

## SUBCHAPTER C—DoD GRANT AND AGREEMENT REGULATIONS

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AUTHORITY: 5 U.S.C. 301 and 10 U.S.C. 113.

SOURCE: 68 FR 47153, Aug. 7, 2003, unless otherwise noted.

## Subpart A—Introduction

### § 21.100 What are the purposes of this part?

This part of the DoD Grant and Agreement Regulations:

- (a) Provides general information about the Defense Grant and Agreement Regulatory System (DGARS).
- (b) Sets forth general policies and procedures related to DoD Components' overall management of functions related to assistance and certain other nonprocurement instruments subject to the DGARS (*see* § 21.205(b)).

## Subpart B—Defense Grant and Agreement Regulatory System

### § 21.200 What is the Defense Grant and Agreement Regulatory System (DGARS)?

The Defense Grant and Agreement Regulatory System (DGARS) is the system of regulatory policies and procedures for the award and administration of DoD Components' assistance and other nonprocurement awards. DoD Directive 3210.6<sup>1</sup> established the DGARS.

<sup>1</sup>Electronic copies may be obtained at the Washington Headquarters Services Internet site <http://www.dtic.mil/whs/directives>. Paper copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

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### § 21.205 What types of instruments are covered by the DGARS?

The Defense Grant and Agreement Regulatory System (DGARS) applies to the following types of funding instruments awarded by DoD Components:

- (a) All grants, cooperative agreements, and technology investment agreements.
- (b) Other nonprocurement instruments, as needed to implement statutes, Executive orders, or other Federal Governmentwide rules that apply to those other nonprocurement instruments, as well as to grants and cooperative agreements.

### § 21.210 What are the purposes of the DGARS?

The purposes of the DGARS are to provide uniform policies and procedures for DoD Components' awards, in order to meet DoD needs for:

- (a) Efficient program execution, effective program oversight, and proper stewardship of Federal funds.
- (b) Compliance with relevant statutes; Executive orders; and applicable guidance, such as Office of Management and Budget (OMB) circulars.
- (c) Collection from DoD Components, retention, and dissemination of management and fiscal data related to awards.

### § 21.215 Who is responsible for the DGARS?

The Director of Defense Research and Engineering, or his or her designee, develops and implements DGARS policies and procedures. He or she does so by issuing and maintaining the DoD publications that comprise the DGARS.

### § 21.220 What publications are in the DGARS?

A DoD publication (DoD 3210.6–R<sup>2</sup>) entitled “The DoD Grant and Agreement Regulations” is the principal element of the DGARS. The Director of Defense Research and Engineering also may publish DGARS policies and procedures in DoD instructions and other DoD publications, as appropriate.

<sup>2</sup>*See* footnote 1 to § 21.200.

### Subpart C—The DoD Grant and Agreement Regulations

#### § 21.300 What instruments are subject to the DoD Grant and Agreement Regulations (DoDGARs)?

(a) The types of instruments that are subject to the DoDGARs vary from one portion of the DoDGARs to another. The types of instruments include grants, cooperative agreements, and technology investment agreements. Some portions of the DoDGARs apply to other types of assistance or non-procurement instruments. The term “awards,” as defined in subpart D of this part, is used in this part to refer collectively to all of the types of instruments that are subject to one or more portions of the DoDGARs.

(b) Note that each portion of the DoDGARs identifies the types of instruments to which it applies. However, grants officers and agreements officers must exercise caution when determining the applicability of some Governmentwide rules that are included within the DoDGARs, because a term may be defined differently in a Governmentwide rule than it is defined elsewhere in the DoDGARs. One example is part 33 of the DoDGARs (32 CFR part 33), which contains administrative requirements for awards to State and local governments. That DoDGARs part is the DoD’s codification of the Governmentwide rule implementing OMB Circular A-102.<sup>3</sup> Part 33 states that it applies to grants, but defines the term “grant” to include cooperative agreements and other forms of financial assistance.

(c) For convenience, the table in Appendix A to this part provides an overview of the applicability of the various portions of the DoDGARs.

#### § 21.305 What is the purpose of the DoDGARs?

The DoD Grant and Agreement Regulations provide uniform policies and procedures for the award and adminis-

tration of DoD Components’ awards. The DoDGARs are the primary DoD regulations for achieving the DGARS purposes described in § 21.210.

#### § 21.310 Who ensures DoD Component compliance with the DoDGARs?

The Head of each DoD Component that makes or administers awards, or his or her designee, is responsible for ensuring compliance with the DoDGARs within that DoD Component.

#### § 21.315 May DoD Components issue supplemental policies and procedures to implement the DoDGARs?

Yes, Heads of DoD Components or their designees may issue regulations, procedures, or instructions to implement the DGARS or supplement the DoDGARs to satisfy needs that are specific to the DoD Component, as long as the regulations, procedures, or instructions do not impose additional costs or administrative burdens on recipients or potential recipients.

#### § 21.320 Are there areas in which DoD Components must establish policies and procedures to implement the DoDGARs?

Yes, Heads of DoD Components or their designees must establish policies and procedures in areas where uniform policies and procedures throughout the DoD Component are required, such as for:

(a) Requesting class deviations from the DoDGARs (*see* §§ 21.335(b) and 21.340(a)) or exemptions from the provisions of 31 U.S.C. 6301 through 6308, that govern the appropriate use of contracts, grants, and cooperative agreements (*see* 32 CFR 22.220).

(b) Designating one or more Grant Appeal Authorities to resolve claims, disputes, and appeals (*see* 32 CFR 22.815).

(c) Reporting data on assistance awards and programs, as required by 31 U.S.C. chapter 61 (*see* subpart E of this part).

(d) Prescribing requirements for use and disposition of real property acquired under awards, if the DoD Component makes any awards to institutions of higher education or to other nonprofit organizations under which real property is acquired in whole or in

<sup>3</sup>Electronic copies may be obtained at the Internet site <http://www.whitehouse.gov/OMB>. For paper copies, contact the Office of Management and Budget, EOP Publications, 725 17th St., NW., New Executive Office Building, Washington, DC 20503.

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part with Federal funds (*see* 32 CFR 32.32).

### **§ 21.325 Do acquisition regulations also apply to DoD grants and agreements?**

Unless the DoDGARs specify that they apply, policies and procedures in the following acquisition regulations that apply to procurement contracts do not apply to grants, cooperative agreements, technology investment agreements, or to other assistance or non-procurement awards:

(a) The Federal Acquisition Regulation (FAR)(48 CFR parts 1–53).

(b) The Defense Federal Acquisition Regulation Supplement (DFARS)(48 CFR parts 201–270).

(c) DoD Component supplements to the FAR and DFARS.

### **§ 21.330 How are the DoDGARs published and maintained?**

(a) The DoD publishes the DoDGARs in the Code of Federal Regulations (CFR) and in a separate internal DoD document (DoD 3210.6–R).

(1) The location of the DoDGARs in the CFR currently is in transition. They are moving from Chapter I, Subchapter C, Title 32, to a new location in Chapter XI, Title 2 of the CFR. During the transition, there will be some parts of the DoDGARs in each of the two titles.

(2) The DoD document is divided into parts, subparts, and sections, to parallel the CFR publication. Cross references within the DoD document are stated as CFR citations (*e.g.*, a reference to section 21.215 in part 21 would be to 32 CFR 21.215), which also is how they are stated in the CFR publication of the DoDGARs.

(b) The DoD publishes updates to the DoDGARs in the FEDERAL REGISTER. When finalized, the DoD also posts the updates to the internal DoD document on the World Wide Web at <http://www.dtic.mil/whs/directives>.

(c) A standing working group recommends revisions to the DoDGARs to the Director of Defense Research and Engineering (DDR&E). The DDR&E, Director of Defense Procurement, and each Military Department must be represented on the working group. Other DoD Components that make or admin-

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ister awards may also nominate representatives. The working group meets when necessary.

[68 FR 47153, Aug. 7, 2003, as amended at 72 FR 34986, June 26, 2007]

### **§ 21.335 Who can authorize deviations from the DoDGARs?**

(a) The Head of the DoD Component or his or her designee may authorize individual deviations from the DoDGARs, which are deviations that affect only one award, if the deviations are not prohibited by statute, executive order or regulation.

(b) The Director of Defense Research and Engineering (DDR&E) or his or her designee must approve in advance any class deviation that affects more than one award. Note that OMB concurrence also is required for class deviations from two parts of the DoDGARs, 32 CFR parts 32 and 33, in accordance with 32 CFR 32.4 and 33.6, respectively.

### **§ 21.340 What are the procedures for requesting and documenting deviations?**

(a) DoD Components must submit copies of justifications and agency approvals for individual deviations and written requests for class deviations to: Deputy Director of Defense Research and Engineering, ATTN: Basic Research, 3080 Defense Pentagon, Washington, DC 20301–3080.

(b) Grants officers and agreements officers must maintain copies of requests and approvals for individual and class deviations in award files.

## **Subpart D—Authorities and Responsibilities for Making and Administering Assistance Awards**

### **§ 21.400 To what instruments does this subpart apply?**

This subpart applies to grants, cooperative agreements, and technology investment agreements, which are legal instruments used to reflect assistance relationships between the United States Government and recipients.

**§ 21.405 What is the purpose of this subpart?**

This subpart describes the sources and flow of authority to make or administer assistance awards, and assigns the broad responsibilities associated with DoD Components' use of those instruments.

**§ 21.410 Must a DoD Component have statutory authority to make an assistance award?**

Yes, the use of an assistance instrument to carry out a program requires authorizing legislation. That is unlike the use of a procurement contract, for which Federal agencies have inherent, Constitutional authority.

**§ 21.415 Must the statutory authority specifically mention the use of grants or other assistance instruments?**

No, the statutory authority described in § 21.410 need not specifically say that the purpose of the program is assistance or mention the use of any type of assistance instrument. However, the intent of the statute must support a judgment that the use of an assistance instrument is appropriate. For example, a DoD Component may judge that the principal purpose of a program for which it has authorizing legislation is assistance, rather than acquisition. The DoD Component would properly use an assistance instrument to carry out that program, in accordance with 31 U.S.C. chapter 63.

**§ 21.420 Under what types of statutory authorities do DoD Components award assistance instruments?**

DoD Components may use assistance instruments under a number of statutory authorities that fall into three categories:

(a) *Authorities that statutes provide to the Secretary of Defense.* These authorities generally are delegated by the Secretary of Defense to Heads of DoD Components, usually through DoD directives, instructions, or policy memoranda that are not part of the Defense Grant and Agreement Regulatory System. Examples of statutory authorities in this category are:

(1) Authority under 10 U.S.C. 2391 to award grants or cooperative agree-

ments to help State and local governments alleviate serious economic impacts of defense program changes (*e.g.*, base openings and closings, contract changes, and personnel reductions and increases).

(2) Authority under 10 U.S.C. 2413 to enter into cooperative agreements with entities that furnish procurement technical assistance to businesses.

(b) *Authorities that statutes may provide directly to Heads of DoD Components.* When a statute authorizes the Head of a DoD Component to use a funding instrument to carry out a program with a principal purpose of assistance, use of that authority requires no delegation by the Secretary of Defense. For example, 10 U.S.C. 2358 authorizes the Secretaries of the Military Departments, in addition to the Secretary of Defense, to perform research and development projects through grants and cooperative agreements. Similarly, 10 U.S.C. 2371 provides authority for the Secretaries of the Military Departments and Secretary of Defense to carry out basic, applied, or advanced research projects using assistance instruments other than grants and cooperative agreements. A Military Department's use of the authority of 10 U.S.C. 2358 or 10 U.S.C. 2371 therefore requires no delegation by the Secretary of Defense.

(c) *Authorities that arise indirectly as the result of statute.* For example, authority to use an assistance instrument may result from:

(1) A federal statute authorizing a program that is consistent with an assistance relationship (*i.e.*, the support or stimulation of a public purpose, rather than the acquisition of a good or service for the direct benefit of the Department of Defense). In accordance with 31 U.S.C. chapter 63, such a program would appropriately be carried out through the use of grants or cooperative agreements. Depending upon the nature of the program (*e.g.*, research) and whether the program statute includes authority for any specific types of instruments, there also may be authority to use other assistance instruments.

(2) Exemptions requested by the Department of Defense and granted by the Office of Management and Budget

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under 31 U.S.C. 6307, as described in 32 CFR 22.220.

### **§ 21.425 How does a DoD Component's authority flow to awarding and administering activities?**

The Head of a DoD Component, or his or her designee, may delegate to the heads of contracting activities (HCAs) within the Component, that Component's authority to make and administer awards, to appoint grants officers and agreements officers (see §§ 21.435 through 21.450), and to broadly manage the DoD Component's functions related to assistance instruments. The HCA is the same official (or officials) designated as the head of the contracting activity for procurement contracts, as defined at 48 CFR 2.101. The intent is that overall management responsibilities for a DoD Component's functions related to nonprocurement instruments be assigned only to officials that have similar responsibilities for procurement contracts.

### **§ 21.430 What are the responsibilities of the head of the awarding or administering activity?**

When designated by the Head of the DoD Component or his or her designee (see 32 CFR 21.425), the head of the awarding or administering activity (*i.e.*, the HCA) is responsible for the awards made by or assigned to that activity. He or she must supervise and establish internal policies and procedures for that activity's awards.

### **§ 21.435 Must DoD Components formally select and appoint grants officers and agreements officers?**

Yes, each DoD Component that awards grants or enters into cooperative agreements must have a formal process (see § 21.425) for selecting and appointing grants officers and for terminating their appointments. Similarly, each DoD Component that awards or administers technology investment agreements must have a process for selecting and appointing agreements officers and for terminating their appointments.

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### **§ 21.440 What are the standards for selecting and appointing grants officers and agreements officers?**

In selecting grants officers and agreements officers, DoD Components must use the following minimum standards:

(a) In selecting a grants officer, the appointing official must judge whether the candidate has the necessary experience, training, education, business acumen, judgment, and knowledge of assistance instruments and contracts to function effectively as a grants officer. The appointing official also must take those attributes of the candidate into account when deciding the complexity and dollar value of the grants and cooperative agreements to be assigned.

(b) In selecting an agreements officer, the appointing official must consider all of the same factors as in paragraph (a) of this section. In addition, the appointing official must consider the candidate's ability to function in the less structured environment of technology investment agreements, where the rules provide more latitude and the individual must have a greater capacity for exercising judgment. Agreements officers therefore should be individuals who have demonstrated expertise in executing complex assistance and acquisition instruments.

### **§ 21.445 What are the requirements for a grants officer's or agreements officer's statement of appointment?**

A statement of a grants officer's or agreements officer's appointment:

(a) Must be in writing.

(b) Must clearly state the limits of the individual's authority, other than limits contained in applicable laws or regulations. Information on those limits of a grants officer's or agreements officer's authority must be readily available to the public and agency personnel.

(c) May, if the individual is a contracting officer, be incorporated into his or her statement of appointment as a contracting officer (*i.e.*, there does not need to be a separate written statement of appointment for assistance instruments).

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### **§ 21.450 What are the requirements for a termination of a grants officer's or agreements officer's appointment?**

A termination of a grants officer's or agreements officer's authority:

(a) Must be in writing, unless the written statement of appointment provides for automatic termination.

(b) May not be retroactive.

(c) May be integrated into a written termination of the individual's appointment as a contracting officer, as appropriate.

### **§ 21.455 Who can sign, administer, or terminate assistance instruments?**

Only grants officers are authorized to sign, administer, or terminate grants or cooperative agreements (other than technology investment agreements) on behalf of the Department of Defense. Similarly, only agreements officers may sign, administer, or terminate technology investment agreements.

### **§ 21.460 What is the extent of grants officers' and agreements officers' authority?**

Grants officers and agreements officers may bind the Government only to the extent of the authority delegated to them in their written statements of appointment (*see* § 21.445).

### **§ 21.465 What are grants officers' and agreements officers' responsibilities?**

Grants officers and agreements officers should be allowed wide latitude to exercise judgment in performing their responsibilities, which are to ensure that:

(a) Individual awards are used effectively in the execution of DoD programs, and are made and administered in accordance with applicable laws, Executive orders, regulations, and DoD policies.

(b) Sufficient funds are available for obligation.

(c) Recipients of awards receive impartial, fair, and equitable treatment.

## **Subpart E—Information Reporting on Awards Subject to 31 U.S.C. Chapter 61**

### **§ 21.500 What is the purpose of this subpart?**

This subpart prescribes policies and procedures for compiling and reporting data related to DoD awards and programs that are subject to information reporting requirements of 31 U.S.C. chapter 61. That chapter of the U.S. Code requires the Office of Management and Budget to maintain a Governmentwide information system to collect data on Federal agencies' domestic assistance awards and programs.

### **§ 21.505 What is the Catalog of Federal Domestic Assistance (CFDA)?**

The Catalog of Federal Domestic Assistance (CFDA) is a Governmentwide compilation of information about domestic assistance programs. It covers all domestic assistance programs and activities, regardless of the number of awards made under the program, the total dollar value of assistance provided, or the duration. In addition to programs using grants and agreements, covered programs include those providing assistance in other forms, such as payments in lieu of taxes or indirect assistance resulting from Federal operations.

### **§ 21.510 Why does the DoD report information to the CFDA?**

The Federal Program Information Act (31 U.S.C. 6101 through 6106), as implemented through OMB Circular A-89,<sup>4</sup> requires the Department of Defense and other Federal agencies to provide certain information about their domestic assistance programs to the OMB and the General Services Administration (GSA). The GSA makes this information available to the public by publishing it in the Catalog of Federal Domestic Assistance (CFDA) and maintaining the Federal Assistance Programs Retrieval System, a computerized data base of the information.

<sup>4</sup>See footnote 3 to § 21.300(b).

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### **§21.515 Who reports the information for the CFDA?**

(a) Each DoD Component that provides domestic financial assistance must:

(1) Report to the Director of Information, Operations and Reports, Washington Headquarters Services (DIOR, WHS) all new programs and changes as they occur or as the DoD Component submits its annual updates to existing CFDA information.

(2) Identify to the DIOR, WHS a point-of-contact who will be responsible for reporting the program information and for responding to inquiries related to it.

(b) The DIOR, WHS is the Department of Defense's single office for collecting, compiling and reporting such program information to the OMB and GSA.

### **§21.520 What are the purposes of the Defense Assistance Awards Data System (DAADS)?**

Data from the Defense Assistance Awards Data System (DAADS) are used to provide:

(a) DoD inputs to meet statutory requirements for Federal Government-wide reporting of data related to obligations of funds by assistance instrument.

(b) A basis for meeting Government-wide requirements to report to the Federal Assistance Awards Data System (FAADS) maintained by the Department of Commerce and for preparing other recurring and special reports to the President, the Congress, the General Accounting Office, and the public.

(c) Information to support policy formulation and implementation and to meet management oversight requirements related to the use of awards.

### **§21.525 Who issues policy guidance for the DAADS?**

The Deputy Director, Defense Research and Engineering (DDDR&E), or his or her designee, issues necessary policy guidance for the Defense Assistance Awards Data System.

### **§21.530 Who operates the DAADS?**

The Director of Information Operations and Reports, Washington Head-

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quarters Services (DIOR, WHS), consistent with guidance issued by the DDDR&E:

(a) Processes DAADS information on a quarterly basis and prepares recurring and special reports using such information.

(b) Prepares, updates, and disseminates instructions for reporting information to the DAADS. The instructions are to specify procedures, formats, and editing processes to be used by DoD Components, including record layout, submission deadlines, media, methods of submission, and error correction schedules.

### **§21.535 Do DoD Components have central points for collecting DAADS data?**

Each DoD Component must have a central point for collecting DAADS information from contracting activities within that DoD Component. The central points are as follows:

(a) For the Army: As directed by the U.S. Army Contracting Support Agency.

(b) For the Navy: As directed by the Office of Naval Research.

(c) For the Air Force: As directed by the Office of the Secretary of the Air Force, Acquisition Contracting Policy and Implementation Division (SAF/AQCP).

(d) For the Office of the Secretary of Defense, Defense Agencies, and DoD Field Activities: Each Defense Agency must identify a central point for collecting and reporting DAADS information to the DIOR, WHS, at the address given in §21.555(a). DIOR, WHS serves as the central point for offices and activities within the Office of the Secretary of Defense and for DoD Field Activities.

### **§21.540 What are the duties of the DoD Components' central points for the DAADS?**

The office that serves, in accordance with §21.535, as the central point for collecting DAADS information from contracting activities within each DoD Component must:

(a) Establish internal procedures to ensure reporting by contracting activities that make awards subject to 31 U.S.C. chapter 61.



(b) Collect information required by DD Form 2566,<sup>5</sup> "DoD Assistance Award Action Report," from those contracting activities, and report it to DIOR, WHS, in accordance with §§ 21.545 through 21.555.

(c) Submit to the DIOR, WHS, any recommended changes to the DAADS.

**§ 21.545 Must DoD Components report every obligation to the DAADS?**

Yes, DoD Components' central points must collect and report the data required by the DD Form 2566 for each individual action that involves the obligation or deobligation of Federal funds for an award that is subject to 31 U.S.C. chapter 61.

**§ 21.550 Must DoD Components relate reported actions to listings in the CFDA?**

Yes, DoD Components' central points must report each action as an obligation or deobligation under a specific programmatic listing in the Catalog of Federal Domestic Assistance (CFDA, see § 21.505). The programmatic listing to be shown is the one that provided the funds being obligated or deobligated. For example, if a grants officer or agreements officer in one DoD Component obligates appropriations of a second DoD Component's programmatic listing, the grants officer or agreements officer must show the CFDA programmatic listing of the second DoD Component on the DD Form 2566.

**§ 21.555 When and how must DoD Components report to the DAADS?**

DoD Components' central points must report:

(a) On a quarterly basis to DIOR, WHS. For the first three quarters of the Federal fiscal year, the data are due by close-of-business (COB) on the 15th day after the end of the quarter (*i.e.*, first-quarter data are due by COB on January 15th, second-quarter data by COB April 15th, and third-quarter data by COB July 15th). Fourth-quarter data are due by COB October 25th, the 25th day after the end of the quarter. If

any due date falls on a weekend or holiday, the data are due on the next regular workday. The mailing address for DIOR, WHS is 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302.

(b) On a floppy diskette or by other means permitted either by the instructions described in § 21.530(b) or by agreement with the DIOR, WHS. The data must be reported in the format specified in the instructions.

**§ 21.560 Must DoD Components assign numbers uniformly to awards?**

Yes, DoD Components must assign identifying numbers to all awards subject to this subpart, including grants, cooperative agreements, and technology investment agreements. The uniform numbering system parallels the procurement instrument identification (PII) numbering system specified in 48 CFR 204.70 (in the "Defense Federal Acquisition Regulation Supplement"), as follows:

(a) The first six alphanumeric characters of the assigned number must be identical to those specified by 48 CFR 204.7003(a)(1) to identify the DoD Component and contracting activity.

(b) The seventh and eighth positions must be the last two digits of the fiscal year in which the number is assigned to the grant, cooperative agreement, or other nonprocurement instrument.

(c) The 9th position must be a number:

(1) "1" for grants.

(2) "2" for cooperative agreements, including technology investment agreements that are cooperative agreements (see Appendix B to 32 CFR part 37).

