warrant should be included
- Early termination should generally be through mutual consent
- Unilateral termination by one or by either party is a matter of negotiation
 - ▷ the government may want to assert the right to unilateral termination based on failure to achieve a milestone event due to inadequate partner performance
 - ▷ In high risk ventures the partner may want a “walk away” termination provision
- A process for wrap up in the event of early termination should be agreed upon



- Management provisions of an agreement will vary considerably based on the structure, scope and complexity of the project
- In simple projects it may be sufficient merely to designate which officials from each party have cognizance over (1) technical and (2) administrative matters and how changes in those matters are to be made
- Large or multi-party arrangements may call for a management committee, program operating plan, periodic program planning process, or other techniques
- A simple process for effecting modifications is essential; avoid all opportunity for delay in this process (note: there are no in scope/out of scope modifications; just modifications)

Agreement Management



Disputes

- **Craft an “all disputes” clause**; both remedies available under the agreement and breach of agreement claims are required to exhaust administrative remedies under the clause
- **Craft a clause that emphasizes early identification, frank discussion and mutual resolution of disputes**
- **Consider elevation to very senior officials of both parties**
- **Consider unilateral government final decision especially in multi-party agreements** (note Wunderlich Act)
- **Contract Disputes Act does not apply**
- Arbitration may not be the right answer



Intellectual Property

Seek the correct balance

Is any Intellectual Property actually needed?

- Why and for What?
- Do not assume traditional approach makes sense, especially if commercial market will drive upgrades and sustainment.



- Bayh-Dole Patent Act baseline (in some cases)
- Variations from Bayh-Dole such as:
 - a. **Permitting the contractor to keep the patentable invention** as a trade secret.
 - b. **Narrowing the Government-purpose license** so that (1) it applies to only one agency (versus the entire Government), or (2) it can be used only to make weapon systems.
 - c. **Eliminating march-in rights or placing further limitations on their exercise** than currently apply under existing laws and regulations.
 - d. **Eliminating the “or first actually reduced to practice” provision** in the definition of “subject invention.”
- Completely different patent regime – Cray Computer
- “Technical Data”
- Trade Secrets (10 USC 1905)
- Know How
- FOIA exemption



Intellectual Property

Pricing An Agreement

- Goal of R&D (accessing and applying knowledge)
- Not just buying things
- Consider Potential payoffs (government & industry)
 - ▷ Risk
 - ▷ Pre-existing investment
 - ▷ Science and engineering effort involved
 - ▷ Other



Traditional Contractor Resource Sharing Examples

2371b

- Payments structured using IRAD rates
- Payment of 2/3 incurred cost under standard rates
- Cash contributions in a jointly-funded project
- Refer to section III-J of OUSD 2018 OTA Guide



What Does Apply

STATUTE	APPLICABILITY
50 U.S.C. §§ 1431-1435, Extraordinary Contractual Authority and Relief, Public Law 85-804 (Kaminski Memorandum, Item 4)	Applies to both S&T and Prototype Other Transactions
10 U.S.C. § 2207, Expenditure of Appropriations: Limitation (Kaminski Memorandum, Item 5)	Applies to both S&T and Prototype Other Transactions
28 U.S.C. § Tucker Act	Other Transactions would be subject to the Tucker Act, and the Court of Federal Claims would have jurisdiction over such instruments.
18 U.S.C. § 1905, Trade Secrets Act	The Trade Secrets Act applies to information obtained by the Government in connection with both S&T and prototype Other Transactions.



What Does Apply

STATUTE	APPLICABILITY
31 U.S.C. § 1304, Judgements, awards, and compromise settlements	Payment from the Judgement Fund would be permitted for an S&T or prototype Other Transaction entered into under Section 2371, provided one of the circumstances described in Section 1304 exists.
31 U.S.C. § 131, Limitations on expending and obligating amounts	The statute applies to and S&T or prototype Other Transaction that would commit the Government to expend funds.
31 U.S.C. § 3801 et seq., Administration Remedies for False Claims and Statements	Applies to both S&T and prototype Other Transactions.



