

## Department of Energy

## § 603.840

(b) If the payments are based on payable milestones, the recipient will submit a report or other evidence of accomplishment to the program official at the completion of each predetermined activity. If the award is an expenditure-based TIA that includes minimum cost sharing percentages for milestones (see 10 CFR 603.570(c)), the recipient must certify in the report that the minimum cost sharing requirement has been met. The contracting officer may approve payment to the recipient after receiving validation from the program manager that the milestone was successfully reached.

### § 603.815 Withholding payments.

A TIA must provide that the contracting officer may withhold payments in the circumstances described in 10 CFR 600.312(g), but not otherwise.

### § 603.820 Interest on advance payments.

If an expenditure-based TIA provides for either advance payments or payable milestones, the agreement must require the recipient to:

(a) Maintain in an interest-bearing account any advance payments or milestone payment amounts received in advance of needs to disburse the funds for program purposes unless:

(1) The recipient receives less than \$120,000 in Federal grants, cooperative agreements, and TIAs per year;

(2) The best reasonably available interest-bearing account would not be expected to earn interest in excess of \$1,000 per year on the advance or milestone payments; or

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources for the project.

(b) Remit annually the interest earned to the contracting officer.

#### REVISION OF BUDGET AND PROGRAM PLANS

### § 603.825 Government approval of changes in plans.

If it is an expenditure-based award, a TIA must require the recipient to obtain the contracting officer's prior ap-

proval if there is to be a change in plans that may result in a need for additional Federal funding (this is unnecessary for a fixed-support TIA because the recipient is responsible for additional costs of achieving the outcomes). Other than that, the program official's substantial involvement in the project should ensure that the Government has advance notice of changes in plans.

### § 603.830 Pre-award costs.

Pre-award costs, as long as they are otherwise allowable costs of the project, may be charged to an expenditure-based TIA only with the specific approval of the contracting officer. All pre-award costs are incurred at the recipient's risk (e.g., DOE is not obligated to reimburse the costs if, for any reason, the recipient does not receive an award, or if the award is less than anticipated and inadequate to cover the costs).

#### PROGRAM INCOME

### § 603.835 Program income requirements.

A TIA must apply the standards of 10 CFR 600.314 for program income that may be generated. The TIA must also specify if the recipient is to have any obligation to the Federal Government with respect to program income generated after the end of the project period (i.e., the period, as established in the award document, during which Federal support is provided).

#### INTELLECTUAL PROPERTY

### § 603.840 Negotiating data and patent rights.

(a) The contracting officer must confer with program officials and assigned intellectual property counsel to develop an overall strategy for intellectual property that takes into account inventions and data that may result from the project and future needs the Government may have for rights in them. The strategy should take into account program mission requirements and any special circumstances that would support modification of standard patent and data terms, and should include considerations such as the extent of the recipient's contribution to the

## § 603.845

development of the technology; expected Government or commercial use of the technology; the need to provide equitable treatment among consortium or team members; and the need for the DOE to engage non-traditional Government contractors with unique capabilities.

(b) Because a TIA entails substantial cost sharing by recipients, the contracting officer must use discretion in negotiating Government rights to data and patentable inventions resulting from the RD&D under the agreements. The considerations in §§ 603.845 through 603.875 are intended to serve as guidelines, within which there is considerable latitude to negotiate provisions appropriate to a wide variety of circumstances that may arise.

### § 603.845 Data rights requirements.

(a) If the TIA is a cooperative agreement, the requirements at 10 CFR 600.325(d), Rights in data—general rule, apply. The “Rights in Data—General” provision in Appendix A to Subpart D of 10 CFR 600 normally applies. This provision provides the Government with unlimited rights in data first produced in the performance of the agreement, except as provided in paragraph (c) Copyright. However, in certain circumstances, the “Rights in Data—Programs Covered Under Special Protected Data Statutes” provision in Appendix A may apply.

(b) If the TIA is an assistance transaction other than a cooperative agreement, the requirements at 10 CFR 600.325(e), Rights in data—programs covered under special protected data statutes, normally apply. The “Rights in Data—Programs Covered Under Special Data Statutes” provision in Appendix A to Subpart D of 10 CFR 600 may be modified to accommodate particular circumstances (e.g., access to or expanded use rights in protected data among consortium or team members), or to list data or categories of data that the recipient must make available to the public. In unique cases, the contracting officer may negotiate special data rights requirements that vary from those in 10 CFR 600.325. Modifications to the standard data provisions must be approved by intellectual property counsel.

## 10 CFR Ch. II (1–1–10 Edition)

### § 603.850 Marking of data.

To protect the recipient’s interests in data, the TIA should require the recipient to mark any particular data that it wishes to protect from disclosure with a specific legend specified in the agreement identifying the data as data subject to use, release, or disclosure restrictions.

### § 603.855 Protected data.

In accordance with law and regulation, the contracting officer must not release or disclose data marked with a restrictive legend (as specified in 603.850) to third parties, unless they are parties authorized by the award agreement or the terms of the legend to receive the data and are subject to a written obligation to treat the data in accordance with the marking.

### § 603.860 Rights to inventions.

(a) The contracting officer should negotiate rights in inventions that represent an appropriate balance between the Government’s interests and the recipient’s interests.

(1) The contracting officer has the flexibility to negotiate patent rights requirements that vary from that which the Bayh-Dole statute (Chapter 18 of Title 35, U.S.C.) and 42 U.S.C. 2182 and 5908 require. A TIA becomes an assistance transaction other than a cooperative agreement if its patent rights requirements vary from those required by these statutes.

(2) If the TIA is a cooperative agreement, the patent rights provision of 10 CFR 600.325(b) or (c) or 10 CFR 600.136 applies, depending on the type of recipient. Unless a class waiver has been issued under 10 CFR 784.7, it will be necessary for a large, for-profit business to request a patent waiver to obtain title to subject inventions.

(b) The contracting officer may negotiate Government rights that vary from the statutorily-required patent rights requirements described in paragraph (a)(2) of this section when necessary to accomplish program objectives and foster the Government’s interests. Doing so would make the TIA an assistance transaction other than a cooperative agreement. The contracting officer must decide, with the