(3) "3" for other nonprocurement instruments, including technology investment agreements that are not cooperative agreements.

(d) The 10th through 13th positions must be the serial number of the instrument. DoD Components and contracting activities need not follow any specific pattern in assigning these numbers and may create multiple series of letters and numbers to meet internal needs for distinguishing between various sets of awards.

<sup>5</sup>Department of Defense forms are available at Internet site <http://www.dior.whs.mil/ICDHOME/FORMTAB.HTM>.

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### **§ 21.565 Must DoD Components' electronic systems accept Data Universal Numbering System (DUNS) numbers?**

The DoD Components must comply with paragraph 5.e of the Office of Management and Budget (OMB) policy directive entitled, "Requirement for a DUNS number in Applications for Federal Grants and Cooperative Agreements."<sup>6</sup> Paragraph 5.e requires electronic systems that handle information about grants and cooperative agreements (which, for the DoD, include Technology Investment Agreements) to accept DUNS numbers. Each DoD Component that awards or administers grants or cooperative agreements must ensure that DUNS numbers are accepted by each such system for which the DoD Component controls the system specifications. If the specifications of such a system are subject to another organization's control and the system can not accept DUNS numbers, the DoD Component must alert that organization to the OMB policy directive's requirement for use of DUNS numbers with a copy to: Director for Basic Sciences, ODDR&E, 3040 Defense Pentagon, Washington, DC 20301-3040.

[72 FR 34986, June 26, 2007]

## **Subpart F—Definitions**

### **§ 21.605 Acquisition.**

The acquiring (by purchase, lease, or barter) of property or services for the direct benefit or use of the United States Government (see more detailed definition at 48 CFR 2.101). In accordance with 31 U.S.C. 6303, procurement contracts are the appropriate legal instruments for acquiring such property or services.

### **§ 21.610 Agreements officer.**

An official with the authority to enter into, administer, and/or terminate technology investment agreements.

<sup>6</sup>This OMB policy directive is available at the Internet site [http://www.whitehouse.gov/omb/grants/grants\\_docs.html](http://www.whitehouse.gov/omb/grants/grants_docs.html).

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### **§ 21.615 Assistance.**

The transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States (*see* 31 U.S.C. 6101(3)). Grants, cooperative agreements, and technology investment agreements are examples of legal instruments used to provide assistance.

### **§ 21.620 Award.**

A grant, cooperative agreement, technology investment agreement, or other nonprocurement instrument subject to one or more parts of the DoD Grant and Agreement Regulations (*see* appendix A to this part).

### **§ 21.625 Contract.**

See the definition for procurement contract in this subpart.

### **§ 21.630 Contracting activity.**

An activity to which the Head of a DoD Component has delegated broad authority regarding acquisition functions, pursuant to 48 CFR 1.601.

### **§ 21.635 Contracting officer.**

A person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. A more detailed definition of the term appears at 48 CFR 2.101.

### **§ 21.640 Cooperative agreement.**

A legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition "grant"), except that substantial involvement is expected between the Department of Defense and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include "cooperative research and development agreements" as defined in 15 U.S.C. 3710a.

### **§ 21.645 Deviation.**

The issuance or use of a policy or procedure that is inconsistent with the DoDGARs.

### **§ 21.650 DoD Components.**

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## § 21.680

Defense Agencies, and DoD Field Activities.

### § 21.655 Grant.

A legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

(a) Of which the principal purpose is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Department of Defense's direct benefit or use.

(b) In which substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated by the grant.

### § 21.660 Grants officer.

An official with the authority to enter into, administer, and/or terminate grants or cooperative agreements.

### § 21.665 Nonprocurement instrument.

A legal instrument other than a procurement contract. Examples include instruments of financial assistance, such as grants or cooperative agreements, and those of technical assistance, which provide services in lieu of money.

### § 21.670 Procurement contract.

A legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal Government and a State, a local government, or other recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government. See the more detailed definition for contract at 48 CFR 2.101.

### § 21.675 Recipient.

An organization or other entity receiving an award from a DoD Component.

### § 21.680 Technology investment agreements.

A special class of assistance instruments used to increase involvement of commercial firms in defense research programs and for other purposes related to integrating the commercial and defense sectors of the nation's technology and industrial base. Technology investment agreements include one kind of cooperative agreement with provisions tailored for involving commercial firms, as well as one kind of other assistance transaction. Technology investment agreements are described more fully in 32 CFR part 37.

## APPENDIX A TO PART 21—INSTRUMENTS TO WHICH DoDGARs PORTIONS APPLY

DoDGARs . . .	which addresses . . .	applies to . . .
Part 21 (32 CFR part 21), all but Subparts D and E	The Defense Grant and Agreement Regulatory System and the DoD Grant and Agreement Regulations	“awards,” which are grants, cooperative agreements, technology investment agreements (TIAs), and other nonprocurement instruments subject to one or more parts of the DoDGARs.
Part 21 (32 CFR part 21), Subpart D	Authorities and responsibilities for assistance award and administration	grants, cooperative agreements, and TIAs.
Part 21 (32 CFR part 21), Subpart E	DoD Components’ information reporting requirements	grants, cooperative agreements, TIAs, and other nonprocurement instruments subject to reporting requirements in 31 U.S.C. chapter 61.
Part 22 (32 CFR part 22)	DoD grants officers’ responsibilities for award and administration of grants and cooperative agreements	grants and cooperative agreements other than TIAs.
Part 26 (32 CFR part 26)	Governmentwide drug-free workplace requirements	grants, cooperative agreements and other financial assistance instruments, including TIAs, that are included in the definition of “award” at 32 CFR 26.605.
Part 28 (32 CFR part 28)	Governmentwide restrictions on lobbying	grants, cooperative agreements and other financial assistance instruments, including TIAs, that are included in the definitions of “Federal grant” and “Federal cooperative agreement” at 32 CFR 28.105.
Part 32 (32 CFR part 32)	Administrative requirements for grants and agreements with institutions of higher education, hospitals, and other non-profit organizations	grants, cooperative agreements other than TIAs, and other assistance included in “award,” as defined in 32 CFR 32.2. Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.
Part 33 (32 CFR part 33)	Administrative requirements for grants and agreements with State and local governments	grants, cooperative agreements other than TIAs, and other assistance included in “grant,” as defined in 32 CFR 33.3. Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.
Part 34 (32 CFR part 34)	Administrative requirements for grants and agreements with for-profit organizations	grants and cooperative agreements other than TIAs (“awards,” as defined in 32 CFR 34.2). Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.
Part 37 (32 CFR part 37)	Agreements officers’ responsibilities for award and administration of TIAs	TIAs. Note that this part refers to portions of DoDGARs parts 32, 33, and 34 that apply to TIAs.
Part 1125 (2 CFR part 1125)	Governmentwide debarment and suspension requirements	nonprocurement generally, including grants, cooperative agreements, TIAs, and any other instruments that are covered transactions under OMB guidance in 2 CFR 180.210 and 180.215, as implemented by 2 CFR part 1125, except acquisition transactions to carry out prototype projects (see 2 CFR 1125.20).

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## § 22.100

[72 FR 34986, June 26, 2007]

### **PART 22—DoD GRANTS AND AGREEMENTS—AWARD AND ADMINISTRATION**

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APPENDIX C TO PART 22—ADMINISTRATIVE REQUIREMENTS AND ISSUES TO BE ADDRESSED IN AWARD TERMS AND CONDITIONS.

AUTHORITY: 5 U.S.C. 301 and 10 U.S.C. 113.

SOURCE: 63 FR 12164, Mar. 12, 1998, unless otherwise noted.

#### **Subpart A—General**

##### **§ 22.100 Purpose, relation to other parts, and organization.**

(a) This part outlines grants officers' and DoD Components' responsibilities related to the award and administration of grants and cooperative agreements.

(b) In doing so, it also supplements other parts of the DoD Grant and Agreement Regulations (DoDGARs) that are either Governmentwide rules or DoD implementation of Governmentwide guidance in Office of Management and Budget (OMB) Circulars. Those other parts of the DoDGARs, which are referenced as appropriate in this part, are:

(1) The DoD implementation, in 2 CFR part 1125, of OMB guidance on nonprocurement debarment and suspension.

(2) The Governmentwide rule on drug-free workplace requirements, in 32 CFR part 26.

(3) The Governmentwide rule on lobbying restrictions, in 32 CFR part 28.

(4) Administrative requirements for grants and agreements awarded to specific types of recipients:

(i) For State and local governmental organizations, in the Governmentwide rule at 32 CFR part 33.

(ii) For institutions of higher education and other nonprofit organizations, at 32 CFR part 32.

(iii) For for-profit organizations, at 32 CFR part 34.

(c) The organization of this part parallels the award and administration process, from pre-award through post-award matters. It therefore is organized in the same manner as the parts of the DoDGARs (32 CFR parts 32, 33, and 34) that prescribe administrative requirements for specific types of recipients.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007]

#### § 22.105 Definitions.

Other than the terms defined in this section, terms used in this part are defined in 32 CFR part 21, subpart F.

*Administrative offset.* An action whereby money payable by the United States Government to, or held by the Government for, a recipient is withheld to satisfy a delinquent debt the recipient owes the Government.

*Advanced research.* Advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way. Advanced research is most closely analogous to precompetitive technology development in the commercial sector (i.e., early phases of research and development on which commercial competitors are willing to collaborate, because the work is not so coupled to specific products and processes that the results of the work must be proprietary). It does not include development of military systems and hardware where specific requirements have been defined. It is typically funded in Advanced Technology Development (Budget Activity 3 and Research Category 6.3A) programs within Research, Development, Test and Evaluation (RDT&E).

*Applied research.* Efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology such as new materials, devices, methods and processes.

It typically is funded in Applied Research (Budget Activity 2 and Research Category 6.2) programs within Research, Development, Test and Evaluation (RDT&E). Applied research normally follows basic research but may not be fully distinguishable from the related basic research. The term does not include efforts whose principal aim is the design, development, or testing of specific products, systems or processes to be considered for sale or acquisition; these efforts are within the definition of “development.”

*Basic research.* Efforts directed toward increasing knowledge and understanding in science and engineering, rather than the practical application of that knowledge and understanding. It typically is funded within Basic Research (Budget Activity 1 and Research Category 6.1) programs within Research, Development, Test and Evaluation (RDT&E). For the purposes of this part, basic research includes:

(1) Research-related, science and engineering education, including graduate fellowships and research traineeships.

(2) Research instrumentation and other activities designed to enhance the infrastructure for science and engineering research.

*Claim.* A written demand or written assertion by one of the parties to a grant or cooperative agreement seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of award terms, or other relief arising under or relating to a grant or cooperative agreement. A routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim by written notice to the grants officer if it is disputed either as to liability or amount, or is not acted upon in a reasonable time.

*Debt.* Any amount of money or any property owed to a Federal Agency by any person, organization, or entity except another United States Federal Agency. Debts include any amounts due from insured or guaranteed loans, fees, leases, rents, royalties, services, sales of real or personal property, or overpayments, penalties, damages, interest, fines and forfeitures, and all other claims and similar sources.

Amounts due a nonappropriated fund instrumentality are not debts owed the United States, for the purposes of this subchapter.

*Delinquent debt.* A debt:

(1) That the debtor fails to pay by the date specified in the initial written notice from the agency owed the debt, normally within 30 calendar days, unless the debtor makes satisfactory payment arrangements with the agency by that date; and

(2) With respect to which the debtor has elected not to exercise any available appeals or has exhausted all agency appeal processes.

*Development.* The systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of potential new products, processes, or services to meet specific performance requirements or objectives. It includes the functions of design engineering, prototyping, and engineering testing.

*Electronic commerce.* The conduct of business through the use of automation and electronic media, in lieu of paper transactions, direct personal contact, telephone, or other means. For grants and cooperative agreements, electronic commerce can include the use of electronic data interchange, electronic mail, electronic bulletin board systems, and electronic funds transfer for: program announcements or solicitations; applications or proposals; award documents; recipients' requests for payment; payment authorizations; and payments.

*Electronic data interchange.* The exchange of standardized information communicated electronically between business partners, typically between computers. It is DoD policy that DoD Component EDI applications conform to the American National Standards Institute (ANSI), Accredited Standards Committee (ASC) X-12 standard.<sup>1</sup>

*Electronic funds transfer.* A system that provides the authority to debit or credit accounts in financial institutions by electronic means rather than

source documents (e.g., paper checks). Processing typically occurs through the Federal Reserve System and/or the Automated Clearing House (ACH) computer network. It is DoD policy that DoD Component EFT transmissions conform to the American National Standards Institute (ANSI), Accredited Standards Committee (ASC) X-12 standard.

*Historically Black colleges and universities.* Institutions of higher education determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. Each DoD Component's contracting activities and grants officers may obtain a list of historically Black colleges and universities from that DoD Component's Small and Disadvantaged Business Utilization office.

*Institution of higher education.* An educational institution that meets the criteria in section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a)). Note, however, that institution of higher education has a different meaning in § 22.520, as given at § 22.520(b)(2).

*Minority institutions.* Institutions of higher education that meet the criteria for *minority institutions* specified in 10 U.S.C. 2323. Each DoD Component's contracting activities and grants officers may obtain copies of a current list of institutions that qualify as *minority institutions* under 10 U.S.C. 2323 from that DoD Component's Small and Disadvantaged Business Utilization office (the list of *minority institutions* changes periodically, based on Department of Education data on institutions' enrollments of minority students).

*Research.* Basic, applied, and advanced research, as defined in this section.

*Subaward.* An award of financial assistance in the form of money, or property in lieu of money, made under a DoD grant or cooperative agreement by a recipient to an eligible subrecipient. The term includes financial assistance for substantive program performance by the subrecipient of a portion of the program for which the DoD grant or cooperative agreement was made. It

<sup>1</sup>Available from Accredited Standards Committee, X-12 Secretariat, Data Interchange Standards Association, 1800 Diagonal Road, Suite 355, Alexandria, VA 22314-2852; Attention: Manager Maintenance and Publications.

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does not include the recipient's procurement of goods and services needed to carry out the program.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

### Subpart B—Selecting the Appropriate Instrument

#### § 22.200 Purpose.

This subpart provides the bases for determining the appropriate type of instrument in a given situation.

#### § 22.205 Distinguishing assistance from procurement.

Before using a grant or cooperative agreement, the grants officer shall make a positive judgment that an assistance instrument, rather than a procurement contract, is the appropriate instrument, based on the following:

(a) *Purpose.* (1) The grants officer must judge that the principal purpose of the activity to be carried out under the instrument is to stimulate or support a public purpose (i.e., to provide assistance), rather than acquisition (i.e., to acquire goods and services for the direct benefit of the United States Government). If the principal purpose is acquisition, then the grants officer shall judge that a procurement contract is the appropriate instrument, in accordance with 31 U.S.C. chapter 63 ("Using Procurement Contracts and Grant and Cooperative Agreements"). Assistance instruments shall not be used in such situations, except:

- (i) When a statute specifically provides otherwise; or
- (ii) When an exemption is granted, in accordance with § 22.220.

(2) For research and development, the appropriate use of grants and cooperative agreements therefore is almost exclusively limited to the performance of selected basic, applied, and advanced research projects. Development projects nearly always shall be performed by contract or other acquisition transaction because their principal purpose is the acquisition of specific deliverable items (e.g., prototypes or other hardware) for the benefit of the Department of Defense.

(b) *Fee or profit.* Payment of fee or profit is consistent with an activity

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whose principal purpose is the acquisition of goods and services for the direct benefit or use of the United States Government, rather than an activity whose principal purpose is assistance. Therefore, the grants officer shall use a procurement contract, rather than an assistance instrument, in all cases where:

(1) Fee or profit is to be paid to the recipient of the instrument; or

(2) The instrument is to be used to carry out a program where fee or profit is necessary to achieving program objectives.

#### § 22.210 Authority for providing assistance.

(a) Before a grant or cooperative agreement may be used, the grants officer must:

(1) Identify the program statute, the statute that authorizes the DoD Component to carry out the activity the principal purpose of which is assistance (see 32 CFR 21.410 through 21.420).

(2) Review the program statute to determine if it contains requirements that affect the:

(i) Solicitation, selection, and award processes. For example, program statutes may authorize assistance to be provided only to certain types of recipients; may require that recipients meet certain other criteria to be eligible to receive assistance; or require that a specific process shall be used to review recipients' proposals.

(ii) Terms and conditions of the award. For example, some program statutes require a specific level of cost sharing or matching.

(b) The grants officer shall ensure that the award of DoD appropriations through a grant or cooperative agreement for a research project meets the standards of 10 U.S.C. 2358, DoD's broad authority to carry out research, even if the research project is authorized under a statutory authority other than 10 U.S.C. 2358. The standards of 10 U.S.C. 2358 are that, in the opinion of the Head of the DoD Component or his or her designee, the projects must be:

(1) Necessary to the responsibilities of the DoD Component.



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(2) Related to weapons systems and other military needs or of potential interest to the DoD Component.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

### § 22.215 Distinguishing grants and cooperative agreements.

(a) Once a grants officer judges, in accordance with §§ 22.205 and 22.210, that either a grant or cooperative agreement is the appropriate instrument, the grants officer shall distinguish between the two instruments as follows:

(1) Grants shall be used when the grants officer judges that substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated in the agreement.

(2) Cooperative agreements shall be used when the grants officer judges that substantial involvement is expected. The grants officer should document the nature of the substantial involvement that led to selection of a cooperative agreement. Under no circumstances are cooperative agreements to be used solely to obtain the stricter controls typical of a contract.

(b) In judging whether substantial involvement is expected, grants officers should recognize that “substantial involvement” is a relative, rather than an absolute, concept, and that it is primarily based on programmatic factors, rather than requirements for grant or cooperative agreement award or administration. For example, substantial involvement may include collaboration, participation, or intervention in the program or activity to be performed under the award.

### § 22.220 Exemptions.

Under 31 U.S.C. 6307, “the Director of the Office of Management and Budget may exempt an agency transaction or program” from the requirements of 31 U.S.C. chapter 63. Grants officers shall request such exemptions only in exceptional circumstances. Each request shall specify for which individual transaction or program the exemption is sought; the reasons for requesting an exemption; the anticipated consequences if the exemption is not granted; and the implications for other

agency transactions and programs if the exemption is granted. The procedures for requesting exemptions shall be:

(a) In cases where 31 U.S.C. chapter 63 would require use of a contract and an exemption from that requirement is desired:

(1) The grants officer shall submit a request for exemption, through appropriate channels established by his or her DoD Component (see 32 CFR 21.320(a)), to the Director of Defense Procurement and Acquisition Policy (DDP&AP).

(2) The DDP&AP, after coordination with the Director of Defense Research and Engineering (DDR&E), shall transmit the request to OMB or notify the DoD Component that the request has been disapproved.

(b) In other cases, the DoD Component shall submit a request for the exemption through appropriate channels to the DDR&E. The DDR&E shall transmit the request to OMB or notify the DoD Component that the request has been disapproved.

(c) Where an exemption is granted, documentation of the approval shall be maintained in the award file.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 70 FR 49464, Aug. 23, 2005]

## Subpart C—Competition

### § 22.300 Purpose.

This subpart establishes DoD policy and implements statutes related to the use of competitive procedures in the award of grants and cooperative agreements.

### § 22.305 General policy and requirement for competition.

(a) It is DoD policy to maximize use of competition in the award of grants and cooperative agreements. This also conforms with:

(1) 31 U.S.C. 6301(3), which encourages the use of competition in awarding all grants and cooperative agreements.

(2) 10 U.S.C. 2374(a), which sets out Congressional policy that any new grant for research, development, test, or evaluation be awarded through merit-based selection procedures.

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(b) Grants officers shall use merit-based, competitive procedures (as defined by § 22.315) to award grants and cooperative agreements:

(1) In every case where required by statute (e.g., 10 U.S.C. 2361, as implemented in § 22.310, for certain grants to institutions of higher education).

(2) To the maximum extent practicable in all cases where not required by statute.

### **§ 22.310 Statutes concerning certain research, development, and facilities construction grants.**

(a) *Definitions specific to this section.* For the purposes of implementing the requirements of 10 U.S.C. 2374 in this section, the following terms are defined:

(1) *Follow-on grant.* A grant that provides for continuation of research and development performed by a recipient under a preceding grant. Note that follow-on grants are distinct from incremental funding actions during the period of execution of a multi-year award.

(2) *New grant.* A grant that is not a follow-on grant.

(b) *Statutory requirement to use competitive procedures.* (1) A grants officer shall not award a grant by other than merit-based, competitive procedures (as defined by § 22.315) to an institution of higher education for the performance of research and development or for the construction of research or other facilities, unless:

(i) In the case of a new grant for research and development, there is a statute meeting the criteria in paragraph (c)(1) of this section;

(ii) In the case of a follow-on grant for research and development, or of a grant for the construction of research or other facilities, there is a statute meeting the criteria in paragraph (c)(2) of this section; and

(iii) The Secretary of Defense submits to Congress a written notice of intent to make the grant. The grant may not be awarded until 180 calendar days have elapsed after the date on which Congress received the notice of intent. Contracting activities must submit a draft notice of intent with supporting documentation through channels to

the Deputy Director, Defense Research and Engineering.

(2) Because subsequently enacted statutes may, by their terms, impose different requirements than set out in paragraph (b)(1) of this section, grants officers shall consult legal counsel on a case-by-case basis, when grants for the performance of research and development or for the construction of research or other facilities are to be awarded to institutions of higher education by other than merit-based competitive procedures.

(c) *Subsequent statutes.* In accordance with 10 U.S.C. 2361 and 10 U.S.C. 2374, a provision of law may not be construed as requiring the award of a grant through other than the merit-based, competitive procedures described in § 22.315, unless:

(1) *Institutions of higher education—new grants for research and development.* In the case of a new grant for research and development to an institution of higher education, such provision of law specifically:

(i) Identifies the particular institution of higher education involved;

(ii) States that such provision of law modifies or supersedes the provisions of 10 U.S.C. 2361 (a requirement that applies only if the statute authorizing or requiring award by other than competitive procedures was enacted after September 30, 1989); and

(iii) States that the award to the institution of higher education involved is required by such provision of law to be made in contravention of the policy set forth in 10 U.S.C. 2374(a).

(2) *Institutions of higher education—follow-on grants for research and development and grants for the construction of any research or other facility.* In the case of any such grant to an institution of higher education, such provision of law specifically:

(i) Identifies the particular institution of higher education involved; and

(ii) States that such provision of law modifies or supersedes the provisions of 10 U.S.C. 2361 (a requirement that applies only if the statute authorizing or requiring award by other than competitive procedures was enacted after September 30, 1989).

(3) *Other entities—new grants for research and development—(i) General.* In

the case of a new grant for research and development to an entity other than an institution of higher education, such provision of law specifically:

(A) Identifies the particular entity involved;

(B) States that the award to that entity is required by such provision of law to be made in contravention of the policy set forth in 10 U.S.C. 2374(a).

(ii) *Exception.* The requirement of paragraph (c)(3)(i) of this section does not apply to any grant that calls upon the National Academy of Sciences to:

(A) Investigate, examine, or experiment upon any subject of science or art of significance to the Department of Defense or any Military Department; and

(B) Report on such matters to the Congress or any agency of the Federal Government.