What Does Apply (sometimes)

STATUTE	APPLICABILITY
<p>31 U.S.C. §§ 3551 et seq., Procurement Protest System, Subtitle D of the Competition in Contracting Act, Pub L, No. 98-369 (1984) (Kaminski Memorandum, Item 3)</p>	<p>The protest system at GAO DOES NOT apply to protests over award of either S&T or prototype Other Transactions. However, GAO will review the agency's use of OTs to determine whether the statutory requirements of 10 U.S.C. § 2371 and § 2371b are met.</p>
<p>41 U.S.C. §§ 51-58, Anti-Kickback Act of 1986 (Kaminski Memorandum, Item 14)</p>	<p>The Anti-Kickback Act may apply to prototype Other Transactions. The Act DOES NOT apply to S&T Other Transactions.</p>
<p>5 U.S.C. § 522, Freedom of Information Act, (FOIA), as amended by FARA</p>	<p>The act applies to OT documents to the same extent as procurement contract documents. In addition, 10 U.S.C. § 2371(i), expressly exempts OT proposals, business plans, supporting documents and confidential technical information from disclosure under FOIA for 5 years.</p>



What Does Not Apply

STATUTE	APPLICABILITY
Competition in Contracting Act, Pub. L. No. 98-369, as amended (Kaminski Memorandum, Item 1)	CICA DOES NOT apply to prototype Other Transactions.
41 U.S.C. §§ 601 es seq., the Contract Disputes Act, Pub. L. Np 95-563 (1987), as amended (Kaminski Memorandum, Item 2)	CDA DOES NOT apply to either S&T and prototype Other Transactions
10 U.S.C. § 2306, Kinds of Contracts (Kaminski Memorandum, Item 6)	This statute applies only to procurement contracts and thus DOES NOT apply to either S&T or prototype Other Transactions.
10 U.S.C. § 2313, Examination of records of contractor (Kaminski Memorandum, Item 7)	DOES NOT apply to either S&T or prototype Other Transactions.
10 U.S.C. § 2353, Contracts: acquisition, construction, or furnishing of test facilities and equipment [to R&D contractors] (Kaminski Memorandum, Item 8)	DOES NOT apply to either S&T or prototype Other Transactions.
10 U.S.C. § 2354, Contracts: indemnification provisions (Kaminski Memorandum, Item 9)	DOES NOT apply to either S&T or prototype Other Transactions.



What Does Not Apply

STATUTE	APPLICABILITY
10 U.S.C. § 2393, Prohibition against doing business with certain offerors (Kaminski Memorandum, Item 10)	DOES NOT apply to either S&T or prototype Other Transactions.
10 U.S.C. § 2403, Major Weapons Systems: Contractor Guarantees (Warranties) (Kaminski Memorandum, Item 11)	DOES NOT apply to either S&T or prototype Other Transactions.
10 U.S.C. § 2408, Prohibitions on persons convicted of defense contract related felonies and related criminal penalty as defense contractors. (Kaminski Memorandum, Item 12)	Arguably DOES NOT apply to S&T or prototype Other Transactions.
10 U.S.C. § 2409, Contractor employees: protection from reprisal for disclosure of certain information (Kaminiski Memorandum, Item 13)	DOES NOT apply to either S&T or prototype Other Transactions.
31 U.S.C. § 1352, Limitation on the use of appropriated funds to influence certain Federal contracting and financial transactions (Kaminski Memorandum, Item 14)	Probably DOES NOT apply to either S&T or prototype Other Transactions.



What Does Not Apply

STATUTE	APPLICABILITY
41 U.S.C. §§ 423, Procurement Integrity Act, Section 27 of the Office of Procurement Policy Act (Kaminski Memorandum, Item 16)	DOES NOT apply to S&T but made applicable to prototype Other Transactions.
41 U.S.C. §§ 701-707, Drug-Free Workplace Act of 1988 (Kaminski Memorandum, Item 18)	Probably DOES NOT apply to either S&T or prototype Other Transactions.
41 U.S.C. §§ 10a-10d, Buy American Act (Kaminski Memorandum, Item 19)	Probably DOES NOT apply to either S&T or prototype Other Transactions.
35 U.S.C. §§ 200-212 (1980)(Bayh-Dole Act) (Added by Working Group)	The requirements of the Bayh-Dole Act are not, by law, mandatorily applicable to S&T or prototype Other Transactions.
10 U.S.C. § 2320 and § 2321, Technical data provisions applicable to DOD (Added by Working Group)	Probably DOES NOT apply to either S&T or prototype Other Transactions.
10 U.S.C. § 2306a (Truth in Negotiations Act)	Probably DOES NOT apply to either S&T or prototype Other Transactions.
41 U.S.C. § 422 (Cost Accounting Standards)	Probably DOES NOT apply to either S&T or prototype Other Transactions.

