



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of CRADAs

June 23, 1995



Cooperative Research and Development Agreements—Where Does Procurement Fit?

by Lisa J. Obayashi

Introduction

It seems that some Government laboratories these days are utilizing Cooperative Research Development Agreements a/k/a CRADAs to bypass CICA, the FAR and a host of other pesky regulatory requirements to obtain goods and services for the Government. This Lawyer's View is intended to provide a basic primer on CRADAs and a few pointers on how procurement issues may arise whenever the word "CRADA" is being used in procurement offices.

What's a CRADA?

Do not confuse a CRADA with a grant, a cooperative agreement, or a joint project. More importantly, it is not a procurement contract. A CRADA is a unique contractual vehicle created by Congress for the purpose of transferring Federal technology to the non-Federal sector. The Stevenson-Wydler Technology Innovation Act of 1980 (P.L. 96-480) (hereinafter "SWTIA") made the transfer of Federal technology a national priority. It was hoped that by transferring Federal technology to American industry, the U.S. position in the world market would be enhanced, thereby strengthening the U.S. Economy. SWTIA was amended by the Federal Technology Transfer Act of 1986 (15 U.S.C. §3710a *et seq.*) (hereinafter "FTTA"), which specifically provided for the creation of CRADAs. The FTFTA states that a CRADA is not a contract, grant or cooperative agreement as defined by the Federal Cooperative Agreement Act, 31 U.S.C. §6303 *et seq.* In short, a CRADA is an agreement between a Federal laboratory and a non-Federal party formed for the purpose of conducting specified research or development efforts which are consistent with the missions of the Federal laboratory.

Who are the parties to a CRADA?

FTFTA defines a Federal laboratory rather broadly with the distinguishing characteristic being "the performance of research, development, or engineering, either by Federal employ-

ees or by contractor" (i.e. Government-owned, contractor-operated facility). §3710a(d)(2). FTFTA provides that the director of a Government operated Federal laboratory may enter into a CRADA on behalf of the agency. An implementing Executive Order in 1987 mandated that each executive agency permit its laboratories to enter into CRADAs. Executive Order No. 12591, "Facilitating Access to Science and Technology," 52 Fed. Reg. 13,414 (Apr. 10, 1987). At Commerce, NIST has specific regulatory authority to enter into CRADAs. 15 C.F.R. §295.13. Although similar regulations for NOAA do not exist, FTFTA and the above-mentioned Executive Order presumably provide authority for NOAA's many labs to enter into CRADAs. FTFTA allows the non-

Federal party to the CRADA to be just about anyone, *i.e.*, state or local governments, industrial organizations, public and private foundations, non-profit organizations, or other persons. 15 U.S.C. §3710(a)(1).

What is a Federal laboratory entering into the CRADA allowed to contribute and receive?

FTFTA allows the lab to provide personnel, services, and property (i.e., facilities and equipment), but no funds. 15 U.S.C. §3710a(b). The Government, including the Federal employee-inventor, may receive royalties from CRADA inventions. 15 U.S.C. §3710c(a)(1). Finally, the Government is entitled to a non-exclusive, paid-up license in each CRADA invention. 15 U.S.C. §§3710a(b)(2) & (b)(4). This last limitation is important because it is questionable as to whether future procurements for CRADA developed inventions could mean the Government is paying twice for the same item.

From the Editor Lisa Obayashi is an attorney in the Contract Law Division who advises M ASC and other clients.

A Lawyer's View is a periodic publication of the Contract Law Division designed to give practical advice to the Department's procurement officers. Comments, criticisms, and suggestions for future topics are welcome.—Call Jerry Walz at 202-482-1122, or via e-mail to Jerry Walz@FinLit@OGC or jwalz@doc.gov.



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of CRADAs

Page 2



So where does procurement fit in?

There are several re-occurring instances where procurement laws and regulations come into conflict with CRADAs.

Example 1:

Consider this scenario—program personnel from a Federal Laboratory which has a CRADA in place with a non-Federal entity wish to procure items produced under the CRADA on a sole-source basis to the non-Federal party to the CRADA. The justification for other than full and open competition (“JOFOC”) is that only the non-Federal party to the CRADA has the necessary skill and technology to provide the required goods or services. Sounds pretty good? Well, yes, if the JOFOC can withstand the required scrutiny. If the JOFOC passes the (c)(1) exception to CICA (only one responsible source), then examine the CRADA. See if the CRADA prohibits the anticipated actions. Check the data rights clause in the proposed contract against the CRADA to ensure that Government data rights are not compromised (remember that in a CRADA the Government may retain a non-exclusive, irrevocable paid-up license to practice the invention on behalf of the Government). The other problem with this scenario is that other offerors who see the CBD notice may cry foul in that they may see this as an attempt to circumvent the CRADA mission/purpose. As no Federal funds are to be used in the CRADA project, purchasing the CRADA invention itself may be seen as use of prohibited Federal funds.

One of the few reported cases on CRADAs also reminds us of this edict. *Chem Service, Inc. v. Environmental Monitoring Systems Laboratory, EPA*, 12 F.3d 1256, 1265 (3d. Cir. 1993). In this Circuit court case, a competitor of a private laboratory brought suit against EPA to enjoin the Government from performing certain duties agreed to in a CRADA between a private laboratory and an EPA lab. Among one of the items of the CRADA was an agreement that the non-Federal party would be allowed to sell reference materials developed under the CRADA for a fee. The competitor charged in its suit that the marketing of the reference materials was a means of

providing government funding of a non-government party in violation of the FTTA. *Id.* at 1261. Although this case dealt mainly with whether the competitor had standing to bring such a suit, the Third Circuit most pointedly held that the competitor had standing where a substantial question was raised as to whether the CRADA was being used to circumvent federal procurement laws. This case was remanded back to the district court for further proceedings. It will be interesting to see the resolution. In the interim, procurement offices are advised to scrutinize the particular procurements which stem from a CRADA.

Example 2:

Program personnel from a Federal Laboratory wish to procure additional goods and services in support of the CRADA. The FTTA specifically states that a CRADA is not a procurement contract. Can the lab totally bypass procurement? Conventional wisdom says no. It is also clear that the FTTA did not intend that a CRADA be used when a procurement contract is more appropriate. 15 U.S.C. §3710a(d). However, the non-Federal party to a CRADA is free to procure goods and services in support of the CRADA without complying with Federal procurement laws and regulations.

Example 3:

Agency has a requirement for goods or services which utilizes technology developed under a CRADA. The agency decides to conduct a full and open competition. The non-Federal party to the CRADA enters the competition. The Federal employees of the CRADA laboratory are requisitioners and therefore serve as technical evaluators. Is there an organizational conflict of interest? What if the Federal employees are receiving royalties as a result of sales of the CRADA invention/technology? As in any procurement, it is necessary to ensure that one party does not have an unfair competitive advantage over others. If the evaluators, due to their close association with the non-Federal CRADA partner or the receipt of royalties, are unable or even potentially unable to render impartial advice to the Government, then an organizational conflict of interest

LV



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of CRADAs



Page 3

exists per FAR §9.501. More importantly for procurement, such a conflict can easily be a basis for a protest.

Summary

As in any situation, scrutinize any procurement which promotes less than full and open competition. Regardless of the dollar amount involved, examine the CRADA itself and seek legal advice. The Office of the Assistant General Counsel for Finance & Litigation has two divisions which can be of assistance in this area: Contract Law Division and the Federal Assistance Law Division.

LV