#### § 22.315 Merit-based, competitive procedures.

Competitive procedures are methods that encourage participation in DoD programs by a broad base of the most highly qualified performers. These procedures are characterized by competition among as many eligible proposers as possible, with a published or widely disseminated notice. Competitive procedures include, as a minimum:

(a) *Notice to prospective proposers.* The notice may be a notice of funding availability or Broad Agency Announcement that is publicly disseminated, with unlimited distribution, or a specific notice that is distributed to eligible proposers (a specific notice must be distributed to at least two eligible proposers to be considered as part of a competitive procedure). Requirements for notices are as follows:

(1) The format and content of each notice must conform with the Governmentwide format for announcements of funding opportunities established by the Office of Management and Budget (OMB) in a policy directive entitled, "Format for Financial Assistance Program Announcements."<sup>2</sup>

<sup>2</sup>This OMB policy directive is available at the Internet site [http://www.whitehouse.gov/omb/grants/grants\\_docs.html](http://www.whitehouse.gov/omb/grants/grants_docs.html) (the link is "Final Policy Directive on Financial Assistance Program Announcements").

(2) In accordance with that OMB policy directive, DoD Components also must post on the Internet any notice under which domestic entities may submit proposals, if the distribution of the notice is unlimited. DoD Components are encouraged to simultaneously publish the notice in other media (*e.g.*, the FEDERAL REGISTER), if doing so would increase the likelihood of its being seen by potential proposers. If a DoD Component issues a specific notice with limited distribution (*e.g.*, for national security considerations), the notice need not be posted on the Internet.

(3) To comply with an OMB policy directive entitled, "Requirement to Post Funding Opportunity Announcement Synopses at Grants.gov and Related Data Elements/Format,"<sup>3</sup> DoD Components must post on the Internet a synopsis for each notice that, in accordance with paragraph (a)(2) of this section, is posted on the Internet. The synopsis must be posted at the Governmentwide site designated by the OMB (currently <http://www.FedGrants.gov>). The synopsis for each notice must provide complete instructions on where to obtain the notice and should have an electronic link to the Internet location at which the notice is posted.

(4) In accordance with an OMB policy directive entitled, "Requirement for a DUNS Number in Applications for Federal Grants and Cooperative Agreements,"<sup>4</sup> each notice must include a requirement for proposers to include Data Universal Numbering System (DUNS) numbers in their proposals. If a notice provides for submission of application forms, the forms must incorporate the DUNS number. To the extent that unincorporated consortia of separate organizations may submit proposals, the notice should explain that an unincorporated consortium

<sup>3</sup>This OMB policy directive is available at the Internet site [http://www.whitehouse.gov/omb/grants/grants\\_docs.html](http://www.whitehouse.gov/omb/grants/grants_docs.html) (the link is "Office of Federal Financial Management Policy Directive on Use of Grants.Gov FIND").

<sup>4</sup>This OMB policy directive is available at the Internet site [http://www.whitehouse.gov/omb/grants/grants\\_docs.html](http://www.whitehouse.gov/omb/grants/grants_docs.html) (the link is "Use of a Universal Identifier by Grant Applicants").

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would use the DUNS number of the entity proposed to receive DoD payments under the award (usually, a lead organization that consortium members identify for administrative matters).

(b) At least two eligible, prospective proposers.

(c) Impartial review of the merits of applications or proposals received in response to the notice, using the evaluation method and selection criteria described in the notice. For research and development awards, in order to be considered as part of a competitive procedure, the two principal selection criteria, unless statute provides otherwise, must be the:

(1) Technical merits of the proposed research and development; and

(2) Potential relationship of the proposed research and development to Department of Defense missions.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007]

## § 22.320 Special competitions.

Some programs may be competed for programmatic or policy reasons among specific classes of potential recipients. An example would be a program to enhance U.S. capabilities for academic research and research-coupled graduate education in defense-critical, science and engineering disciplines, a program that would be competed specifically among institutions of higher education. All such special competitions shall be consistent with program representations in the President's budget submission to Congress and with subsequent Congressional authorizations and appropriations for the programs.

## § 22.325 Historically Black colleges and universities (HBCUs) and other minority institutions (MIs).

Increasing the ability of HBCUs and MIs to participate in federally funded, university programs is an objective of Executive Order 12876 (3 CFR, 1993 Comp., p. 671) and 10 U.S.C. 2323. Grants officers shall include appropriate provisions in Broad Agency Announcements (BAAs) or other announcements for programs in which awards to institutions of higher education are anticipated, in order to promote participation of HBCUs and MIs in such pro-

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grams. Also, whenever practicable, grants officers shall reserve appropriate programmatic areas for exclusive competition among HBCUs and MIs when preparing announcements for such programs.

## Subpart D—Recipient Qualification Matters—General Policies and Procedures

### § 22.400 Purpose.

The purpose of this subpart is to specify policies and procedures for grants officers' determination of recipient qualifications prior to award.

### § 22.405 Policy.

(a) *General.* Grants officers normally shall award grants or cooperative agreements only to qualified recipients that meet the standards in § 22.415. This practice conforms with the Governmentwide policy to do business only with responsible persons, which is stated in OMB guidance at 2 CFR 180.125(a) and implemented by the Department of Defense in 2 CFR part 1125.

(b) *Exception.* In exceptional circumstances, grants officers may make awards to recipients that do not fully meet the standards in § 22.415 and include special award conditions that are appropriate to the particular situation, in accordance with 32 CFR 32.14, 33.12, or 34.4.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007]

### § 22.410 Grants officers' responsibilities.

The grants officer is responsible for determining a recipient's qualification prior to award. The grants officer's signature on the award document shall signify his or her determination that either:

(a) The potential recipient meets the standards in § 22.415 and is qualified to receive the grant or cooperative agreement; or

(b) An award is justified to a recipient that does not fully meet the standards, pursuant to § 22.405(b). In such cases, grants officers shall document in the award file the rationale for making

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an award to a recipient that does not fully meet the standards.

### § 22.415 Standards.

To be qualified, a potential recipient must:

(a) Have the management capability and adequate financial and technical resources, given those that would be made available through the grant or cooperative agreement, to execute the program of activities envisioned under the grant or cooperative agreement.

(b) Have a satisfactory record of executing such programs or activities (if a prior recipient of an award).

(c) Have a satisfactory record of integrity and business ethics.

(d) Be otherwise qualified and eligible to receive a grant or cooperative agreement under applicable laws and regulations (see § 22.420(c)).

### § 22.420 Pre-award procedures.

(a) The appropriate method to be used and amount of effort to be expended in deciding the qualification of a potential recipient will vary. In deciding on the method and level of effort, the grants officer should consider factors such as:

(1) DoD's past experience with the recipient;

(2) Whether the recipient has previously received cost-type contracts, grants, or cooperative agreements from the Federal Government; and

(3) The amount of the prospective award and complexity of the project to be carried out under the award.

(b) There is no DoD-wide requirement to obtain a pre-award credit report, audit, or any other specific piece of information. On a case-by-case basis, the grants officer will decide whether there is a need to obtain any such information to assist in deciding whether the recipient meets the standards in § 22.415 (a), (b), and (c).

(1) Should the grants officer in a particular case decide that a pre-award credit report, audit, or survey is needed, he or she should consult first with the appropriate grants administration office (identified in § 22.710), and decide whether pre-existing surveys or audits of the recipient, such as those of the recipient's internal control systems

under OMB Circular A-133<sup>5</sup> will satisfy the need (see § 22.715(a)(1)).

(2) If, after consulting with the grants administration office, the grants officer decides to obtain a credit report, audit, or other information, and the report or other information discloses that a potential recipient is delinquent on a debt to an agency of the United States Government, then:

(i) The grants officer shall take such information into account when determining whether the potential recipient is qualified with respect to the grant or cooperative agreement; and

(ii) If the grants officer decides to make the award to the recipient, unless there are compelling reasons to do otherwise, the grants officer shall delay the award of the grant or cooperative agreement until payment is made or satisfactory arrangements are made to repay the debt.

(c) In deciding whether a recipient is otherwise qualified and eligible in accordance with the standard in § 22.415(d), the grants officer shall ensure that the potential recipient:

(1) Is not identified in the Governmentwide Excluded Parties List System (EPLS) as being debarred, suspended, or otherwise ineligible to receive the award. In addition to being a requirement for every new award, note that checking the EPLS also is a requirement for subsequent obligations of additional funds, such as incremental funding actions, in the case of pre-existing awards to institutions of higher education, as described at 32 CFR 22.520(e)(5). The grants officer's responsibilities include (see the OMB guidance at 2 CFR 180.425 and 180.430, as implemented by the Department of Defense at 2 CFR 1125.425) checking the EPLS for:

(i) Potential recipients of prime awards; and

(ii) A recipient's principals (as defined in OMB guidance at 2 CFR 180.995, implemented by the Department of Defense in 2 CFR part 1125), potential recipients of subawards, and principals of

<sup>5</sup>Electronic copies may be obtained at Internet site <http://www.whitehouse.gov/OMB>. For paper copies, contact the Office of Management and Budget, EOP Publications, 725 17th St. NW., New Executive Office Building, Washington, DC 20503.

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those potential subaward recipients, if DoD Component approval of those principals or lower-tier recipients is required under the terms of the award (*e.g.*, if a subsequent change in a recipient's principal investigator or other key person would be subject to the DoD Component's prior approval under 32 CFR 32.25(c)(2), 33.30(d)(3), or 34.15(c)(2)(i)).

(2) Has provided all certifications and assurances required by Federal statute, Executive order, or codified regulation, unless they are to be addressed in award terms and conditions at the time of award (see § 22.510).

(3) Meets any eligibility criteria that may be specified in the statute authorizing the specific program under which the award is being made (see § 22.210(a)(2)).

(d) Grants officers shall obtain each recipient's Taxpayer Identification Number (TIN, which may be the Social Security Number for an individual and Employer Identification Number for a business or non-profit entity) and notify the recipient that the TIN is being obtained for purposes of collecting and reporting on any delinquent amounts that may arise out of the recipient's relationship with the Government. Obtaining the TIN and so notifying the recipient is a statutory requirement of 31 U.S.C. 7701, as amended by the Debt Collection Improvement Act of 1996 (section 31001(i)(1), Pub. L. 104-134).

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007]

## Subpart E—National Policy Matters

### § 22.505 Purpose.

The purpose of this subpart is to supplement other regulations that implement national policy requirements, to the extent that it is necessary to provide additional guidance to DoD grants officers. The other regulations that implement national policy requirements include:

(a) The other parts of the DoDGARs (32 CFR parts 32, 33, and 34) that implement the Governmentwide guidance in OMB Circulars A-102<sup>6</sup> and A-110<sup>7</sup> on ad-

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ministrative requirements for grants and cooperative agreements. Those parts address some national policy matters that appear in the OMB Circulars.

(b) DoD regulations other than the DoDGARs.

(c) Other Federal agencies' regulations.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005]

### § 22.510 Certifications, representations, and assurances.

(a) *Certifications*—(1) *Policy*. Certifications of compliance with national policy requirements are to be obtained from recipients only for those national policies where a statute, Executive order, or codified regulation specifically states that a certification is required. Other national policy requirements may be addressed by obtaining representations or assurances (see paragraph (b) of this section). Grants officers should utilize methods for obtaining certifications, in accordance with Executive Order 12866 (3 CFR, 1993 Comp., p. 638), that minimize administration and paperwork.

(2) *Procedures*. (i) When necessary, grants officers may obtain individual, written certifications.

(ii) Whenever possible, and to the extent consistent with statute and codified regulation, grants officers should identify the certifications that are required for the particular type of recipient and program, and consolidate them into a single certification provision that cites them by reference.

(A) If a grants officer elects to have proposers incorporate certifications by reference into their proposals, he or she must do so in one of the two following ways. When required by statute or codified regulation, the solicitation must include the full text of the certifications that proposers are to provide by reference. In other cases, the grants officer may include language in the solicitation that informs the proposers where the full text may be found (*e.g.*, in documents or computer network sites that are readily available to the public) and offers to provide it to proposers upon request.

<sup>6</sup> See footnote 5 to § 22.420(b)(1).

<sup>7</sup> See footnote 5 to § 22.420(b)(1).

(B) Appendix A to this part provides language that may be used for incorporating by reference the certification on lobbying, which currently is the only certification requirement that commonly applies to DoD grants and agreements. Because that certification is required by law to be submitted at the time of proposal, rather than at the time of award, Appendix A includes language to incorporate the certification by reference into a proposal.

(C) Grants officers may incorporate certifications by reference in award documents when doing so is consistent with statute and codified regulation (that is not the case for the lobbying certification addressed in paragraph (a)(2)(ii)(B) of this section). The provision that a grants officer would use to incorporate certifications in award documents, when consistent with statute and codified regulation, would be similar to the provision in Appendix A to this part, except that it would be modified to state that the recipient is providing the required certifications by signing the award document or by accepting funds under the award.

(b) *Representations and assurances.* Many national policies, either in statute or in regulation, require recipients of grants and cooperative agreements to make representations or provide assurances (rather than certifications) that they are in compliance with the policies. As discussed in § 22.610(b), Appendix B to this part suggests award terms and conditions that may be used to address several of the more commonly applicable national policy requirements. These terms and conditions may be used to obtain required assurances and representations, if the grants officer wishes to do so at the time of award, rather than through the use of the standard application form (SF-424<sup>8</sup>) or other means at the time of proposal.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005]

<sup>8</sup>For copies of Standard Forms listed in this part, contact regional grants administration offices of the Office of Naval Research. Addresses for the offices are listed in the "Federal Directory of Contract Administration Services (CAS) Components," which may be accessed through the Defense Con-

#### § 22.515 Provisions of annual appropriations acts.

An annual appropriations act can include general provisions stating national policy requirements that apply to the use of funds (e.g., obligation through a grant or cooperative agreement) appropriated by the act. Because these requirements are of limited duration (the period during which a given year's appropriations are available for obligation), and because they can vary from year to year and from one agency's appropriations act to another agency's, the grants officer must know the agency(ies) and fiscal year(s) of the appropriations being obligated by a given grant or cooperative agreement, and may need to consult legal counsel if he or she does not know the requirements applicable to those appropriations.

#### § 22.520 Campus access for military recruiting and Reserve Officer Training Corps (ROTC).

(a) *Purpose.* (1) The purpose of this section is to implement 10 U.S.C. 983 as it applies to grants. Under that statute, DoD Components are prohibited from providing funds to institutions of higher education that have policies or practices, as described in paragraph (c) of this section, restricting campus access of military recruiters or the Reserve Officer Training Corps (ROTC).

(2) By addressing the effect of 10 U.S.C. 983 on grants and cooperative agreements, this section supplements the DoD's primary implementation of that statute in 32 CFR part 216, "Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education." Part 216 establishes procedures by which the Department of Defense identifies institutions of higher education that have a policy or practice described in paragraph (c) of this section.

(b) *Definition specific to this section.* "Institution of higher education" in this section has the meaning given at 32 CFR 216.3, which is different than the meaning given at § 22.105 for other sections of this part.

tract Management Agency homepage at: <http://www.dcmil.mil>.

(c) *Statutory requirement of 10 U.S.C. 983.* No funds made available to the Department of Defense may be provided by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that the institution (or any subelement of that institution) has a policy or practice that either prohibits, or in effect prevents:

(1) The Secretary of a Military Department from maintaining, establishing, or operating a unit of the Senior ROTC (in accordance with 10 U.S.C. 654 and other applicable Federal laws) at that institution (or any subelement of that institution);

(2) A student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior ROTC at another institution of higher education;

(3) The Secretary of a Military Department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(4) Access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(i) Names, addresses, and telephone listings.

(ii) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(d) *Policy.* (1) *Applicability to cooperative agreements.* As a matter of DoD policy, the restrictions of 10 U.S.C. 983, as implemented by 32 CFR part 216, apply to cooperative agreements, as well as grants.

(2) *Deviations.* Grants officers may not deviate from any provision of this section without obtaining the prior approval of the Director of Defense Research and Engineering. Requests for deviations shall be submitted, through appropriate channels, to: Director for Basic Sciences, ODUSD(LABS), 3040

Defense Pentagon, Washington, D.C. 20301–3040.

(e) *Grants officers' responsibility.* (1) A grants officer shall not award any grant or cooperative agreement to an institution of higher education that has been identified pursuant to the procedures of 32 CFR part 216. Such institutions are identified as being ineligible on the Governmentwide Excluded Parties List System (EPLS). The cause and treatment code on the EPLS indicates the reason for an institution's ineligibility, as well as the effect of the exclusion. Note that OMB guidance in 2 CFR 180.425 and 180.430, as implemented by the Department of Defense at 2 CFR part 1125, require a grants officer to check the EPLS prior to determining that a recipient is qualified to receive an award.

(2) A grants officer shall not consent to a subaward of DoD funds to such an institution, under a grant or cooperative agreement to any recipient, if the subaward requires the grants officer's consent.

(3) A grants officer shall include the following award term in each grant or cooperative agreement with an institution of higher education (note that this requirement does not flow down and that recipients are not required to include the award term in subawards):

“As a condition for receipt of funds available to the Department of Defense (DoD) under this award, the recipient agrees that it is not an institution of higher education (as defined in 32 CFR part 216) that has a policy or practice that either prohibits, or in effect prevents:

(A) The Secretary of a Military Department from maintaining, establishing, or operating a unit of the Senior Reserve Officers Training Corps (in accordance with 10 U.S.C. 654 and other applicable Federal laws) at that institution (or any subelement of that institution);

(B) Any student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior ROTC at another institution of higher education;

(C) The Secretary of a Military Department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or



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(D) Access by military recruiters for purposes of military recruiting to the names of students (who are 17 years of age or older and enrolled at that institution or any subelement of that institution); their addresses, telephone listings, dates and places of birth, levels of education, academic majors, and degrees received; and the most recent educational institutions in which they were enrolled.

If the recipient is determined, using the procedures in 32 CFR part 216, to be such an institution of higher education during the period of performance of this agreement, the Government will cease all payments of DoD funds under this agreement and all other DoD grants and cooperative agreements to the recipient, and it may suspend or terminate such grants and agreements unilaterally for material failure to comply with the terms and conditions of award."

(4) If an institution of higher education refuses to accept the award term in paragraph (e)(3) of this section, the grants officer shall:

(i) Determine that the institution is not qualified with respect to the award. The grants officer may award to an alternative recipient.

(ii) Transmit the name of the institution, through appropriate channels, to the Director for Accession Policy, Office of the Deputy Under Secretary of Defense for Military Personnel Policy (ODUSD(MPP)), 4000 Defense Pentagon, Washington, DC 20301-4000. This will allow ODUSD(MPP) to decide whether to initiate an evaluation of the institution under 32 CFR part 216, to determine whether it is an institution that has a policy or practice described in paragraph (c) of this section.

(5) With respect to any pre-existing award to an institution of higher education that currently is listed on the EPLS pursuant to a determination under 32 CFR part 216, a grants officer:

(i) Shall not obligate additional funds available to the DoD for the award. A grants officer therefore must check the EPLS before approving an incremental funding action or other additional funding for any pre-existing award to an institution of higher education. The grants officer may not obligate the additional funds if the cause and treatment code indicates that the reason for an institution's EPLS listing is a determination under 32 CFR part 216 that institutional policies or

practices restrict campus access of military recruiters or ROTC.

(ii) Shall not approve any request for payment submitted by such an institution (including payments for costs already incurred).

(iii) Shall:

(A) Terminate the award unless he or she has a reason to believe, after consulting with the ODUSD(MPP), 4000 Defense Pentagon, Washington, DC 20301-4000, that the institution may be removed from the EPLS in the near term and have its eligibility restored; and

(B) Suspend any award that is not immediately terminated, as well as all payments under it.

(f) *Post-award administration responsibilities of the Office of Naval Research (ONR).* As the DoD office assigned responsibility for performing field administration services for grants and cooperative agreements with institutions of higher education, the ONR shall disseminate the list it receives from the ODUSD(MPP) of institutions of higher education identified pursuant to the procedures of 32 CFR part 216 to:

(1) ONR field administration offices, with instructions to:

(i) Disapprove any payment requests under awards to such institutions for which post-award payment administration was delegated to the ONR; and

(ii) Alert the DoD offices that made the awards to their responsibilities under paragraphs (e)(5)(i) and (e)(5)(iii) of this section.

(2) Awarding offices in DoD Components that may be identified from data in the Defense Assistance Awards Data System (see 32 CFR 21.520 through 21.555) as having awards with such institutions for which post-award payment administration was not delegated to ONR. The ONR is to alert those offices to their responsibilities under paragraph (e)(5) of this section.

[70 FR 49465, Aug. 23, 2005, as amended at 72 FR 34988, June 26, 2007]

### § 22.525 Paperwork Reduction Act.

Grants officers shall include appropriate award terms or conditions, if a recipient's activities under an award will be subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3500, et seq.):

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(a) Generally, the Act only applies to Federal agencies—it requires agencies to obtain clearance from the Office of Management and Budget before collecting information using forms, schedules, questionnaires, or other methods calling either for answers to:

(1) Identical questions from ten or more persons other than agencies, instrumentalities, or employees of the United States.

(2) Questions from agencies, instrumentalities, or employees of the United States which are to be used for statistical compilations of general public interest.

(b) The Act applies to similar collections of information by recipients of grants or cooperative agreements only when:

(1) A recipient collects information at the specific request of the awarding Federal agency; or

(2) The terms and conditions of the award require specific approval by the agency of the information collection or the collection procedures.

## § 22.530 Metric system of measurement.

(a) *Statutory requirement.* The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205) and implemented by Executive Order 12770 (3 CFR, 1991 Comp., p. 343), states that:

(1) The metric system is the preferred measurement system for U.S. trade and commerce.

(2) The metric system of measurement will be used, to the extent economically feasible, in federal agencies' procurements, grants, and other business-related activities.

(3) Metric implementation shall not be required to the extent that such use is likely to cause significant inefficiencies or loss of markets to United States firms.

(b) *Responsibilities.* DoD Components shall ensure that the metric system is used, to the maximum extent practicable, in measurement-sensitive activities supported by programs that use grants and cooperative agreements, and in measurement-sensitive outputs of such programs.

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### Subpart F—Award

#### § 22.600 Purpose.

This subpart sets forth grants officers' responsibilities relating to the award document and other actions at the time of award.

#### § 22.605 Grants officers' responsibilities.

At the time of award, the grants officer is responsible for ensuring that:

(a) The award instrument contains the appropriate terms and conditions, in accordance with § 22.610.

(b) Information about the award is provided to the office responsible for preparing reports for the Defense Assistance Award Data System (DAADS), to ensure timely and accurate reporting of data required by 31 U.S.C. 6101–6106 (see 32 CFR part 21, subpart E).

(c)(1) In addition to the copy of the award document provided to the recipient, a copy is forwarded to the office designated to administer the grant or cooperative agreement, and another copy is forwarded to the finance and accounting office designated to make the payments to the recipient.

(2) For any award subject to the electronic funds transfer (EFT) requirement described in § 22.810(b)(2), the grants officer shall include a prominent notification of that fact on the first page of the copies forwarded to the recipient, the administrative grants officer, and the finance and accounting office. On the first page of the copy forwarded to the recipient, the grants officer also shall include a prominent notification that the recipient, to be paid, must submit a Payment Information Form (Standard Form SF–3881<sup>9</sup>) to the responsible DoD payment office, if that payment office does not currently have the information (e.g., bank name and account number) needed to pay the recipient by EFT.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 70 FR 49465, Aug. 23, 2005]

<sup>9</sup>See footnote 8 to § 22.510(b).

**§ 22.610 Award instruments.**

(a) Each award document shall include terms and conditions that:

(1) Address programmatic requirements (e.g., a statement of work or other appropriate terms or conditions that describe the specific goals and objectives of the project). The grants officer shall develop such terms and conditions in coordination with program officials.

(2) Provide for the recipient's compliance with:

(i) Pertinent Federal statutes or Executive orders that apply broadly to Federal or DoD assistance awards.

(ii) Any program-specific requirements that are prescribed in the program statute (see § 22.210(a)(2)), or appropriation-specific requirements that are stated in the pertinent Congressional appropriations (see § 22.515).

(iii) Pertinent portions of the DoDGARs or other Federal regulations, including those that implement the Federal statutes or Executive orders described in paragraphs (a)(2) (i) and (ii) of this section.

(3) Specify the grants officer's instructions for post-award administration, for any matter where the post-award administration provisions in 32 CFR part 32, 33, or 34 give the grants officer options for handling the matter. For example, under 32 CFR 32.24(b), the grants officers must choose among possible methods for the recipient's disposition of program income. It is essential that the grants officer identify the option selected in each case, to provide clear instructions to the recipient and the grants officer responsible for post-award administration of the grant or cooperative agreement.

(b) To assist grants officers:

(1) Appendix B to this part provides model clauses to implement certain Federal statutes, Executive orders, and regulations (see paragraph (a)(2)(i) of this section) that frequently apply to DoD grants and cooperative agreements. Grants officers may incorporate the model clauses into award terms and conditions, as appropriate. It should be noted that Appendix B to this part is an aid, and not an exhaustive list of all requirements that apply in all cases. Depending on the circumstances of a given award, other

statutes, Executive orders, or codified regulations also may apply (e.g., Appendix B to this part does not list program-specific requirements described in paragraph (a)(2)(ii) of this section).

(2) Appendix C to this part is a list of administrative requirements that apply to awards to different types of recipients. It also identifies post-award administration issues that the grants officer must address in the award terms and conditions.

**Subpart G—Field Administration****§ 22.700 Purpose.**

This subpart prescribes policies and procedures for administering grants and cooperative agreements. It does so in conjunction with 32 CFR parts 32, 33, and 34, which prescribe administrative requirements for particular types of recipients.

**§ 22.705 Policy.**

(a) DoD policy is to have each recipient deal with a single office, to the maximum extent practicable, for post-award administration of its grants and cooperative agreements. This reduces burdens on recipients that can result when multiple DoD offices separately administer grants and cooperative agreements they award to a given recipient. It also minimizes unnecessary duplication of field administration services.

(b) To further reduce burdens on recipients, the office responsible for performing field administration services for grants and cooperative agreements to a particular recipient shall be, to the maximum extent practicable, the same office that is assigned responsibility for performing field administration services for contracts awarded to that recipient.

(c) Contracting activities and grants officers therefore shall use cross-servicing arrangements whenever practicable and, to the maximum extent possible, delegate responsibility for post-award administration to the cognizant grants administration offices identified in § 22.710.

**§ 22.710 Assignment of grants administration offices.**

In accordance with the policy stated in § 22.705(b), the DoD offices (referred to in this part as “grants administration offices”) that are assigned responsibility for performing field administration services for grants and cooperative agreements are (see the “Federal Directory of Contract Administration Services (CAS) Components”<sup>10</sup> for specific addresses of administration offices):

(a) Regional offices of the Office of Naval Research, for grants and cooperative agreements with:

(1) Institutions of higher education and laboratories affiliated with such institutions, to the extent that such organizations are subject to the university cost principles in OMB Circular A–21.<sup>11</sup>

(2) Nonprofit organizations that are subject to the cost principles in OMB Circular A–122,<sup>12</sup> if their principal business with the Department of Defense is research and development.

(b) Field offices of the Defense Contract Management Command, for grants and cooperative agreements with all other entities, including:

(1) For-profit organizations.

(2) Nonprofit organizations identified in Attachment C of OMB Circular A–122 that are subject to for-profit cost principles in 48 CFR part 31.

(3) Nonprofit organizations subject to the cost principles in OMB Circular A–122, if their principal business with the Department of Defense is other than research and development.

(4) State and local governments.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49466, Aug. 23, 2005; 72 FR 34989, June 26, 2007]

**§ 22.715 Grants administration office functions.**

The primary responsibility of cognizant grants administration offices shall be to advise and assist grants offi-

cers and recipients prior to and after award, and to help ensure that recipients fulfill all requirements in law, regulation, and award terms and conditions. Specific functions include:

(a) Conducting reviews and coordinating reviews, audits, and audit requests. This includes:

(1) Advising grants officers on the extent to which audits by independent auditors (i.e., public accountants or Federal auditors) have provided the information needed to carry out their responsibilities. If a recipient has had an independent audit in accordance with OMB Circular A–133, and the audit report disclosed no material weaknesses in the recipient’s financial management and other management and control systems, additional preaward or closeout audits usually will not be needed (see §§ 22.420(b) and 22.825(b)).

(2) Performing pre-award surveys, when requested by a grants officer, after providing advice described in paragraph (a)(1) of this section.

(3) Reviewing recipients’ systems and compliance with Federal requirements, in coordination with any reviews and compliance audits performed by independent auditors under OMB Circular A–133, or in accordance with the terms and conditions of the award. This includes:

(i) Reviewing recipients’ financial management, property management, and purchasing systems, to determine the adequacy of such systems.

(ii) Determining that recipients have drug-free workplace programs, as required under 32 CFR part 26.

(iii) Determining that governmental, university and nonprofit recipients have complied with requirements in OMB Circular A–133, as implemented at 32 CFR 32.26 and 33.26, to have single audits and submit audit reports to the Federal Audit Clearinghouse. If a recipient has not had a required audit, appropriate action must be taken (e.g., contacting the recipient and coordinating with the Office of the Assistant Inspector General for Audit Policy and Oversight (OAIG(P&O)), Office of the Deputy Inspector General for Inspections and Policy, Office of the Inspector General of the Department of Defense (OIG, DoD), 400 Army-Navy Drive, Arlington, VA 22202).

<sup>10</sup>The “Federal Directory of Contract Administration Services (CAS) Components” may be accessed through the Defense Contract Management Agency homepage at <http://www.dcmamail.com>.

<sup>11</sup>See footnote 5 to § 22.420(b)(1).

<sup>12</sup>See footnote 5 to § 22.420(b)(1).

(4) Issuing timely management decisions, in accordance with DoD Directive 7640.2, "Policy for Follow-up on Contract Audit Reports,"<sup>13</sup> on single audit findings referred by the OIG, DoD, under DoD Directive 7600.10, "Audits of States, Local Governments, and Non-Profit Organizations."<sup>14</sup>

(b) Performing property administration services for Government-owned property, and for any property acquired by a recipient, with respect to which the recipient has further obligations to the Government.

(c) Ensuring timely submission of required reports.

(d) Executing administrative close-out procedures.

(e) Establishing recipients' indirect cost rates, where the Department of Defense is the cognizant or oversight Federal agency with the responsibility for doing so.

(f) Performing other administration functions (e.g., receiving recipients' payment requests and transmitting approved payment authorizations to payment offices) as delegated by applicable cross-servicing agreements or letters of delegation.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49466, Aug. 23, 2005; 72 FR 34989, June 26, 2007]

### Subpart H—Post-Award Administration

#### § 22.800 Purpose and relation to other parts.

This subpart sets forth grants officers' and DoD Components' responsibilities for post-award administration, by providing DoD-specific requirements on payments; debt collection; claims, disputes and appeals; and closeout audits.

#### § 22.805 Post-award requirements in other parts.

Grants officers responsible for post-award administration of grants and co-

operative agreements shall administer such awards in accordance with the following parts of the DoDGARs, as supplemented by this subpart:

(a) *Awards to domestic recipients.* Standard administrative requirements for grants and cooperative agreements with domestic recipients are specified in other parts of the DoDGARs, as follows:

(1) For awards to domestic institutions of higher education and other nonprofit organizations, requirements are specified in 32 CFR part 32, which is the DoD implementation of OMB Circular A-110.

(2) For awards to State and local governments, requirements are specified in 32 CFR part 33, which is the DoD codification of the Governmentwide common rule to implement OMB Circular A-102.

(3) For awards to domestic for-profit organizations, requirements are specified in 32 CFR part 34, which is modeled on the requirements in OMB Circular A-110.

(b) *Awards to foreign recipients.* DoD Components shall use the administrative requirements specified in paragraph (a) of this section, to the maximum extent practicable, for grants and cooperative agreements to foreign recipients.

#### § 22.810 Payments.

(a) *Purpose.* This section prescribes policies and grants officers' post-award responsibilities, with respect to payments to recipients of grants and cooperative agreements.

(b) *Policy.* (1) It is Governmentwide policy to minimize the time elapsing between any payment of funds to a recipient and the recipient's disbursement of the funds for program purposes (see 32 CFR 32.22(a) and 33.21(b), and the implementation of the Cash Management Improvement Act at 31 CFR part 205).

(2) It also is a Governmentwide requirement to use electronic funds transfer (EFT) in the payment of any grant for which an application or proposal was submitted or renewed on or after July 26, 1996, unless the recipient has obtained a waiver by submitting to the head of the pertinent Federal agency a certification that it has neither an

<sup>13</sup> Electronic copies may be obtained at the Washington Headquarters Services Internet site <http://www.dtic.mil/whs/directives>. Paper copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

<sup>14</sup> See footnote 13 to § 22.715(a)(4).

account with a financial institution nor an authorized payment agent. This requirement is in 31 U.S.C. 3332, as amended by the Debt Collection Improvement Act of 1996 (section 31001(x)(1)(A), Pub. L. 104–134), and as implemented by Department of Treasury regulations at 31 CFR part 208. As a matter of DoD policy, this requirement applies to cooperative agreements, as well as grants. Within the Department of Defense, the Defense Finance and Accounting Service implements this EFT requirement, and grants officers have collateral responsibilities at the time of award, as described in § 22.605(c), and in postaward administration, as described in § 22.810(c)(3)(iv).

(3) Expanding on these Governmentwide policies, DoD policy is for DoD Components to use electronic commerce, to the maximum extent practicable, in the portions of the payment process for grants and cooperative agreements for which grants officers are responsible. In cases where recipients submit each payment request to the grants officer, this includes using electronic methods to receive recipients' requests for payment and to transmit authorizations for payment to the DoD payment office. Using electronic methods will improve timeliness and accuracy of payments and reduce administrative burdens associated with paper-based payments.

(c) *Post-award responsibilities.* In cases where the recipient submits each payment request to the grants officer, the administrative grants officer designated to handle payments for a grant or cooperative agreement is responsible for:

(1) Handling the recipient's requests for payments in accordance with DoD implementation of Governmentwide guidance (see 32 CFR 32.22, 33.21, or 34.12, as applicable).

(2) Reviewing each payment request to ensure that:

(i) The request complies with the award terms.

(ii) Available funds are adequate to pay the request.

(iii) The recipient will not have excess cash on hand, based on expenditure patterns.

(3) Maintaining a close working relationship with the personnel in the finance and accounting office responsible for making the payments. A good working relationship is necessary, to ensure timely and accurate handling of financial transactions for grants and cooperative agreements. Administrative grants officers:

(i) Should be generally familiar with policies and procedures for disbursing offices that are contained in Chapter 19 of Volume 10 of the DoD Financial Management Regulation (the FMR, DoD 7000.14-R<sup>15</sup>).

(ii) Shall forward authorizations to the designated payment office expeditiously, so that payments may be made in accordance with the timely payment guidelines in Chapter 19 of Volume 10 of the FMR. Unless alternative arrangements are made with the payment office, authorizations should be forwarded to the payment office at least 3 working days before the end of the period specified in the FMR. The period specified in the FMR is:

(A) No more than seven calendar days after receipt of the recipient's request by the administrative grants officer, whenever electronic commerce is used (i.e., EDI to request and authorize payments and electronic funds transfer (EFT) to make payments).

(B) No more than thirty calendar days after receipt of the recipient's request by the administrative grants officer, when it is not possible to use electronic commerce and paper transactions are used.

(C) No more than seven calendar days after each date specified, when payments are authorized in advance based on a predetermined payment schedule, provided that the payment schedule was received in the disbursing office at least 30 calendar days in advance of the date of the scheduled payment.

(iii) Shall ensure that the recipients' Taxpayer Identification Number (TIN) is included with each payment authorization forwarded to the payment office. This is a statutory requirement of 31 U.S.C. 3325, as amended by the Debt Collection Improvement Act of 1996 (section 31001(y), Pub. L. 104–134).

<sup>15</sup> See footnote 13 to § 22.715(a)(4).

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(iv) For each award that is required to be paid by EFT (see § 22.605(c) and (§ 22.810(b)(2))), shall prominently indicate that fact in the payment authorization.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49467, Aug. 23, 2005]

### § 22.815 Claims, disputes, and appeals.

(a) *Award terms.* Grants officers shall include in grants and cooperative agreements a term or condition that incorporates the procedures of this section for:

(1) Processing recipient claims and disputes.

(2) Deciding appeals of grants officers' decisions.

(b) *Submission of claims*—(1) *Recipient claims.* If a recipient wishes to submit a claim arising out of or relating to a grant or cooperative agreement, the grants officer shall inform the recipient that the claim must:

(i) Be submitted in writing to the grants officer for decision;

(ii) Specify the nature and basis for the relief requested; and

(iii) Include all data that supports the claim.

(2) *DoD Component claims.* Claims by a DoD Component shall be the subject of a written decision by a grants officer.

(c) *Alternative Dispute Resolution (ADR)*—(1) *Policy.* DoD policy is to try to resolve all issues concerning grants and cooperative agreements by mutual agreement at the grants officer's level. DoD Components therefore are encouraged to use ADR procedures to the maximum extent practicable. ADR procedures are any voluntary means (e.g., mini-trials or mediation) used to resolve issues in controversy without resorting to formal administrative appeals (see paragraph (e) of this section) or to litigation.

(2) *Procedures.* (i) The ADR procedures or techniques to be used may either be agreed upon by the Government and the recipient in advance (e.g., when agreeing on the terms and conditions of the grant or cooperative agreement), or may be agreed upon at the time the parties determine to use ADR procedures.

(ii) If a grants officer and a recipient are not able to resolve an issue through unassisted negotiations, the grants of-

ficer shall encourage the recipient to enter into ADR procedures. ADR procedures may be used prior to submission of a recipient's claim or at any time prior to the Grant Appeal Authority's decision on a recipient's appeal (see paragraph (e)(3)(iii) of this section).

(d) *Grants officer decisions.* (1) Within 60 calendar days of receipt of a written claim, the grants officer shall either:

(i) Prepare a written decision, which shall include the reasons for the decision; shall identify all relevant data on which the decision is based; shall identify the cognizant Grant Appeal Authority and give his or her mailing address; and shall be included in the award file; or

(ii) Notify the recipient of a specific date when he or she will render a written decision, if more time is required to do so. The notice shall inform the recipient of the reason for delaying the decision (e.g., the complexity of the claim, a need for more time to complete ADR procedures, or a need for the recipient to provide additional information to support the claim).

(2) The decision of the grants officer shall be final, unless the recipient decides to appeal. If a recipient decides to appeal a grants officer's decision, the grants officer shall encourage the recipient to enter into ADR procedures, as described in paragraph (c) of this section.

(e) *Formal administrative appeals*—(1) *Grant appeal authorities.* Each DoD Component that awards grants or cooperative agreements shall establish one or more Grant Appeal Authorities to decide formal, administrative appeals in accordance with paragraph (e)(3) of this section. Each Grant Appeal Authority shall be either:

(i) An individual at a grade level in the Senior Executive Service, if civilian, or at the rank of Flag or General Officer, if military; or

(ii) A board chaired by such an individual.

(2) *Right of appeal.* A recipient has the right to appeal a grants officer's decision to the Grant Appeal Authority (but note that ADR procedures, as described in paragraph (c) of this section, are the preferred means for resolving any appeal).

(3) *Appeal procedures*—(i) *Notice of appeal*. A recipient may appeal a decision of the grants officer within 90 calendar days of receiving that decision, by filing a written notice of appeal to the Grant Appeal Authority and to the grants officer. If a recipient elects to use an ADR procedure, the recipient is permitted an additional 60 calendar days to file the written notice of appeal to the Grant Appeal Authority and grants officer.

(ii) *Appeal file*. Within 30 calendar days of receiving the notice of appeal, the grants officer shall forward to the Grant Appeal Authority and the recipient the appeal file, which shall include copies of all documents relevant to the appeal. The recipient may supplement the file with additional documents it deems relevant. Either the grants officer or the recipient may supplement the file with a memorandum in support of its position. The Grant Appeal Authority may request additional information from either the grants officer or the recipient.

(iii) *Decision*. The appeal shall be decided solely on the basis of the written record, unless the Grant Appeal Authority decides to conduct fact-finding procedures or an oral hearing on the appeal. Any fact-finding or hearing shall be conducted using procedures that the Grant Appeal Authority deems appropriate.

(f) *Representation*. A recipient may be represented by counsel or any other designated representative in any claim, appeal, or ADR proceeding brought pursuant to this section, as long as the representative is not otherwise prohibited by law or regulation from appearing before the DoD Component concerned.

(g) *Non-exclusivity of remedies*. Nothing in this section is intended to limit a recipient's right to any remedy under the law.

**§ 22.820 Debt collection.**

(a) *Purpose*. This section prescribes procedures for establishing debts owed by recipients of grants and cooperative agreements, and transferring them to payment offices for collection.

(b) *Resolution of indebtedness*. The grants officer shall attempt to resolve by mutual agreement any claim of a

recipient's indebtedness to the United States arising out of a grant or cooperative agreement (e.g., by a finding that a recipient was paid funds in excess of the amount to which the recipient was entitled under the terms and conditions of the award).

(c) *Grants officer's decision*. In the absence of such mutual agreement, any claim of a recipient's indebtedness shall be the subject of a grants officer decision, in accordance with § 22.815(b)(2). The grants officer shall prepare and transmit to the recipient a written notice that:

(1) Describes the debt, including the amount, the name and address of the official who determined the debt (e.g., the grants officer under § 22.815(d)), and a copy of that determination.

(2) Informs the recipient that:

(i) Within 30 calendar days of the grants officer's decision, the recipient shall either pay the amount owed to the grants officer (at the address that was provided pursuant to paragraph (c)(1) of this section) or inform the grants officer of the recipient's intention to appeal the decision.

(ii) If the recipient elects not to appeal, any amounts not paid within 30 calendar days of the grants officer's decision will be a delinquent debt.

(iii) If the recipient elects to appeal the grants officer's decision the recipient has 90 calendar days, or 150 calendar days if ADR procedures are used, after receipt of the grants officer's decision to file the appeal, in accordance with § 22.815(e)(3)(i).

(iv) The debt will bear interest, and may include penalties and other administrative costs, in accordance with the debt collection provisions in Chapters 29, 31, and 32 of Volume 5 and Chapters 18 and 19 of Volume 10 of the DoD Financial Management Regulation (DoD 7000.14-R). No interest will be charged if the recipient pays the amount owed within 30 calendar days of the grants officer's decision. Interest will be charged for the entire period from the date the decision was mailed, if the recipient pays the amount owed after 30 calendar days.

(d) *Follow-up*. Depending upon the response from the recipient, the grants officer shall proceed as follows:



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(1) If the recipient pays the amount owed within 30 calendar days to the grants officer, the grants officer shall forward the payment to the responsible payment office.

(2) If within 30 calendar days the recipient elects to appeal the grants officer's decision, further action to collect the debt is deferred, pending the outcome of the appeal. If the final result of the appeal is a determination that the recipient owes a debt to the Federal Government, the grants officer shall send a demand letter to the recipient and transfer responsibility for further debt collection to a payment office, as described in paragraph (d)(3) of this section.

(3) If within 30 calendar days the recipient has neither paid the amount due nor provided notice of intent to file an appeal of the grants officer's decision, the grants officer shall send a demand letter to the recipient, with a copy to the payment office that will be responsible for collecting the delinquent debt. The payment office will be responsible for any further debt collection activity, including issuance of additional demand letters (see Chapter 19 of volume 10 of the DoD Financial Management Regulation, DoD 7000.14-R). The grants officer's demand letter shall:

(i) Describe the debt, including the amount, the name and address of the official that determined the debt (e.g., the grants officer under § 22.815(d)), and a copy of that determination.

(ii) Notify the recipient that the debt is a delinquent debt that bears interest from the date of the grants officer's decision, and that penalties and other administrative costs may be assessed.

(iii) Identify the payment office that is responsible for the collection of the debt, and notify the recipient that it may submit a proposal to that payment office to defer collection, if immediate payment is not practicable.

(e) *Administrative offset.* In carrying out the responsibility for collecting delinquent debts, a disbursing officer may need to consult grants officers, to

determine whether administrative offset against payments to a recipient owing a delinquent debt would interfere with execution of projects being carried out under grants or cooperative agreements. Disbursing officers may also ask grants officers whether it is feasible to convert payment methods under grants or cooperative agreements from advance payments to reimbursements, to facilitate use of administrative offset. Grants officers therefore should be familiar with guidelines for disbursing officers, in Chapter 19 of Volume 10 of the Financial Management Regulation (DoD 7000.14-R), concerning withholding and administrative offset to recover delinquent debts.

### § 22.825 Closeout audits.

(a) *Purpose.* This section establishes DoD policy for obtaining audits at closeout of individual grants and cooperative agreements. It thereby supplements the closeout procedures specified in:

(1) 32 CFR 32.71 and 32.72, for awards to institutions of higher education and other nonprofit organizations.

(2) 32 CFR 33.50 and 33.51, for awards to State and local governments.

(3) 32 CFR 34.61 and 34.62, for awards to for-profit entities.

(b) *Policy.* Grants officers shall use their judgment on a case-by-case basis, in deciding whether to obtain an audit prior to closing out a grant or cooperative agreement (i.e., there is no specific DoD requirement to obtain an audit prior to doing so). Factors to be considered include:

(1) The amount of the award.

(2) DoD's past experience with the recipient, including the presence or lack of findings of material deficiencies in recent:

(i) Audits of individual awards; or

(ii) Systems-wide financial audits and audits of the compliance of the recipient's systems with Federal requirements, under OMB Circular A-133, where that Circular is applicable. (See § 22.715(a)(1)).

## APPENDIX A TO PART 22—PROPOSAL PROVISION FOR REQUIRED CERTIFICATION

PROVISION IN PROPOSAL (or, suitably modified, in award)	USED FOR			SOURCE OF REQUIREMENT
	Type of Award	Type of Recipient	Specific Situation	
By signing and submitting this proposal, the recipient is providing the certification at Appendix A to 32 CFR Part 28 regarding lobbying.	Any financial assistance [see 32 CFR 28.105(b) and definitions of "Federal grant," "Federal cooperative agreement," and "Federal loan" in 32 CFR 28.105(c), (d), and (e)]	All but Indian tribe or tribal organization with respect to expenditures specifically permitted by other Federal law [see 32 CFR 28.105(f)]	Any	32 CFR 28, which implements 31 U.S.C. 1352

[70 FR 49468, Aug. 23, 2005]

## APPENDIX B TO PART 22—SUGGESTED AWARD PROVISIONS FOR NATIONAL POLICY REQUIREMENTS THAT OFTEN APPLY

SUGGESTED AWARD PROVISION	USED FOR:			SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE
	Type of Award	Type of Recipient	Specific Situation	
<p><b>Nondiscrimination</b> By signing this agreement or accepting funds under this agreement, the recipient assures that it will comply with applicable provisions of the following, national policies prohibiting discrimination:</p> <p>a. On the basis of race, color, or national origin, in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, et seq.), as implemented by DoD regulations at 32 CFR part 195.</p> <p>b. On the basis of race, color, religion, sex, or national origin, in Executive Order 11246 [32 CFR, 1964-1965 Comp., p. 335], as implemented by Department of Labor regulations at 41 CFR part 60.</p> <p>c. On the basis of sex or blindness, in Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, et seq.), as implemented by DoD regulations at 32 CFR part 196.</p> <p>d. On the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.), as implemented by Department of Health and Human Services regulations at 45 CFR part 90.</p>	<p>Grants, cooperative agreements, and other financial assistance included at 32 CFR 195.2(d).</p> <p>Grants, cooperative agreements, and other prime awards defined at 40 CFR 60-1.3 as "Federally assisted construction contract."</p> <p>Grants, cooperative agreements, and other financial assistance included at 20 U.S.C. 1682.</p> <p>Grants, cooperative agreements, and other awards defined at 45 CFR 90.4 as "Federal financial assistance."</p>	<p>Any.</p> <p>Any.</p> <p>Any [for sex discrimination, 32 CFR 196.235 excepts an entity controlled by a religious organization, if not consistent with the organization's religious tenets].</p> <p>Any.</p>	<p>Any.</p> <p>Awards under which construction work is to be done.</p> <p>Any educational program or activity receiving Federal financial assistance.</p> <p>Any.</p>	<p>32 CFR part 195.6 requires grants officer to obtain recipient's assurance of compliance. It also requires the recipient to flow down requirements to subrecipients.</p> <p>The grants officer should inform recipients that 41 CFR 60-1.4(b) prescribes a clause that recipients must include in federally assisted construction awards and subawards [60-1.4(d) allows incorporation by reference]. This requirement also is at 32 CFR 33.36(l)(3) and in Appendices A to 32 CFR part 32 and 32 CFR part 34.</p> <p>32 CFR 196.115 requires assurance of compliance. The inclusion of subrecipients in the definition of "recipient" at 32 CFR 196.105 requires recipient to flow down requirements to subrecipients.</p> <p>45 CFR 90.4 requires that recipient flow down requirements to subrecipients [definition of "recipient" at 45 CFR 90.4 includes entities to which assistance is extended indirectly, through another recipient].</p>

SUGGESTED AWARD PROVISION	USED FOR:			SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE
	Type of Award	Type of Recipient	Specific Situation	
e. On the basis of handicap, in:				
1. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as implemented by Department of Justice regulations at 28 CFR part 41 and DoD regulations at 32 CFR part 56.	Grants, cooperative agreements, and other awards included in "Federal financial assistance" definition at 32 CFR 56.3(b).	Any.	Any.	32 CFR 56.9(b) requires grants officer to obtain recipient's written assurance of compliance and specifies what the assurance includes. Note that requirements flow down to subawards ["recipient," defined at 32 CFR 56.3(g), includes entities receiving assistance indirectly through other recipients].
2. The Architectural Barriers Act of 1968 (42 U.S.C. 4151, et seq.).	Grant or loan.	Any.	Construction or alteration of buildings or facilities; except those restricted to use only by able-bodied uniformed personnel.	
<b>Live Organisms</b> By signing this agreement or accepting funds under this agreement, the recipient assures that it will comply with applicable provisions of the following national policies concerning live organisms:				
a. For human subjects, the Common Federal Policy for the Protection of Human Subjects, codified by the Department of Health and Human Services at 45 CFR part 46 and implemented by the Department of Defense at 32 CFR part 219.	Any.	Any.	Research, development, test, or evaluation involving live human subjects, with some exceptions (see 32 CFR part 219).	32 CFR 219.103 requires each recipient to have a Federally approved, written assurance of compliance [it may be HHS-approved, on file with HHS; DoD-approved, on file with a DoD Component; or may need to be obtained by the grants officer for the specific award].

SUGGESTED AWARD PROVISION	USED FOR:		SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE
	Type of Award	Type of Recipient	
<p>b. For animals:</p> <p>1. Rules on animal acquisition, transport, care, handling, and use in 9 CFR parts 1-4; Department of Agriculture rules implementing the Laboratory Animal Welfare Act of 1966 (7 U.S.C. 2131-2156), and guidelines in the National Academy of Sciences (NAS) "Guide for the Care and Use of Laboratory Animals" (1996), including the Public Health Service Policy and Government Principles Regarding the Care and Use of Animals in Appendix D to the guide.</p> <p>2. Prohibitions on the purchase or use of dogs or cats for certain medical training purposes, in Section 8019 (10 U.S.C. 2241 note) of the Department of Defense Appropriations Act, 1991 (Pub. Law 101-511).</p> <p>3. Rules of the Departments of Interior (50 CFR parts 10-24) and Commerce (50 CFR parts 217-227) implementing laws and conventions on the taking, possession, transport, purchase, sale, export, or import of wildlife and plants, including the: Endangered Species Act of 1973 (16 U.S.C. 1531-1543); Marine Mammal Protection Act (16 U.S.C. 1361-1394); Lacey Act (18 U.S.C. 42); and Convention on International Trade in Endangered Species of Wild Fauna and Flora.</p>	Any.	Any.	<p>Prior to making an award under which animal-based research, testing, or training is to be performed, DoD Directive 3216.1<sup>1</sup> requires administrative review of the proposal by a DoD veterinarian trained or experienced in laboratory animal science and medicine, as well as a review by the recipient's Institutional Animal Care and Use Committee.</p>
	Any.	Any.	<p>Research, experimentation, or testing involving the use of animals.</p>
	Any.	Any.	<p>Use of DoD appropriations for training on treatment of wounds.</p>
	Any.	Any.	<p>Activities that may involve or impact wildlife and plants.</p>

<sup>1</sup> Electronic copies may be obtained at the Washington Headquarters Services Internet site <http://www.dtic.mil/whs/directives>. Paper copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

SUGGESTED AWARD PROVISION	USED FOR:			SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE
	Type of Award	Type of Recipient	Specific Situation	
<u>Debarment and Suspension</u> The recipient agrees to comply with the requirements regarding debarment and suspension in Subpart C of the OMB guidance in 2 CFR part 180, as implemented by the Department of Defense in 2 CFR part 1125. The recipient also agrees to communicate the requirement to comply with Subpart C to persons at the next lower tier with whom the recipient enters into transactions that are "covered transactions" under Subpart B of 2 CFR part 180 and the DoD implementation in 2 CFR part 1125.	Any nonprocurement transaction [see "covered transaction" as specified in Subpart B of 2 CFR part 180, especially sections 180.210 and 180.215]	All but foreign governments, foreign governmental entities, and others excluded at 2 CFR 180.215(a)	Any	
<u>Hatch Act</u> The recipient agrees to comply with the Hatch Act (5 U.S.C. 1501–1508 and 7324–7328), as implemented by the Office of Personnel Management at 5 CFR part 151, which limits political activity of employees or officers of State or local governments whose employment is connected to an activity financed in whole or part with Federal funds.	Grants or loans.	State and local governments.	All but employees of educational or research institutions supported by State; political subdivision thereof; or religious, philanthropic, or cultural organization.	
<u>Environmental Standards</u> By signing this agreement or accepting funds under this agreement, the recipient assures that it will: <ol style="list-style-type: none"> <li>Comply with applicable provisions of the Clean Air Act (42 U.S.C. 7401, et. seq.) and Clean Water Act (33 U.S.C. 1251, et. seq.), as implemented by Executive Order 11738 [3 CFR, 1971–1975 Comp., p. 799] and Environmental Protection Agency (EPA) rules at Subpart J of 40 CFR part 32.</li> </ol>	Any nonprocurement transaction [see 40 CFR 32.1110].	Any.	Any.	Executive Order 11738 establishes additional responsibilities for grants officers.

SUGGESTED AWARD PROVISION	USED FOR:			SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE
	Type of Award	Type of Recipient	Specific Situation	
<p>b. Identify to the awarding agency any impact this award may have on:</p> <p>1. The quality of the human environment, and provide help the agency may need to comply with the National Environmental Policy Act (NEPA, at 42 U.S.C. 4321, et. seq.) and to prepare Environmental Impact Statements or other required environmental documentation. In such cases, the recipient agrees to take no action that will have an adverse environmental impact (e.g., physical disturbance of a site such as breaking of ground) until the agency provides written notification of compliance with the environmental impact analysis process.</p> <p>2. Flood-prone areas, and provide help the agency may need to comply with the National Flood Insurance Act of 1968 and Flood Disaster Protection Act of 1973 (42 U.S.C. 4001, et. seq.), which require flood insurance, when available, for Federally assisted construction or acquisition in flood-prone areas.</p>	Any.	Any.	Any actions that may affect the environment.	<p>The Council on Environmental Quality's regulations for implementing NEPA are at 40 C.F.R. parts 1500-1508. Executive Order 11514 [3 CFR, 1966-1970 Comp., p. 902], as amended by Executive Order 11991, sets policies and procedures for considering actions in the U.S. Executive Orders 11988 [3 CFR, 1977 Comp., p. 117] and 11990 [3 CFR, 1977 Comp., p. 121] specify additional considerations, when actions involve floodplains or wetlands, respectively.</p> <p>The grants officer should inform the recipient that 42 U.S.C. 4012a prohibits awards for acquisition or construction in flood-prone areas (Federal Emergency Management Agency publishes lists of such areas in the Federal Register) unless recipient has required insurance. If action is in a floodplain, Executive Order 11988 [3 CFR, 1977 Comp., p. 117] specifies additional pre-award procedures for Federal agencies. Recipients are to apply requirements to subawards ("financial assistance," defined at 42 U.S.C. 4003, includes indirect Federal assistance).</p>

SUGGESTED AWARD PROVISION	USED FOR:			SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE
	Type of Award	Type of Recipient	Specific Situation	
3. Coastal zones, and provide help the agency may need to comply with the Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et. Seq.), concerning protection of U.S. coastal resources.	Grants, cooperative agreements, and other "Federal assistance" [see 16 U.S.C. 1456(d)].	State and local governments, interstate and other regional agencies.	Awards that may affect the coastal zone.	16 U.S.C. 1456(d) prohibits approval of projects inconsistent with a coastal State's approved management program for the coastal zone.
4. Coastal barriers, and provide help the agency may need to comply with the Coastal Barriers Resource Act (16 U.S.C. 3501, et. seq.), concerning preservation of barrier resources.	Grants, cooperative agreements, and other "financial assistance" [see 16 U.S.C. 3502].	Any.	Awards that may affect barriers along the Atlantic and Gulf coasts and Great Lakes' shores.	16 U.S.C. 3504-3505 prohibit new awards for actions within Coastal Barrier System, except for certain purposes. Requirements flow to subawards (16 U.S.C. 3502 includes indirect assistance as "financial assistance").
5. Any existing or proposed component of the National Wild and Scenic Rivers system, and provide help the agency may need to comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271, et seq.).	Any.	Any.	Awards that may affect existing or proposed element of National Wild and Scenic Rivers system.	
6. Underground sources of drinking water in areas that have an aquifer that is the sole or principal drinking water source, and provide help the agency may need to comply with the Safe Drinking Water Act (42 U.S.C. 300h-3).	Any.	Any.	Construction in any area with aquifer that the EPA finds would create public health hazard, if contaminated.	42 U.S.C. 300h-3(e) precludes awards of Federal financial assistance for any project that the EPA administrator determines may contaminate a sole-source aquifer so as to threaten public health.
Drug-Free Workplace The recipient agrees to comply with the requirements regarding drug-free workplace requirements in Subpart B (or Subpart C, if the recipient is an individual) of 32 CFR part 26, which implements sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D, 41 U.S.C. 701, et seq.).	Any financial assistance, including any grant or cooperative agreement [see "award" as broadly defined at 32 CFR 26.605]	Any	Any, except where inconsistent with international obligations of the U.S. or the laws or regulations of a foreign government [see 32 CFR 26.110]	



SUGGESTED AWARD PROVISION	USED FOR:			SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE
	Type of Award	Type of Recipient	Specific Situation	
<p><u>National Historic Preservation</u> The recipient agrees to identify to the awarding agency any property listed or eligible for listing on the National Register of Historic Places that will be affected by this award, and to provide any help the awarding agency may need, with respect to this award, to comply with Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470, et seq.), as implemented by the Advisory Council on Historic Preservation regulations at 36 C.F.R. part 800 and Executive Order 11593 [3 CFR, 1971-1975 Comp., p. 559].</p>	Any.	Any.	Any construction, acquisition, modernization, or other activity that may impact a historic property.	36 CFR part 800 requires grants officers to get comments from the Advisory Council on Historic Preservation before proceeding with Federally assisted projects that may affect properties listed on or eligible for listing on the National Register of Historic Places.
<p><u>Officials Not to Benefit</u> No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this agreement, or to any benefit arising from it, in accordance with 41 U.S.C. 22.</p>	Grants, cooperative agreements, and other "agreements."	Any.	Any.	
<p><u>Preference for U.S. Flag Carriers</u> Travel supported by U.S. Government funds under this agreement shall use U.S.-flag air carriers (air carriers holding certificates under 49 U.S.C. 41102) for international air transportation of people and property to the extent that such service is available, in accordance with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118) and the interpretative guidelines issued by the Comptroller General of the United States in the March 31, 1981, amendment to Comptroller General Decision B138942.</p>	Any.	Any.	Any agreement under which international air travel may be supported by U.S. Government funds.	

SUGGESTED AWARD PROVISION	USED FOR:			SOME REQUIREMENT(S) THE GRANTS OFFICER SHOULD NOTE
	Type of Award	Type of Recipient	Specific Situation	
<b>Cargo Preference</b> The recipient agrees that it will comply with the Cargo Preference Act of 1954 (46 U.S.C. 1241), as implemented by Department of Transportation regulations at 46 CFR 381.7, which require that at least 50 percent of equipment, materials or commodities procured or otherwise obtained with U.S. Government funds under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned U.S.-flag commercial vessels, if available.	Grants, cooperative agreements, and other awards included in 46 CFR 381.7.	Any.	Any award where possibility exists for ocean transport of items procured or obtained by or on behalf of the recipient, or any of the recipient's contractors or subcontractors.	46 CFR 381.7 requires grants officers to include appropriate clauses in award documents. It also requires recipients to include appropriate clauses in contracts using U.S. Government funds under agreements, where ocean transport of procured goods is possible [e.g., see clause at 46 CFR 381.7(b)].
<b>Military Recruiters</b> [Grants officers shall include the exact award provision specified at 32 CFR 22.520]	Grants and cooperative agreements.	Domestic institution of higher education (see 32 CFR 22.520).	Any.	
<b>Relocation and Real Property Acquisition</b> The recipient assures that it will comply with 49 CFR part 24, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601, et seq.) and provides for fair and equitable treatment of persons displaced by Federally assisted programs or persons whose property is acquired as a result of such programs.	Grants, cooperative agreements, and other "Federal financial assistance" [see 49 CFR 24.2(i)].	"State agency" as defined in 49 CFR part 24 to include persons with authority to acquire property by eminent domain under State law.	Any project that may result in real property acquisition or displacement where State agency hasn't opted to certify to Dept. of Transportation in lieu of providing assurance.	42 U.S.C. 4630 and 49 CFR 24.4, as implemented by DoD at 32 CFR part 259, requires grants officers to obtain recipients' assurance of compliance.

[72 FR 34989, June 26, 2007]

APPENDIX C TO PART 22—ADMINISTRATIVE REQUIREMENTS AND ISSUES TO BE  
ADDRESSED IN AWARD TERMS AND CONDITIONS

REQUIREMENT, IN BRIEF	SOURCE OF REQUIREMENT FOR EACH TYPE OF RECIPIENT (WHERE DETAILS MAY BE FOUND)			ISSUES TO BE ADDRESSED IN AWARD TERMS/CONDITIONS
	University or other nonprofit	Governmental entity	For-profit entity	
Standards for Financial Management Systems. Recipients' systems to comply with.	32 CFR 32.21	32 CFR 33.20	32 CFR 34.11	For university, nonprofit, or for-profit entity, specify if want: • Bonding and insurance [32 CFR 32.21(c) or 32 CFR 34.11(b)]. • Fidelity bond [32 CFR 32.21(d) or 32 CFR 34.11(c)].
Payment. Recipients request payments and handle advances and interest in compliance with:	32 CFR 32.22	32 CFR 33.21, 33.41(d) and (e)	32 CFR 34.12	Specify: • Payment method (e.g., advance, reimbursement, working capital advance). NOTE: If predetermined payment schedule is used, must specify means to ensure that recipients don't develop large cash balances well in advance of needs for such funds (e.g., recipient submits SF-269 or SF-270 forms at regular intervals, for grants officer to review recipients' cash on hand). • Name/address of office to which recipient sends payment requests. • How frequently recipient may submit payment requests. • Whether recipient requests payment by SF-270, SF-271, or other form, or by electronic means (e.g., electronic data interchange). • Name/address of office that will make payments, and whether the recipient is to receive payments by electronic funds transfer (see 32.605(c) and 32.810(b)(2)). • Name/address of office to which recipient is to remit any interest earned. If advance payment method is to be used, if interest is to be remitted using electronic commerce, information should be provided on required format and data elements.
Allowable costs. Allowability of costs to be in accordance with:	32 CFR 32.27 and 32.28	32 CFR 33.22 and 33.23	32 CFR 34.17	
Fee/profit. None allowed.			32 CFR 34.18	
Cost share or match. If cost share or match is required, allowability and valuation are governed by:	32 CFR 32.23	32 CFR 33.24	32 CFR 34.13	Specify if want to allow inclusion of certain types of items as cost share or allow them to be valued in certain ways [32 CFR 32.23(b), (c), and (g); 32 CFR 33.24(b)(4), (b)(5), and (e)(2); 32 CFR 34.13(a)(7), (b)(1), and (b)(4)(iii)]

REQUIREMENT, IN BRIEF	SOURCE OF REQUIREMENT, FOR EACH TYPE OF RECIPIENT (WHERE DETAILS MAY BE FOUND)			ISSUES TO BE ADDRESSED IN AWARD TERMS/CONDITIONS
	University or other nonprofit	Governmental entity	For-profit entity	
<u>Program income.</u> Recipients account for program income in accordance with:	32 CFR 32.24	32 CFR 33.25	32 CFR 34.14	Specify: <ul style="list-style-type: none"> <li>Method for disposition [32 CFR 32.24(b), (c), and (d); 32 CFR 33.25(g); 32 CFR 34.14(d), (e), and (f)].</li> <li>If want recipient to have obligation to Government for certain types of income or for income earned after end of project period [32 CFR 32.24(e) and (h), 32 CFR 33.25(a), (d), (e), and (h), 32 CFR 34.14(b)].</li> <li>If want to allow recipient to deduct costs of generating income [32 CFR 32.24(f), 32 CFR 33.25(c), 32 CFR 34.14(c)].</li> </ul>
<u>Revision of budget/program plans.</u> Recipients request prior approval for plan changes, in accordance with:	32 CFR 32.25	32 CFR 33.30	32 CFR 34.15	Specify, if wish to: <ul style="list-style-type: none"> <li>Waive some prior approvals that are optional, but are in effect unless specifically waived [32 CFR 33.30(b), (c)(1), (d)(3); 32 CFR 34.15(c)(2)].</li> <li>Require some prior approvals that are optional, but are only in effect if specifically stated [32 CFR 32.25(c)(5), (d), (e), (h); 32 CFR 34.15(c)(3)].</li> <li>Waive the requirement for prior approval [32 CFR 25.25(d)(3)] for recipient to initiate one-time, no-cost extension, as long as the DoD Component judges that the recipient's doing so would not cause the DoD Component to fail to comply with DoD funding policies (e.g., the incremental programming and budgeting policy for research funding) contained in Volume 2A of the DoD Financial Management Regulation (DoD 7000.14-R).</li> </ul>
<u>Audit.</u> Recipients periodically to have independent, financial and compliance audit and report to DoD, subject to provisions of:	32 CFR 32.26	32 CFR 33.26	32 CFR 34.16	Require all but for-profit entities to submit copy of OMB Circular A-133 audit reports to IG, DoD. Require for-profit entities to submit audit reports to whichever office(s) the DoD Component wishes audit reports to be sent.
<u>Procurement.</u> Recipients' systems for acquiring goods and services under awards are to comply with:	32 CFR 32.40 through 32.49	32 CFR 33.36	32 CFR 34.30 through 34.31	Specify if want to require recipient to make certain preaward documents available for DoD Component's review [32 CFR 32.44(e); 32 CFR 33.36(g); 32 CFR 34.31(b)].

REQUIREMENT, IN BRIEF	SOURCE OF REQUIREMENT FOR EACH TYPE OF RECIPIENT (WHERE DETAILS MAY BE FOUND)			ISSUES TO BE ADDRESSED IN AWARD TERMS/CONDITIONS
	University or other nonprofit	Governmental entity	For-profit entity	
Subawards. Recipients flow down requirements to subawards in accordance with:	32 CFR 32.5, 32 CFR 33.37, and 32 CFR 34.1(b)(2)			
Property. Recipients manage in accordance with:	32 CFR 32.30 through 32.37	32 CFR 33.31 through 33.34	32 CFR 34.20 through 34.25	<p>Specify if want:</p> <ul style="list-style-type: none"> <li>To allow for-profit entities to acquire real property under awards [32 CFR 34.21(a)].</li> <li>University or other nonprofit to have any further obligation to Government for exempt property [32 CFR 32.33(b)].</li> <li>To retain right to transfer title [32 CFR 32.34(h), 32 CFR 33.32(g)].</li> <li>To allow recipients to use equipment for certain purposes [32 CFR 32.34(d) and (e), 32 CFR 33.32(c)(4), 32 CFR 34.21(d)].</li> <li>To waive data rights [32 CFR 34.25(b)(2)].</li> <li>To require recipients to record liens [32 CFR 32.37].</li> </ul> <p>For research awards to certain recipients, include patents clause required by 37 CFR 401 [32 CFR 32.36(b), 32 CFR 34.25(a)].</p> <p>Specify:</p> <ul style="list-style-type: none"> <li>When recipients are to submit periodic and final performance reports [32 CFR 32.51(b) and (c), 32 CFR 33.40(b), (c), and (f), 32 CFR 34.41].</li> <li>Frequency of financial status/cash transaction reports [32 CFR 32.52(a)(1)(iii) and (a)(2)(iv), 32 CFR 33.41(b)(3) and (c), 32 CFR 34.41] or if wish to waive them under certain conditions [32 CFR 32.52(a)(1)(i) and (a)(2)(v), 32 CFR 33.41(a)(6), 32 CFR 34.41].</li> <li>Whether want reports on cash or accrual basis [32 CFR 32.52(a)(1)(iii), 32 CFR 33.41(b)(2), 32 CFR 34.41].</li> </ul>
Reports. Requirements are specified in:	32 CFR 32.51 and 32.52	32 CFR 33.40 and 33.41	32 CFR 34.41	
Records. Retention and access requirements specified in:	32 CFR 32.53	32 CFR 33.42	32 CFR 34.42	

REQUIREMENT, IN BRIEF	SOURCE OF REQUIREMENT, FOR EACH TYPE OF RECIPIENT (WHERE DETAILS MAY BE FOUND)			ISSUES TO BE ADDRESSED IN AWARD TERMS/CONDITIONS
	University or other nonprofit	Governmental entity	For-profit entity	
Termination and enforcement. Award is subject to:	32 CFR 32.61 and 32.62	32 CFR 33.43 and 33.44	32 CFR 34.51 and 34.52	
Disputes, claims, and appeals. Procedures are specified in:		32 CFR 22.815		<ul style="list-style-type: none"> <li>Include term or condition that incorporates procedures, in accordance with 32 CFR 22.815(e).</li> </ul>
After-the-award requirements. Closeout, subsequent adjustments, continuing responsibilities, and collection of amounts due are subject to requirements in:	32 CFR 32.71 through 32.73	32 CFR 33.50 through 33.52	32 CFR 34.61 through 34.63	

[65 FR 14411, Mar. 16, 2000]

## PART 26—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

### Subpart A—Purpose and Coverage

Sec.

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## § 26.115

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26.670 Suspension.

AUTHORITY: 41U.S.C.701, *et seq.*

SOURCE: 68 FR 66557, 66609, Nov. 26, 2003, unless otherwise noted.

### Subpart A—Purpose and Coverage

#### § 26.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

#### § 26.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

(1) A recipient of an assistance award from the DOD Component; or

(2) A(n) DOD Component awarding official. (See definitions of award and recipient in §§ 26.605 and 26.660, respectively.)

(b) The following table shows the subparts that apply to you:

If you are . . .	see subparts . . .
(1) A recipient who is not an individual ....	A, B and E.
(2) A recipient who is an individual .....	A, C and E.
(3) A(n) DOD Component awarding official.	A, D and E.

#### § 26.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the Head of the DOD Component or his or her designee determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

#### § 26.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 26.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to

## § 26.200

Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

### Subpart B—Requirements for Recipients Other Than Individuals

#### § 26.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 26.205 through 26.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 26.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 26.230).

#### § 26.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

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#### § 26.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 26.205 be given to each employee who will be engaged in the performance of any Federal award.

#### § 26.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

#### § 26.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 26.205 and an ongoing awareness program as described in § 26.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) The performance period of the award is less than 30 days.	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more.	must have the policy statement and program in place within 30 days after award.
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program.	may ask the DOD Component awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

#### § 26.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:



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(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 26.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must—

- (1) Be in writing;
- (2) Include the employee's position title;
- (3) Include the identification number(s) of each affected award;
- (4) Be sent within ten calendar days after you learn of the conviction; and
- (5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either—

- (1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or
- (2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

### **§ 26.230 How and when must I identify workplaces?**

(a) You must identify all known workplaces under each DOD Component award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces—

- (1) To the DOD Component official that is making the award, either at the time of application or upon award; or
- (2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by DOD Component officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical de-

scriptions may be used (*e.g.*, all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the DOD Component awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the DOD Component awarding official.

### **Subpart C—Requirements for Recipients Who Are Individuals**

#### **§ 26.300 What must I do to comply with this part if I am an individual recipient?**

As a condition of receiving a(n) DOD Component award, if you are an individual recipient, you must agree that—

- (a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and
- (b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

- (1) In writing.
- (2) Within 10 calendar days of the conviction.

(3) To the DOD Component awarding official or other designee for each award that you currently have, unless § 26.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

#### **§ 26.301 [Reserved]**

### **Subpart D—Responsibilities of DOD Component Awarding Officials**

#### **§ 26.400 What are my responsibilities as a(n) DOD Component awarding official?**

As a(n) DOD Component awarding official, you must obtain each recipient's

## § 26.500

agreement, as a condition of the award, to comply with the requirements in—

- (a) Subpart B of this part, if the recipient is not an individual; or
- (b) Subpart C of this part, if the recipient is an individual.

### Subpart E—Violations of this Part and Consequences

#### § 26.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the Head of the DOD Component or his or her designee determines, in writing, that—

- (a) The recipient has violated the requirements of subpart B of this part; or
- (b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

#### § 26.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the Head of the DOD Component or his or her designee determines, in writing, that—

- (a) The recipient has violated the requirements of subpart C of this part; or
- (b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

#### § 26.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in § 26.500 or § 26.505, the DOD Component may take one or more of the following actions—

- (a) Suspension of payments under the award;
- (b) Suspension or termination of the award; and
- (c) Suspension or debarment of the recipient under 32 CFR Part 25, for a period not to exceed five years.

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#### § 26.515 Are there any exceptions to those actions?

The Secretary of Defense or Secretary of a Military Department may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the Secretary of Defense or Secretary of a Military Department determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

### Subpart F—Definitions

#### § 26.605 Award.

*Award* means an award of financial assistance by the DOD Component or other Federal agency directly to a recipient.

(a) The term award includes:

- (1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.
- (2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 32 CFR Part 33 that implements OMB Circular A-102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

- (1) Technical assistance that provides services instead of money.
- (2) Loans.
- (3) Loan guarantees.
- (4) Interest subsidies.
- (5) Insurance.
- (6) Direct appropriations.
- (7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

#### § 26.610 Controlled substance.

*Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

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## § 26.650

### § 26.615 Conviction.

*Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

### § 26.620 Cooperative agreement.

*Cooperative agreement* means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in § 26.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

### § 26.625 Criminal drug statute.

*Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

### § 26.630 Debarment.

*Debarment* means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Non-procurement), that implements Executive Order 12549 and Executive Order 12689.

### § 26.632 DOD Component.

*DOD Component* means the Office of the Secretary of Defense, a Military Department, a Defense Agency, or the Office of Economic Adjustment.

[68 FR 66609, Nov. 26, 2003]

### § 26.635 Drug-free workplace.

*Drug-free workplace* means a site for the performance of work done in connection with a specific award at which

employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

### § 26.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (*e.g.*, volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

### § 26.645 Federal agency or agency.

*Federal agency or agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

### § 26.650 Grant.

*Grant* means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

## **§ 26.655**

### **§ 26.655 Individual.**

*Individual* means a natural person.

### **§ 26.660 Recipient.**

*Recipient* means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

### **§ 26.665 State.**

*State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

### **§ 26.670 Suspension.**

*Suspension* means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered non-procurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Non-procurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

## **PART 28—NEW RESTRICTIONS ON LOBBYING**

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APPENDIX A TO PART 28—CERTIFICATION REGARDING LOBBYING

APPENDIX B TO PART 28—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Public Law 102-121 (31 U.S.C. 1352); 5 U.S.C. section 301; 10 U.S.C. 113.

SOURCE: 55 FR 6737, 6752, Feb. 26, 1990, unless otherwise noted. Redesignated at 57 FR 6199, Feb. 21, 1992.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

### **Subpart A—General**

#### **§ 28.100 Conditions on use of funds.**

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in Appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in Appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in Appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

#### § 28.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

- (1) The awarding of any Federal contract;
- (2) The making of any Federal grant;
- (3) The making of any Federal loan;
- (4) The entering into of any cooperative agreement; and,
- (5) The extension, continuation, renewal, amendment, or modification of

any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local

public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

#### § 28.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000,

Unless such person previously filed a certification, and a disclosure form, if

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## § 28.200

required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding \$100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding \$100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding \$100,000 at any tier under a Federal loan exceeding \$150,000; or,

(4) A contract or subcontract exceeding \$100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification

or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

### Subpart B—Activities by Own Employees

#### § 28.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 28.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or

adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

[55 FR 6737 and 6752, Feb. 26, 1990. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

**§ 28.205 Professional and technical services.**

(a) The prohibition on the use of appropriated funds, in § 28.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, “professional and technical services” shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal docu-

ment accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

[55 FR 6737 and 6752, Feb. 26, 1990. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

**§ 28.210 Reporting.**

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.



### Subpart C—Activities by Other Than Own Employees

#### § 28.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 28.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 28.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, “professional and technical services” shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of

his or her client’s proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

[55 FR 6737 and 6752, Feb. 26, 1990. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### Subpart D—Penalties and Enforcement

#### § 28.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see Appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced

with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of \$10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between \$10,000 and \$100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

**§ 28.405 Penalty procedures.**

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

**§ 28.410 Enforcement.**

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

**Subpart E—Exemptions**

**§ 28.500 Secretary of Defense.**

(a) *Exemption authority.* The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall

transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) *Policy.* It is the policy of the Department of Defense that exemptions under paragraph (a) of this section shall be requested only rarely and in exceptional circumstances.

(c) *Procedures.* Each DoD Component that awards or administers Federal grants, Federal cooperative agreements, or Federal loans subject to this part shall establish procedures whereby:

(1) A grants officer wishing to request an exemption for a grant, cooperative agreement, or loan shall transmit such request through appropriate channels to: Director for Research, ODDR&E(R), 3080 Defense Pentagon, Washington, DC. 20301-3080.

(2) Each such request shall explain why an exemption is in the national interest, a justification that must be transmitted to Congress for each exemption that is approved.

[63 FR 12188, Mar. 12, 1998]

**Subpart F—Agency Reports**

**§ 28.600 Semi-annual compilation.**

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures

agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

#### **§ 28.605 Inspector General report.**

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the

agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

#### **APPENDIX A TO PART 28—CERTIFICATION REGARDING LOBBYING**

##### *Certification for Contracts, Grants, Loans, and Cooperative Agreements*

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed

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when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

*Statement for Loan Guarantees and Loan Insurance*

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any

agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

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## DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB  
0348-0046

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**INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES**

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.  
(b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

**DISCLOSURE OF LOBBYING ACTIVITIES  
CONTINUATION SHEET**

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# **PART 32—ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS**

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**AUTHORITY:** 5 U.S.C. 301 and 10 U.S.C. 113.

**SOURCE:** 63 FR 12188, Mar. 12, 1998, unless otherwise noted.

## **Subpart A—General**

### **§ 32.1 Purpose.**

(a) *General.* This part implements OMB Circular A-110<sup>1</sup> and establishes uniform administrative requirements for awards and subawards to institutions of higher education, hospitals, and other non-governmental, non-profit organizations.

(b) *Relationship to other parts.* This part is an integral part of the DoD Grant and Agreement Regulations (DoDGARs), which comprise this subchapter of the Code of Federal Regulations. This part includes references to other parts of the DoDGARs that implement Governmentwide guidance and provide uniform internal policies and procedures for DoD Components that make or administer awards. Although parts 21 and 22 of this subchapter do not impose any direct requirements on recipients, and recipients therefore are not required to be familiar with those parts, the information in those parts

<sup>1</sup>For copies of the Circular, contact the Office of Management and Budget, EOP Publications, 725 17th St. NW, New Executive Office Building, Washington, DC 20503.



concerning internal policies and procedures should be helpful to recipients of DoD awards.

(c) *Prime awards.* DoD Components shall apply the provisions of this part to awards to recipients that are institutions of higher education, hospitals, and other non-profit organizations. DoD Components shall not impose additional or inconsistent requirements, except as provided in §§ 32.4 and 32.14, or unless specifically required by Federal statute or executive order.

(d) *Subawards.* Any legal entity that receives an award from a DoD Component shall apply the provisions of this part to subawards with institutions of higher education, hospitals, and other non-profit organizations. Thus, a governmental or for-profit organization, whose prime award from a DoD Component is subject to 32 CFR part 33 or part 34, respectively, applies this part to subawards with institutions of higher education, hospitals, or other non-profit organizations. It should be noted that subawards are for the performance of substantive work under awards, and are distinct from contracts for procuring goods and services. It should be further noted that non-profit organizations that implement Federal programs for the States are also subject to State requirements.

### § 32.2 Definitions.

The following are definitions of terms used in this part. Grants officers are cautioned that terms may be defined differently in this part than they are in other parts of the DoD Grant and Agreement Regulations, because this part implements OMB Circular A-110 and uses definitions as stated in that Circular. In such cases, the definition given in this section applies to the term as it is used in this part, and the definition given in other parts applies to the term as it is used in those parts. For example, "suspension" is defined in this section to mean temporary withdrawal of Federal sponsorship under an award, but is defined in the part of the DoD Grant and Agreement Regulations on nonprocurement suspension and debarment (2 CFR part 1125, which implements OMB guidance at 2 CFR part 180) to be an action taken to exclude a person from partici-

pating in a grant, cooperative agreement, or other covered transaction (see definition at 2 CFR 180.1015).

*Accrued expenditures.* The charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and

(3) Other amounts becoming owed under programs for which no current services or performance is required.

*Accrued income.* The sum of:

(1) Earnings during a given period from:

(i) Services performed by the recipient; and

(ii) Goods and other tangible property delivered to purchasers.

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

*Acquisition cost of equipment.* The net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

*Advance.* A payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

*Award.* Financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: Technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which

are required to be entered into and administered under procurement laws and regulations.

*Cash contributions.* The recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

*Closeout.* The process by which the grants officer administering an award made by a DoD Component determines that all applicable administrative actions and all required work of the award have been completed by the recipient and DoD Component.

*Contract.* A procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

*Cost sharing or matching.* That portion of project or program costs not borne by the Federal Government.

*Date of completion.* The date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

*Disallowed costs.* Those charges to an award that the grants officer administering an award made by a DoD Component determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

*DoD Component.* A Military Department, Defense Agency, DoD field activity, or organization within the Office of the Secretary of Defense that provides or administers an award to a recipient.

*Equipment.* Tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. However, consistent with recipient policy, lower limits may be established.

*Excess property.* Property under the control of any DoD Component that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

*Exempt property.* Tangible personal property acquired in whole or in part with Federal funds, where the DoD Component has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal

Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

*Federal funds authorized.* The total amount of Federal funds obligated by a DoD Component for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

*Federal share (of real property, equipment, or supplies).* That percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

*Funding period.* The period of time when Federal funding is available for obligation by the recipient.

*Intangible property and debt instruments.* Property that includes, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

*Obligations.* The amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

*Outlays or expenditures.* Charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and

other payees and other amounts becoming owed under programs for which no current services or performance are required.

*Personal property.* Property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

*Prior approval.* Written approval by an authorized official evidencing prior consent.

*Program income.* Gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in § 32.24(e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in program regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

*Project costs.* All allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

*Project period.* The period established in the award document during which Federal sponsorship begins and ends.

*Property.* Real property and personal property (equipment, supplies, intangible property and debt instruments), unless stated otherwise.

*Real property.* Land, including land improvements, structures and appurtenances thereto, but excluding movable machinery and equipment.

*Recipient.* An organization receiving financial assistance directly from DoD Components to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals,

and other quasi-public and private nonprofit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term also includes consortia comprised of any combination of universities, other nonprofit organizations, governmental organizations, for-profit organizations, and other entities, to the extent that the consortia are legally incorporated as nonprofit organizations. The term does not include Government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are Government-owned or controlled, or are designated as federally-funded research and development centers.

*Research and development.* All research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. *Research* is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. *Development* is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

*Small award.* An award not exceeding the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently \$100,000).

*Subaward.* An award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded

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from the definition of “award” in this section.

*Subrecipient.* The legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided.

*Supplies.* All personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (“subject inventions”), as defined in 37 CFR part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements.”

*Suspension.* An action by a DoD Component that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the DoD Component. Suspension of an award is a separate action from suspension of a participant under 2 CFR part 1125.

*Termination.* The cancellation of an award, in whole or in part, at any time prior to the date of completion.

*Third party in-kind contributions.* The value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

*Unliquidated obligations.* The amount of obligations incurred by the recipient:

(1) That have not been paid, if financial reports are prepared on a cash basis.

(2) For which an outlay has not been recorded, if reports are prepared on an accrued expenditure basis.

*Unobligated balance.* The portion of the funds authorized by a DoD Component that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

*Unrecovered indirect cost.* The difference between the amount awarded and the amount which could have been

awarded under the recipient’s approved negotiated indirect cost rate.

*Working capital advance.* A procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

[63 FR 12188, Mar. 12, 1998, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34998, June 26, 2007]

### § 32.3 Effect on other issuances.

For awards subject to this part, all administrative requirements of codified program regulations, program manuals, handbooks and other non-regulatory materials which are inconsistent with the requirements of this part shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in § 32.4.

### § 32.4 Deviations.

(a) *Individual deviations.* Individual deviations affecting only one award may be approved by DoD Components in accordance with procedures stated in 32 CFR 21.335(a) and 21.340.

(b) *Small awards.* DoD Components may apply less restrictive requirements than the provisions of this part when awarding small awards, except for those requirements which are statutory.

(c) *Other class deviations.* (1) For classes of awards other than small awards, the Director of Defense Research and Engineering (DDR&E), or his or her designee, may grant exceptions from the requirements of this part:

(i) With the written concurrence of the Office of the Management and Budget (OMB). The DDR&E, or his or her designee, shall provide written notification to OMB of the Department of Defense’s intention to grant a class deviation; and

(ii) When exceptions are not prohibited by statute.

(2) DoD Components shall request approval for such deviations in accordance with 32 CFR 21.335(b) and 21.340. However, in the interest of maximum

uniformity, exceptions from the requirements of this part shall be permitted only in unusual circumstances.

[63 FR 12188, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

### § 32.5 Subawards.

Unless sections of this part specifically exclude subrecipients from coverage, the provisions of this part shall be applied to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals or other non-profit organizations. State and local government subrecipients are subject to the provisions of 32 CFR part 33. Subrecipients that are for-profit organizations are subject to 32 CFR part 34.

## Subpart B—Pre-Award Requirements

### § 32.10 Purpose.

Sections 32.11 through 32.17 prescribe application forms and instructions and other pre-award matters.

### § 32.11 Pre-award policies.

(a) *Use of grants, cooperative agreements, and contracts.* (1) OMB Circular A-110 states that:

(i) In each instance, the Federal awarding agency shall decide on the appropriate award instrument (i.e., grant, cooperative agreement, or contract).

(ii) The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301-6308) governs the use of grants, cooperative agreements, and contracts. Under that Act:

(A) A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute.

(B) Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(C) The statutory criterion for choosing between grants and cooperative agreements is that for the latter, “substantial involvement is expected between the executive agency and the State, local government, or other re-

cipient when carrying out the activity contemplated in the agreement.”

(2) In selecting the appropriate award instruments, DoD Components’ grants officers shall comply with the DoD implementation of the Federal Grant and Cooperative Agreement Act at 32 CFR part 22, subpart B.

(b) *Public notice and priority setting.* As a matter of Governmentwide policy, Federal awarding agencies shall notify the public of intended funding priorities for programs that use discretionary awards, unless funding priorities are established by Federal statute. For DoD Components, compliance with competition policies and statutory requirements implemented in 32 CFR part 22, subpart C, shall constitute compliance with this Governmentwide policy.

[63 FR 12188, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

### § 32.12 Forms for applying for Federal assistance.

(a) DoD Components shall comply with the applicable report clearance requirements of 5 CFR part 1320, “Controlling Paperwork Burdens on the Public,” with regard to all forms used in place of or as a supplement to the Standard Form 424<sup>2</sup> (SF-424) series.

(b) Applicants shall use the SF-424 series or those forms and instructions prescribed by DoD Components.

(c) For Federal programs covered by E.O. 12372 (3 CFR, 1982 Comp., p. 197), “Intergovernmental Review of Federal Programs,” the applicant shall complete the appropriate sections of the SF-424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the DoD Component or the Catalog of Federal Domestic Assistance. The

<sup>2</sup>For copies of Standard Forms listed in this part, contact regional grants administration offices of the Office of Naval Research. Addresses for the offices are listed in the “DoD Directory of Contract Administration Services Components,” DLAH 4105.4, which can be obtained from: Defense Logistics Agency, Publications Distribution Division (DASC-WDM), 8725 John J. Kingman Rd., Suite 0119, Fort Belvoir, VA 22060-6220.

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SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) DoD Components that do not use the SF-424 form should indicate whether the application is subject to review by the State under E.O. 12372.

### **§ 32.13 Debarment and suspension.**

DoD Components and recipients shall comply with the policy and procedural requirements in the OMB guidance on nonprocurement debarment and suspension (2 CFR part 180), as implemented by the Department of Defense in 2 CFR part 1125. Those policies and procedures restrict subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

[72 FR 34998, June 26, 2007]

### **§ 32.14 Special award conditions.**

(a) DoD Components may impose additional requirements as needed, over and above those provided in this part, if an applicant or recipient:

- (1) Has a history of poor performance;
- (2) Is not financially stable;
- (3) Has a management system that does not meet the standards prescribed in this part;
- (4) Has not conformed to the terms and conditions of a previous award; or
- (5) Is not otherwise responsible.

(b) Before imposing additional requirements, DoD Components shall notify the applicant or recipient in writing as to:

- (1) The nature of the additional requirements;
- (2) The reason why the additional requirements are being imposed;
- (3) The nature of the corrective action needed;
- (4) The time allowed for completing the corrective actions; and
- (5) The method for requesting reconsideration of the additional requirements imposed.

(c) Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

(d) Grants officers:

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(1) Should coordinate the imposition and removal of special award conditions with the cognizant grants administration office identified in 32 CFR 22.710.

(2) Shall include in the award file the written notification to the recipient, described in paragraph (b) of this section, and the documentation required by 32 CFR 22.410(b).

### **§ 32.15 Metric system of measurement.**

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce, and for Federal agencies' procurements, grants, and other business-related activities. DoD grants officers shall comply with requirements concerning the use of the metric system at 32 CFR 22.530.

### **§ 32.16 Resource Conservation and Recovery Act (RCRA).**

Recipients' procurements shall comply with applicable requirements of the Resource Conservation and Recovery Act (RCRA), as described at § 32.49.

### **§ 32.17 Certifications and representations.**

(a) OMB Circular A-110 authorizes and encourages each Federal agency, unless prohibited by statute or codified regulation, to allow recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. The Circular further states that annual certifications and representations, when used, shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

(b) DoD grants officers shall comply with the provisions concerning certifications and representations at 32 CFR 22.510. Those provisions ease burdens on recipients to the extent possible, given current statutory and regulatory impediments to obtaining all certifications on an annual basis. The provisions thereby also comply with the intent of OMB Circular A-110, to use less

burdensome methods for obtaining certifications and representations, as such methods become feasible.

### **Subpart C—Post-Award Requirements**

#### **FINANCIAL AND PROGRAM MANAGEMENT**

#### **§ 32.20 Purpose of financial and program management.**

Sections 32.21 through 32.28 prescribe standards for financial management systems, methods for making payments and rules for: satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

#### **§ 32.21 Standards for financial management systems.**

(a) DoD Components shall require recipients to relate financial data to performance data and develop unit cost information whenever practical. For awards that support research, it should be noted that it is generally not appropriate to develop unit cost information.

(b) Recipients' financial management systems shall provide for the following.

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 32.52. If a DoD Component requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for its reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and

assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data. As discussed in paragraph (a) of this section, unit cost data is generally not appropriate for awards that support research.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101-453) govern, payment methods of State agencies, instrumentalities, and fiscal agents should be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, "Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs."

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles (see § 32.27) and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the DoD Component, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The DoD Component may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, "Surety Companies Doing Business with the United States."

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### § 32.22 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State agreements under the Cash Management Improvement Act (CMIA) (31 U.S.C. 3335 and 6503) or default procedures in 31 CFR part 205.

(b) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain:

(1) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient; and

(2) Financial management systems that meet the standards for fund control and accountability as established in § 32.21. Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances shall be consolidated to cover anticipated cash needs for all awards made by the DoD Component to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients shall be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF-270,<sup>3</sup> “Request for Advance or Reimbursement,” or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient

ent automatically through the use of a predetermined payment schedule or if inconsistent with DoD procedures for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. DoD Components may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, the responsible DoD payment office generally makes payment within 30 calendar days after receipt of the billing by the office designated to receive the billing, unless the billing is improper (for further information about timeframes for payments, see 32 CFR 22.810(c)(3)(ii)).

(2) Recipients shall be authorized to submit requests for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and the grants officer, in consultation with the program manager, has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the award may provide for cash on a working capital advance basis. Under this procedure, the award shall provide for advancing cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee’s disbursing cycle. Thereafter, the award shall provide for reimbursing the recipient for its actual cash disbursements. The working capital advance method of payment shall not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient’s actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

<sup>3</sup>See footnote 2 to § 32.12(a).



(h) Unless otherwise required by statute, grants officers shall not withhold payments for proper charges made by recipients at any time during the project period unless:

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements; or

(2) The recipient or subrecipient is delinquent in a debt to the United States under OMB Circular A-129, "Managing Federal Credit Programs" (see definitions of "debt" and "delinquent debt," at 32 CFR 22.105). Under such conditions, the grants officer may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated (also see 32 CFR 22.420(b)(2) and 22.820).

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows:

(1) Except for situations described in paragraph (i)(2) of this section, DoD Components shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients shall be encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless:

(1) The recipient receives less than \$120,000 in Federal awards per year;

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of \$250 per year on Federal cash balances; 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.

(l)(1) Interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, PO Box 6021, Rockville, MD 20852.

(2) In keeping with Electronic Funds Transfer rules (31 CFR part 206), interest should be remitted to the HHS Payment Management System through an electronic medium such as the FEDWIR Deposit System. Electronic remittances should be in the format and should include any data that are specified by the grants officer as being necessary to facilitate direct deposit in HHS' account at the Department of the Treasury.

(3) Recipients that do not have electronic remittance capability should use a check.

(4) Interest amounts up to \$250 per year may be retained by the recipient for administrative expense.

(m) Except as noted elsewhere in this part, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. DoD Components shall not require more than an original and two copies of these forms.

(1) SF-270, Request for Advance or Reimbursement. Each DoD Component shall adopt the SF-270 as a standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. DoD Components, however, have the option of using this form for construction programs in lieu of the SF-271,<sup>4</sup> "Outlay Report and Request for Reimbursement for Construction Programs."

(2) SF-271, Outlay Report and Request for Reimbursement for Construction Programs. Each DoD Component shall adopt the SF-271 as the standard form to be used for requesting reimbursement for construction programs. However, a DoD Component may substitute the SF-270 when the DoD Component determines that it provides adequate information to meet Federal needs.

<sup>4</sup>See footnote 2 to § 32.12(a).

**§ 32.23 Cost sharing or matching.**

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria:

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget when required by the DoD Component.

(7) Conform to other provisions of this part, as applicable.

(b) Unrecovered indirect costs (see definition in § 32.2) may be included as part of cost sharing or matching.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If a DoD Component authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of:

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation; or

(2) The current fair market value. However, when there is sufficient justification, the DoD Component may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project. The DoD Component may accept the use of any reasonable basis for determining the fair market value of the property.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an ap-

proved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if the purpose of the award is to:

(1) Assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching; or

(2) Support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the DoD Component has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(i) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties:

(1) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(2) The basis for determining the valuation for personal service and property shall be documented.

#### § 32.24 Program income.

(a) DoD Components shall apply the standards set forth in this section in requiring recipient organizations to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with the terms and conditions of the award, shall be used in one or more of the following ways:

(1) Added to funds committed to the project by the DoD Component and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(c) When a program regulation or award authorizes the disposition of

program income as described in paragraphs (b)(1) or (b)(2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) In the event that program regulations or the terms and conditions of the award do not specify how program income is to be used, paragraph (b)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section shall apply automatically unless the terms and conditions specify another alternative or the recipient is subject to special award conditions, as indicated in § 32.14.

(e) Unless program regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by program regulations or the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (see §§ 32.30 through 32.37).

(h) Unless program regulations or the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. Note that the Patent and Trademark Amendments (35 U.S.C. chapter 18) apply to inventions made under an experimental, developmental, or research award.

#### § 32.25 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the sum of the Federal and non-Federal shares, or only the Federal share, depending upon DoD Component requirements. It shall be

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related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from the cognizant grants officer for one or more of the following program or budget related reasons.

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the DoD Component. DoD Components should require this prior approval only in exceptional circumstances. The requirement in each such case must be stated in the award document.

(6) The inclusion, unless waived by the DoD Component, of costs that require prior approval in accordance with OMB Circular A-21,<sup>5</sup> “Cost Principles for Institutions of Higher Education,” OMB Circular A-122,<sup>6</sup> “Cost Principles for Non-Profit Organizations,” or Appendix E to 45 CFR part 74, “Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals,” or 48 CFR part 31, “Contract Cost Principles and Procedures,” as applicable. However, it should be noted that many of the prior approvals in these cost principles are appropriately waived only after consultation with the cognizant federal agency responsible for negotiating the recipient’s indirect costs.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(9) If required by the DoD Component, the transfer of funds among direct cost categories that is described in paragraph (e) of this section.

(d) (1) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, OMB Circular A-110 authorizes DoD Components, at their option, to waive cost-related and administrative prior written approvals required by this part and OMB Circulars A-21 and A-122 (but see cautionary note at end of paragraph (c)(5) of this section).

(2) The two prior approvals listed in paragraphs (d)(2)(i) and (ii) of this section are automatically waived unless the award document states otherwise. DoD Components should override this automatic waiver and require the prior approvals, especially for research awards, only in exceptional circumstances. Absent an override in the award terms and conditions, recipients need not obtain prior approvals before:

(i) Incurring pre-award costs 90 calendar days prior to award (incurring pre-award costs more than 90 calendar days prior to award would still require the prior approval of the DoD Component). All pre-award costs are incurred at the recipient’s risk (i.e., the DoD Component is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(ii) Carrying forward unobligated balances to subsequent funding periods.

(3) Under certain conditions, a DoD Component may authorize a recipient to initiate, without prior approval, a one-time, no-cost extension (i.e., an extension in the expiration date of an award that does not require additional Federal funds) for a period of up to twelve months, as long as the no-cost extension does not involve a change in the approved objectives or scope of the

<sup>5</sup>See footnote 1 to § 32.1(a).

<sup>6</sup>See footnote 1 to § 32.1(a).

project. The conditions for waiving this prior approval requirement are that the DoD Component must:

(i) Judge that the recipient's subsequently initiating a one-time, no-cost extension would not cause the DoD Component to fail to comply with DoD funding policies (for further information on the location of DoD funding policies, grants officers may refer to Appendix C to 32 CFR part 22).

(ii) Require a recipient that wishes to initiate a one-time, no-cost extension to so notify the office that made the award at least 10 calendar days before the original expiration date of the award.

(e) The DoD Component may, at its option, restrict the transfer of funds among direct cost categories, functions and activities for awards in which the Federal share of the project exceeds \$100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the DoD Component. As a matter of DoD policy, requiring prior approvals for such transfers generally is not appropriate for grants to support research. No DoD Component shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(f) For construction awards, recipients shall request prior written approval promptly from grants officers for budget revisions whenever:

(1) The revision results from changes in the scope or the objective of the project or program;

(2) The need arises for additional Federal funds to complete the project; or

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in § 32.27.

(g) When a DoD Component makes an award that provides support for both construction and nonconstruction work, the DoD Component may require the recipient to request prior approval from the grants officer before making any fund or budget transfers between the two types of work supported.

(h) No other prior approval requirements for specific items may be imposed unless a deviation has been approved, in accordance with the deviation procedures in § 32.4(c).

(i) For both construction and non-construction awards, DoD Components shall require recipients to notify the grants officer in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than \$5000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(j) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the grants officer indicates a letter of request suffices.

(k) Within 30 calendar days from the date of receipt of the request for budget revisions, the grants officer shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the grants officer shall inform the recipient in writing of the date when the recipient may expect the decision.

#### § 32.26 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133,<sup>7</sup> "Audits of States, Local Governments, and Non-Profit Organizations."

(b) State and local governments that are subrecipients shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

(c) Hospitals that are subrecipients and are not covered by the audit provisions of revised OMB Circular A-133

<sup>7</sup> See footnote 1 to § 32.1(a).

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shall be subject to the audit requirements specified in award terms and conditions.

(d) For-profit organizations that are subrecipients shall be subject to the audit requirements specified in 32 CFR 34.16.

### § 32.27 Allowable costs.

(a) *General.* For each kind of recipient or subrecipient of a cost-type assistance award, or each contractor receiving a cost-type contract under an assistance award, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined in accordance with the cost principles applicable to the entity incurring the costs.

(b) *Governmental organizations.* Allowability of costs incurred by State, local or federally-recognized Indian tribal governments that may be subrecipients or contractors under awards subject to this part is determined in accordance with the provisions of OMB Circular A-87,<sup>8</sup> “Cost Principles for State and Local Governments.”

(c) *Non-profit organizations.* The allowability of costs incurred by non-profit organizations that may be recipients or subrecipients of awards subject to this part, or contractors under such awards, is determined in accordance with the provisions of OMB Circular A-122, “Cost Principles for Non-Profit Organizations.”

(d) *Higher educational institutions.* The allowability of costs incurred by institutions of higher education that may be recipients, subrecipients, or contractors is determined in accordance with the provisions of OMB Circular A-21, “Cost Principles for Educational Institutions.”

(e) *Hospitals.* The allowability of costs incurred by hospitals that are recipients, subrecipients, or contractors is determined in accordance with the provisions of Appendix E to 45 CFR part 74, “Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.”

(f) *For-profit organizations.* The allowability of costs incurred by subrecipients or contractors that are either for-

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profit organizations or non-profit organizations listed in Attachment C to Circular A-122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31; however, the grants officer or the award terms and conditions may in rare cases authorize a determination of allowable costs that are in accordance with uniform cost accounting standards and comply with cost principles acceptable to the Department of Defense.

### § 32.28 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the award only allowable costs resulting from obligations incurred during the funding period and any pre-award costs (see § 32.25(d)(2)(i)) authorized by the DoD Component.

## PROPERTY STANDARDS

### § 32.30 Purpose of property standards.

Sections 32.31 through 32.37 set forth uniform standards governing management and disposition of property furnished by the Federal Government and property whose cost was charged to a project supported by a Federal award. DoD Components shall require recipients to observe these standards under awards and shall not impose additional requirements, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 32.31 through 32.37.

### § 32.31 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

### § 32.32 Real property.

Each DoD Component that makes awards under which real property is acquired in whole or in part with Federal funds shall prescribe requirements for

<sup>8</sup>See footnote 1 to § 32.1(a).

recipients concerning the use and disposition of such property. Unless otherwise provided by statute, such requirements, at a minimum, shall contain the following:

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the DoD Component.

(b) The recipient shall obtain written approval by the grants officer for the use of real property in other federally sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized for support by the DoD Component.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from the DoD Component or its successor Federal agency. The responsible Federal agency shall observe one or more of the following disposition instructions:

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by the DoD Component and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible

third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

#### **§ 32.33 Federally-owned and exempt property.**

(a) *Federally-owned property.* (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to the DoD Component that made the award. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to the DoD Component for further Federal agency utilization.

(2) If the DoD Component that made the award has no further need for the property, it shall be declared excess and either:

(i) Reported to the General Services Administration, in accordance with the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483(b)(2)), as implemented by General Services Administration regulations at 41 CFR 101-47.202; or

(ii) Disposed of by alternative methods pursuant to other specific statutory authority. For example, DoD Components are authorized by the Federal Technology Transfer Act (15 U.S.C. 3710(i)), to donate research equipment to educational and non-profit organizations for the conduct of technical and scientific education and research activities—donations under this Act shall be in accordance with the DoD implementation of E.O. 12999 (3 CFR, 1996 Comp., p. 180), “Educational Technology: Ensuring Opportunity for All Children in the Next Century,” as applicable. Appropriate instructions shall be issued to the recipient by the DoD Component.

(b) *Exempt property.* (1) When statutory authority exists, a DoD Component may vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the DoD Component considers appropriate. For example, under 31 U.S.C. 6306, DoD Components may so vest title to tangible personal property

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under a grant or cooperative agreement for basic or applied research in a nonprofit institution of higher education or a nonprofit organization whose primary purpose is conducting scientific research. Such property is “exempt property.”

(2) As a matter of policy, DoD Components shall make maximum use of the authority of 31 U.S.C. 6306 to vest title to exempt property in institutions of higher education, without further obligation to the Government, to enhance the university infrastructure for future performance of defense research and related, science and engineering education.

(3) DoD Components may establish conditions, in regulation or in award terms and conditions, for vesting title to exempt property. Should a DoD Component not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

### § 32.34 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of the DoD Component that made the award. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority:

(1) First, activities sponsored by the DoD Component that funded the original project.

(2) Second, activities sponsored by other DoD Components.

(3) Then, activities sponsored by other Federal agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by the DoD Component that financed the equipment; second preference shall be given to projects or programs sponsored by other DoD Components; and third preference shall be given to projects or programs sponsored by other Federal agencies. If the property is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the DoD Component that financed the property. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of the DoD Component that financed the equipment.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned property shall include all of the following:

(1) Records for equipment and federally-owned property shall be maintained accurately and shall include the following information:

(i) A description of the equipment or federally-owned property.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment or federally-owned property, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the property was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal



participation in the cost of the equipment (not applicable to property furnished by the Federal Government).

(vii) Location and condition of the equipment or federally-owned property and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the DoD Component that made the award for its share.

(2) Property owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment and federally-owned property shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment or federally-owned property.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment or federally-owned property. Any loss, damage, or theft of equipment or federally-owned property shall be investigated and fully documented; if the property was owned by the Federal Government, the recipient shall promptly notify the DoD Component.

(5) Adequate maintenance procedures shall be implemented to keep the equipment or federally-owned property in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards.

(1) For equipment with a current per unit fair market value of \$5,000 or more, the recipient may retain the

equipment for other uses provided that compensation is made to the DoD Component that originally made the award or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment.

(2) If the recipient has no need for the equipment, the recipient shall request disposition instructions from the DoD Component. The DoD Component shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern:

(i) The grants officer, in consultation with the program manager, shall judge whether the age and nature of the equipment warrant a screening procedure to determine whether the equipment is useful to a DoD Component or other Federal agency. If a screening procedure is warranted:

(A) The DoD Component shall determine whether the equipment can be used to meet DoD requirements.

(B) If no DoD requirement exists, the availability of the equipment shall be reported to the General Services Administration by the DoD Component to determine whether a requirement for the equipment exists in other Federal agencies.

(ii) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse the DoD Component that made the award an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share \$500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(iii) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable

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shipping or interim storage costs incurred.

(iv) If the recipient is instructed to otherwise dispose of the equipment, the recipient shall be reimbursed by the DoD Component that made the award for such costs incurred in its disposition.

(h) The DoD Component may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when such third party is otherwise eligible under existing statutes. Such transfer shall be subject to the following standards.

(1) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing. For exempt property, in accordance with § 32.33(b)(3), note that this identification must occur by the time of award, or title to the property vests in the recipient without further obligation to the Government.

(2) The DoD Component shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with award funds and federally-owned property. If the DoD Component fails to issue disposition instructions for equipment within the 120 calendar day period, the recipient shall apply the standards of paragraph (g) of this section.

(3) When the DoD Component exercises its right to take title, the equipment shall be subject to the provisions for federally-owned property.

### § 32.35 Supplies.

(a) Title to supplies shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to

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provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

### § 32.36 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. DoD Components reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including Governmentwide regulations issued by the Department of Commerce at 37 CFR part 401, “Rights to Inventions Made by Non-profit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.”

(c) The Federal Government has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d)(1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the DoD Component that made the award shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the DoD Component that made the award obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the

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agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of this paragraph (d):

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This “recorded” material excludes physical objects (*e.g.*, laboratory samples). *Research data* also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(e) Title to intangible property and debt instruments acquired under an award or subaward (rather than developed or produced under the award or subaward) vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of the DoD Component that made the award. When no longer needed for the originally authorized purpose, disposition of the intangible property shall

occur in accordance with the provisions of § 32.34(g).

[63 FR 12188, Mar. 12, 1998, as amended at 65 FR 14407, 14416, Mar. 16, 2000]

### § 32.37 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. DoD Components may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

### PROCUREMENT STANDARDS

### § 32.40 Purpose of procurement standards.

Sections 32.41 through 32.48 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders.

### § 32.41 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to the DoD Component that made the award, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

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### **§ 32.42 Codes of conduct.**

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

### **§ 32.43 Competition.**

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the re-

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cipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

### **§ 32.44 Procurement procedures.**

(a) All recipients shall establish written procurement procedures. These procedures shall provide, at a minimum, that:

(1) Recipients avoid purchasing unnecessary items;

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement; and

(3) Solicitations for goods and services provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal:

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by the DoD implementation, in 2 CFR part 1125, of OMB guidance on nonprocurement debarment and suspension (2 CFR part 180)

(e) Recipients shall, on request, make available for the DoD Component's pre-award review, procurement documents such as request for proposals or invita-

tions for bids, independent cost estimates, etc., when any of the following conditions apply:

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the simplified acquisition threshold fixed at 41 U.S.C. 403 (11) (currently \$100,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "brand name" product.

(4) The proposed award over the simplified acquisition threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the simplified acquisition threshold.

[63 FR 12188, Mar. 12, 1998, as amended at 72 FR 34998, June 26, 2007]

#### § 32.45 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

#### § 32.46 Procurement records.

Procurement records and files for purchases in excess of the simplified acquisition threshold shall include the following at a minimum:

- (a) Basis for contractor selection;
- (b) Justification for lack of competition when competitive bids or offers are not obtained; and
- (c) Basis for award cost or price.

#### § 32.47 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms,

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conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

### § 32.48 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions shall also be applied to subcontracts:

(a) Contracts in excess of the simplified acquisition threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the simplified acquisition threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds \$100,000. For those contracts or subcontracts exceeding \$100,000, the DoD Component may accept the bonding policy and requirements of the recipient, provided the grants officer has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid

price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described in §§32.40 through 32.49, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, "Surety Companies Doing Business with the United States."

(d) All negotiated contracts (except those for less than the simplified acquisition threshold) awarded by recipients shall include a provision to the effect that the recipient, the Department of Defense, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including those for amounts less than the simplified acquisition threshold, by recipients and their contractors shall contain the procurement provisions of Appendix A to this part, as applicable.

### § 32.49 Resource Conservation and Recovery Act.

Under the Resource Conservation and Recovery Act (RCRA) (section 6002, Pub. L. 94-580, 42 U.S.C. 6962), any State agency or agency of a political subdivision of a State which is using

appropriated Federal funds must comply with section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, State and local institutions of higher education, hospitals, and non-profit organizations that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

#### REPORTS AND RECORDS

##### § 32.50 Purpose of reports and records.

Sections 32.51 through 32.53 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

##### § 32.51 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in § 32.26.

(b) The award terms and conditions shall prescribe the frequency with which the performance reports shall be submitted. Except as provided in paragraph (f) of this section, performance reports shall not be required more frequently than quarterly or less frequently than annually. Annual reports shall be due 90 calendar days after the award year; quarterly or semi-annual reports shall be due 30 calendar days after the reporting period. DoD Components may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report shall not be required after completion of the project.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following:

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs. However, unit costs are generally inappropriate for research (see § 32.21 (a) and (b)(4)).

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the grants officer of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) DoD Components' representatives may make site visits, as needed.

(h) DoD Components shall comply with applicable clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

##### § 32.52 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients:

(1) *SF-269<sup>9</sup> or SF-269A,<sup>10</sup> Financial Status Report.* (i) DoD Components shall require recipients to use the SF-269 or SF-269A to report the status of funds for all nonconstruction projects or programs. A DoD Component may, however, have the option of not requiring the SF-269 or SF-269A when the SF-270,

<sup>9</sup>See footnote 2 to § 32.12(a).

<sup>10</sup>See footnote 2 to § 32.12(a).

Request for Advance or Reimbursement, or SF-272,<sup>11</sup> Report of Federal Cash Transactions, is determined to provide adequate information to meet agency needs, except that a final SF-269 or SF-269A shall be required at the completion of the project when the SF-270 is used only for advances.

(ii) The DoD Component shall prescribe whether the report shall be on a cash or accrual basis. If the award requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient shall not be required to convert its accounting system, but shall develop such accrual information through best estimates based on an analysis of the documentation on hand.

(iii) The DoD Component shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the award.

(iv) The DoD Component shall require recipients to submit the SF-269 or SF-269A (an original and no more than two copies) no later than 30 calendar days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by the grants officer upon request of the recipient.

(2) *SF-272, Report of Federal Cash Transactions.* (i) When funds are advanced to recipients the DoD Component shall require each recipient to submit the SF-272 and, when necessary, its continuation sheet, SF-272a.<sup>12</sup> The grants officer shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each award to the recipients.

(ii) DoD Components may require forecasts of Federal cash requirements in the "Remarks" section of the report.

(iii) When practical and deemed necessary, DoD Components may require recipients to report in the "Remarks" section the amount of cash advances received in excess of three working days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF-272 15 calendar days following the end of each quarter. DoD Components may require a monthly report from those recipients receiving advances totaling \$1 million or more per year.

(v) DoD Components may waive the requirement for submission of the SF-272 for any one of the following reasons:

(A) When monthly advances do not exceed \$25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in the grants officer's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or

(C) When electronic payment mechanisms or SF-270 forms provide adequate data.

(b) When the DoD Component needs additional information or more frequent reports, the following shall be observed:

(1) When additional information is needed to comply with legislative requirements, grants officers shall issue instructions to require recipients to submit such information under the "Remarks" section of the reports.

(2) When a grants officer, after consultation with the Federal agency assigned cognizance for a recipient's audit and audit resolution, determines that the recipient's accounting system does not meet the standards in §32.21, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. The grants officer, in obtaining this information, shall comply with applicable report clearance requirements of 5 CFR part 1320.

<sup>11</sup> See footnote 2 to §32.12(a).

<sup>12</sup> See footnote 2 to §32.12(a).



(3) Grants officers are encouraged to shade out any line item on any report if not necessary.

(4) DoD Components are encouraged to accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) DoD Components may provide computer or electronic outputs to recipients when it expedites or contributes to the accuracy of reporting.

**§ 32.53 Retention and access requirements for records.**

(a) This section sets forth requirements for record retention and access to records for awards to recipients. DoD Components shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the DoD Component that made the award, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, and related records, for which retention requirements are specified in paragraph (g) of this section.

(c) Copies of original records may be substituted for the original records if authorized by the grants officer.

(d) The grants officer shall request that recipients transfer certain records to DoD Component custody when he or she determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping,

a grants officer may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) DoD Components, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, no DoD Component shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the DoD Component can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the DoD Component making the award.

(g) Indirect cost rate proposals, cost allocations plans, etc. Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) *If submitted for negotiation.* If the recipient submits an indirect-cost proposal, plan, or other computation to the Federal agency responsible for negotiating the recipient's indirect cost rate, as the basis for negotiation of the rate, or the subrecipient submits such a proposal, plan, or computation to the recipient, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) *If not submitted for negotiation.* If the recipient is not required to submit

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to the cognizant Federal agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(h) If the information described in this section is maintained on a computer, recipients shall retain the computer data on a reliable medium for the time periods prescribed. Recipients may transfer computer data in machine readable form from one reliable computer medium to another. Recipients' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Recipients shall also maintain an audit trail describing the data transfer. For the record retention time periods prescribed in this section, recipients shall not destroy, discard, delete, or write over such computer data.

### TERMINATION AND ENFORCEMENT

#### § 32.60 Purpose of termination and enforcement.

Sections 32.61 and 32.62 set forth uniform suspension, termination and enforcement procedures.

#### § 32.61 Termination.

(a) Awards may be terminated in whole or in part only as follows:

(1) By the grants officer, if a recipient materially fails to comply with the terms and conditions of an award;

(2) By the grants officer with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated; or

(3) By the recipient upon sending to the grants officer written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. The recipient must provide such notice at least 30 calendar days prior to the effective

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date of the termination. However, if the grants officer determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purposes for which the award was made, he or she may terminate the award in its entirety.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 32.71, including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

#### § 32.62 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the grants officer may, in addition to imposing any of the special conditions outlined in § 32.14, take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the grants officer and DoD Component.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, the DoD Component shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved. Award terms or conditions will incorporate the procedures of 32 CFR 22.815 for processing recipient claims and disputes and for deciding appeals of grants officers' decisions.

(c) *Effects of suspension and termination.* Costs of a recipient resulting

from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the grants officer expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if the costs:

(1) Result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable; and

(2) Would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under 2 CFR part 1125.

[63 FR 12188, Mar. 12, 1998, as amended at 72 FR 34998, June 26, 2007]

### Subpart D—After-the-Award Requirements

#### § 32.70 Purpose.

Sections 32.71 through 32.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

#### § 32.71 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports required by the terms and conditions of the award. The grants officer may approve extensions when requested by the recipient.

(b) Unless the grants officer authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) The responsible grants officer and payment office shall expedite completion

of steps needed to close out awards and make prompt, final payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that the DoD Component has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A-129<sup>13</sup> governs unreturned amounts that become delinquent debts (see 32 CFR 22.820).

(e) When authorized by the terms and conditions of the award, the grants officer shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 32.31 through 32.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, the DoD Component shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

#### § 32.72 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of the Department of Defense to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 32.26.

(4) Property management requirements in §§ 32.31 through 32.37.

(5) Records retention as required in § 32.53.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the grants officer and the recipient, provided the responsibilities of the recipient referred to in § 32.73(a), including those for property management as applicable, are

<sup>13</sup> See footnote 1 to § 32.1(a).

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considered and provisions made for continuing responsibilities of the recipient, as appropriate.

### § 32.73 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government.

(b) OMB Circular A-110 informs each Federal agency that:

(1) If a debt is not paid within a reasonable period after the demand for payment, the Federal agency may reduce the debt by:

(i) Making administrative offset against other requests for reimbursement.

(ii) Withholding advance payments otherwise due to the recipient.

(iii) Taking other action permitted by statute.

(2) Except as otherwise provided by law, the Federal awarding agency shall charge interest on an overdue debt in accordance with 4 CFR Chapter II, "Federal Claims Collection Standards."

(c) DoD grants officers shall follow the procedures in 32 CFR 22.820 for issuing demands for payment and transferring debts to DoD payment offices for collection. Recipients will be informed about pertinent procedures and timeframes through the written notices of grants officers' decisions and demands for payment.

### APPENDIX A TO PART 32—CONTRACT PROVISIONS

All contracts awarded by a recipient, including those for amounts less than the simplified acquisition threshold, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246 (3 CFR, 1964-1965 Comp., p. 339), "Equal Employment Opportunity," as amended by E.O. 11375 (3 CFR, 1966-1970 Comp., p. 684), "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR ch. 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

2. *Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subawards in excess of \$2000 for construction or

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repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the responsible DoD Component.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)*—This Act applies to procurements under awards only when the Federal program legislation specifically makes it apply (i.e., Davis-Bacon does not by itself apply to procurements under awards). In cases where another statute does make the Davis-Bacon Act apply, all construction contracts awarded by the recipients and subrecipients of more than \$2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR part 5, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction"). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333)*—Where applicable, all contracts awarded by recipients in excess of \$100,000 for construction or other purposes that involve the employment of mechanics or laborers shall include a provision for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), as supplemented by Department of Labor regulations (29 CFR part 5). Under section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section

107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract, Grant or Cooperative Agreement*—Contracts, grants, or cooperative agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.”

6. *Clean Air Act* (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*), as amended—Contracts and subawards of amounts in excess of \$100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to the responsible DoD Component and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment* (31 U.S.C. 1352)—Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension* (E.O.s 12549 and 12689)—A contract award with an amount expected to equal or exceed \$25,000 and certain other contract awards (see 2 CFR 1125.220, which implements OMB guidance at 2 CFR 180.220) shall not be made to parties listed on the Governmentwide Excluded Parties List System, in accordance with the DoD adoption at 2 CFR part 1125 of the OMB guidance implementing E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), “Debarment and Suspension.” The Excluded Parties List System accessible

on the Internet at [www.epls.gov](http://www.epls.gov) contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than E.O. 12549.

[63 FR 12188, Mar. 12, 1998, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34998, June 26, 2007]

## PART 33—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

### Subpart A—General

#### Sec.

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- 33.2 Scope of subpart.
- 33.3 Definitions.
- 33.4 Applicability.
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- 33.6 Additions and exceptions.

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#### CHANGES, PROPERTY, AND SUBAWARDS

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#### REPORTS, RECORDS RETENTION, AND ENFORCEMENT

- 33.40 Monitoring and reporting program performance.
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### Subpart D—After-the-Grant Requirements

- 33.50 Closeout.
- 33.51 Later disallowances and adjustments.
- 33.52 Collections of amounts due.

### Subpart E—Entitlements [Reserved]

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 113.

SOURCE: 53 FR 8070, 8087, Mar. 11, 1988, unless otherwise noted. Redesignated at 57 FR 6200, Feb. 21, 1992.

### Subpart A—General

#### § 33.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

#### § 33.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

#### § 33.3 Definitions.

As used in this part:

*Accrued expenditures* mean the charges incurred by the grantee during a given period requiring the provision of funds for:

- (1) Goods and other tangible property received;
- (2) Services performed by employees, contractors, subgrantees, subcontractors, and other payees; and
- (3) Other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

*Accrued income* means the sum of:

- (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and
- (2) Amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

*Acquisition cost* of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was

acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

*Administrative requirements* mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from “*programmatic*” requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

*Awarding agency* means:

- (1) With respect to a grant, the Federal agency, and
- (2) With respect to a subgrant, the party that awarded the subgrant.

*Cash contributions* means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

*Contract* means (except as used in the definitions for “*grant*” and “*subgrant*” in this section and except where qualified by “*Federal*”) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

*Cost sharing or matching* means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

*Cost-type contract* means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

*Equipment* means tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. A grantee may use its own definition of equipment provided that

such definition would at least include all equipment defined above.

*Expenditure report* means:

(1) For nonconstruction grants, the SF-269 “Financial Status Report” (or other equivalent report);

(2) For construction grants, the SF-271 “Outlay Report and Request for Reimbursement” (or other equivalent report).

*Federally recognized Indian tribal government* means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

*Government* means a State or local government or a federally recognized Indian tribal government.

*Grant* means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

*Grantee* means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

*Local government* means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

*Obligations* means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

*OMB* means the United States Office of Management and Budget.

*Outlays* (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

*Percentage of completion method* refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

*Prior approval* means documentation evidencing consent prior to incurring specific cost.

*Real property* means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

*Share*, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

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*State* means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

*Subgrant* means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of “grant” in this part.

*Subgrantee* means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

*Supplies* means all tangible personal property other than “equipment” as defined in this part.

*Suspension* means depending on the context, either:

(1) Temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or

(2) An action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

*Termination* means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. “Termination” does not include:

(1) Withdrawal of funds awarded on the basis of the grantee’s underestimate of the unobligated balance in a prior period;

(2) Withdrawal of the unobligated balance as of the expiration of a grant;

(3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or

(4) Voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

*Terms of a grant or subgrant* mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

*Third party in-kind contributions* mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

*Unliquidated obligations* for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

*Unobligated balance* means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

#### § 33.4 Applicability.

(a) *General.* Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 33.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States’ Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education



other than programs administered by the Secretary of Education under title V, subtitle D, chapter 2, section 583—the Secretary's discretionary grant program) and titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and part C of title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)(19)(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also

supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 33.4(a) (3) through (8) are subject to subpart E.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### § 33.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 33.6.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### § 33.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

### Subpart B—Pre-Award Requirements

#### § 33.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

#### § 33.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, “Intergovernmental Review of Federal Programs,” States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

#### § 33.12 Special grant or subgrant conditions for “high-risk” grantees.

(a) A grantee or subgrantee may be considered “high risk” if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

### Subpart C—Post-Award Requirements

#### FINANCIAL ADMINISTRATION

#### § 33.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been

used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed

whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

#### § 33.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if

it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall

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be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 33.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to \$100 per year for administrative expenses.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

### § 33.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A-87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122.
Educational institutions. ....	OMB Circular A-21.
For-profit organization other than a hospital and an organization named in OMB Circular A-122 as not subject to that circular.	48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

### § 33.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee.

### § 33.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs

borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 33.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 33.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching

requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will

be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given

only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 33.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

#### § 33.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income

from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. “During the grant period” is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 33.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 33.31 and 33.32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish be-

tween income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

#### § 33.26 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A-133, “Audits of States, Local Governments, and Non-Profit Organizations.” The audits shall be made by an independent auditor in accordance with generally accepted government



auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends \$500,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 33.36 shall be followed.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992; 62 FR 45939, 45943, Aug. 29, 1997; 70 FR 49477, Aug. 23, 2005]

#### CHANGES, PROPERTY, AND SUBAWARDS

#### § 33.30 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 33.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes—(1) Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a non-construction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds \$100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and non-construction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any

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fund or budget transfer from non-construction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 33.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget format the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 33.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a

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change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6200, Feb. 21, 1992]

#### § 33.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be

followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

#### § 33.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 33.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services,

unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

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(2) Items of equipment with a current per unit fair market value in excess of \$5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow § 33.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### § 33.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

### § 33.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

### § 33.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must comply with the requirements of OMB guidance in Subpart C, 2 CFR part 180, as implemented by the Department of Defense in 2 CFR part 1125. Those requirements include restrictions on entering into a covered transaction with any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

[53 FR 8070, 8087, Mar. 11, 1988, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34998, June 26, 2007]

### § 33.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by

Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- (i) The employee, officer or agent,
- (ii) Any member of his immediate family,
- (iii) His or her partner, or
- (iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohi-

bitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 33.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the

named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures*. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at \$100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) *Procurement by sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 33.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them suffi-

cient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) *Procurement by competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected,

subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the



complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § 33.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition

threshold, specifies a "brand name" product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond,

certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee’s and subgrantee’s contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled “Equal Employment Opportunity,” as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts in excess of \$2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2000, and in excess of \$2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the

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Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992; 60 FR 19639, Apr. 19, 1995]

### § 33.37 Subgrants.

(a) *States.* States shall follow State law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 33.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 33.10;

(2) Section 33.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in § 33.21; and

(4) Section 33.50.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

### § 33.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output

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may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its perform-

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ance reporting obligations to the Federal agency.

#### § 33.41 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report—(1) Form.* Grantees will use Standard Form 269 or

269A, Financial Status Report, to report the status of funds for all non-construction grants and for construction grants when required in accordance with § 33.41(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report—*(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash re-

quirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement—*(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 33.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs—*(1) *Grants that support construction activities paid by reimbursement method.* (i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 33.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 33.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 33.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 33.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 33.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 33.41(b)(2).

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

**§ 33.42 Retention and access requirements for records.**

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 33.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period—*(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records—(1) Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are

not required to permit public access to their records.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

#### § 33.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination,

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are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to “Debarment and Suspension” under E.O. 12549 (see § 33.35).

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### § 33.44 Termination for convenience.

Except as provided in § 33.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 33.43 or paragraph (a) of this section.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### Subpart D—After-The-Grant Requirements

#### § 33.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable).*

(3) *Final request for payment (SF-270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:*

In accordance with § 33.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

#### § 33.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency’s right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee’s obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 33.42;

(d) Property management requirements in §§ 33.31 and 33.32; and



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(e) Audit requirements in § 33.26.

[53 FR 8070 and 8087, Mar. 11, 1988. Redesignated and amended at 57 FR 6199 and 6201, Feb. 21, 1992]

### § 33.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

### Subpart E—Entitlement [Reserved]

## PART 34—ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH FOR-PROFIT ORGANIZATIONS

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#### APPENDIX A TO PART 34—CONTRACT PROVISIONS

AUTHORITY: 5 U.S.C. 301 and 10 U.S.C. 113.

SOURCE: 63 FR 12204, Mar. 12, 1998, unless otherwise noted.

### Subpart A—General

#### § 34.1 Purpose.

(a) This part prescribes administrative requirements for awards to for-profit organizations.

(b) Applicability to prime awards and subawards is as follows:

(1) *Prime awards.* DoD Components shall apply the provisions of this part to awards to for-profit organizations. DoD Components shall not impose requirements that are in addition to, or inconsistent with, the requirements provided in this part, except:

(i) In accordance with the deviation procedures or special award conditions in § 34.3 or § 34.4, respectively; or

(ii) As required by Federal statute, Executive order, or Federal regulation

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implementing a statute or Executive order.

(2) *Subawards.* (i) Any legal entity (including any State, local government, university or other nonprofit organization, as well as any for-profit entity) that receives an award from a DoD Component shall apply the provisions of this part to subawards with for-profit organizations. It should be noted that subawards (see definition in § 34.2) are financial assistance for substantive programmatic performance and do not include recipients' procurement of goods and services.

(ii) For-profit organizations that receive prime awards covered by this part shall apply to each subaward the administrative requirements that are applicable to the particular type of subrecipient (e.g., 32 CFR part 33 specifies requirements for subrecipients that are States or local governments, and 32 CFR part 32 contains requirements for universities or other nonprofit organizations).

### § 34.2 Definitions.

The following are definitions of terms as used in this part. Grants officers are cautioned that terms may be defined differently in this part than they are in other parts of the DoD Grant and Agreement Regulations (DoDGARs).

*Advance.* A payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

*Award.* A grant or a cooperative agreement other than a technology investment agreement (TIA). TIAs are covered by part 37 of the DoDGARs (32 CFR part 37). Portions of this part may apply to a TIA, but only to the extent that 32 CFR part 37 makes them apply.

*Cash contributions.* The recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

*Closeout.* The process by which the grants officer administering an award made by a DoD Component determines that all applicable administrative actions and all required work of the

award have been completed by the recipient and DoD Component.

*Contract.* Either:

(1) A procurement contract made by a recipient under a DoD Component's award or by a subrecipient under a subaward; or

(2) A procurement subcontract under a contract awarded by a recipient or subrecipient.

*Cost sharing or matching.* That portion of project or program costs not borne by the Federal Government.

*Disallowed costs.* Those charges to an award that the grants officer administering an award made by a DoD Component determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

*DoD Component.* A Military Department, Defense Agency, DoD Field Activity, or organization within the Office of the Secretary of Defense that provides or administers an award to a recipient.

*Equipment.* Tangible nonexpendable personal property charged directly to the award having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. That definition applies for the purposes of the Federal administrative requirements in this part. However, the recipient's policy may be to use a lower dollar value for defining "equipment," and nothing in this part should be construed as requiring the recipient to establish a higher limit for purposes other than the administrative requirements in this part.

*Excess property.* Property under the control of any DoD Component that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

*Expenditures.* See the definition for outlays in this section.

*Federally owned property.* Property in the possession of, or directly acquired by, the Government and subsequently made available to the recipient.

*Funding period.* The period of time when Federal funding is available for obligation by the recipient.

*Intellectual property.* Intangible personal property such as patents and patent applications, trademarks, copyrights, technical data, and software rights.

*Obligations.* The amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

*Outlays or expenditures.* Charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

*Personal property.* Property of any kind except real property. It may be:

- (1) Tangible, having physical existence (i.e., equipment and supplies); or
- (2) Intangible, having no physical existence, such as patents, copyrights, data and software.

*Prior approval.* Written or electronic approval by an authorized official evidencing prior consent.

*Program income.* Gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award. Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest

earned on advances of Federal funds is not program income. Except as otherwise provided in program regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

*Project costs.* All allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

*Project period.* The period established in the award document during which Federal sponsorship begins and ends.

*Property.* Real property and personal property (equipment, supplies, and intellectual property), unless stated otherwise.

*Real property.* Land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

*Recipient.* A for-profit organization receiving an award directly from a DoD Component to carry out a project or program.

*Research.* Basic, applied, and advanced research activities. *Basic research* is defined as efforts directed toward increasing knowledge or understanding in science and engineering. *Applied research* is defined as efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology, such as new materials, devices, methods, and processes. "Advanced research," advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way, is most closely analogous to precommercialization or precompetitive technology development in the commercial sector (it does not include development of military systems and hardware where specific requirements have been defined).

*Small award.* An award not exceeding the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently \$100,000).

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*Small business concern.* A concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it has applied for an award, and qualified as a small business under the criteria and size standards in 13 CFR part 121. For more details, grants officers should see 48 CFR part 19 in the “Federal Acquisition Regulation.”

*Subaward.* Financial assistance in the form of money, or property in lieu of money, provided under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but the term includes neither procurement of goods and services nor any form of assistance which is excluded from the definition of “award” in this section.

*Subrecipient.* The legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided.

*Supplies.* Tangible expendable personal property that is charged directly to the award and that has a useful life of less than one year or an acquisition cost of less than \$5000 per unit.

*Suspension.* An action by a DoD Component that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the DoD Component. Suspension of an award is a separate action from suspension of a participant under 2 CFR part 1125.

*Termination.* The cancellation of an award, in whole or in part, under an agreement at any time prior to either:

(1) The date on which all work under an award is completed; or

(2) The date on which Federal sponsorship ends, as given on the award document or any supplement or amendment thereto.

*Third party in-kind contributions.* The value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifi-

cally identifiable to the project or program.

*Unobligated balance.* The portion of the funds authorized by a DoD Component that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

[63 FR 12204, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 72 FR 34998, June 26, 2007]

#### § 34.3 Deviations.

(a) *Individual deviations.* Individual deviations affecting only one award may be approved by DoD Components in accordance with procedures stated in 32 CFR 21.335(a) and 21.340.

(b) *Small awards.* DoD Components may apply less restrictive requirements than the provisions of this part when awarding small awards, except for those requirements which are statutory.

(c) *Other class deviations.* For classes of awards other than small awards, the Director, Defense Research and Engineering, or his or her designee, may grant exceptions from the requirements of this part when exceptions are not prohibited by statute. DoD Components shall request approval for such deviations in accordance with 32 CFR 21.335 (b) and 21.340.

[63 FR 12204, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

#### § 34.4 Special award conditions.

(a) Grants officers may impose additional requirements as needed, over and above those provided in this part, if an applicant or recipient:

(1) Has a history of poor performance;

(2) Is not financially stable;

(3) Has a management system that does not meet the standards prescribed in this part;

(4) Has not conformed to the terms and conditions of a previous award; or

(5) Is not otherwise responsible.

(b) Before imposing additional requirements, DoD Components shall notify the applicant or recipient in writing as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the corrective action needed;

(4) The time allowed for completing the corrective actions; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(c) Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

(d) Grants officers:

(1) Should coordinate the imposition and removal of special award conditions with the cognizant grants administration office identified in 32 CFR 22.710.

(2) Shall include in the award file the written notification to the recipient, described in paragraph (b) of this section, and the documentation required by 32 CFR 22.410(b).

### Subpart B—Post-award Requirements

#### FINANCIAL AND PROGRAM MANAGEMENT

##### § 34.10 Purpose of financial and program management.

Sections 34.11 through 34.17 prescribe standards for financial management systems; methods for making payments; and rules for cost sharing and matching, program income, revisions to budgets and program plans, audits, allowable costs, and fee and profit.

##### § 34.11 Standards for financial management systems.

(a) Recipients shall be allowed and encouraged to use existing financial management systems established for doing business in the commercial marketplace, to the extent that the systems comply with Generally Accepted Accounting Principles (GAAP) and the minimum standards in this section. As a minimum, a recipient's financial management system shall provide:

(1) Effective control of all funds. Control systems must be adequate to ensure that costs charged to Federal funds and those counted as the recipient's cost share or match are consistent with requirements for cost reasonableness, allowability, and allocability in the applicable cost prin-

ciples (see § 34.17) and in the terms and conditions of the award.

(2) Accurate, current and complete records that document for each project funded wholly or in part with Federal funds the source and application of the Federal funds and the recipient's required cost share or match. These records shall:

(i) Contain information about receipts, authorizations, assets, expenditures, program income, and interest.

(ii) Be adequate to make comparisons of outlays with budgeted amounts for each award (as required for programmatic and financial reporting under § 34.41. Where appropriate, financial information should be related to performance and unit cost data. Note that unit cost data are generally not appropriate for awards that support research.

(3) To the extent that advance payments are authorized under § 34.12, procedures that minimize the time elapsing between the transfer of funds to the recipient from the Government and the recipient's disbursement of the funds for program purposes.

(4) The recipient shall have a system to support charges to Federal awards for salaries and wages, whether treated as direct or indirect costs. Where employees work on multiple activities or cost objectives, a distribution of their salaries and wages will be supported by personnel activity reports which must:

(i) Reflect an after the fact distribution of the actual activity of each employee.

(ii) Account for the total activity for which each employee is compensated.

(iii) Be prepared at least monthly, and coincide with one or more pay periods.

(b) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the DoD Component, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(c) The DoD Component may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

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(d) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, “Surety Companies Doing Business with the United States.”

### § 34.12 Payment.

(a) *Methods available.* Payment methods for awards with for-profit organizations are:

(1) *Reimbursement.* Under this method, the recipient requests reimbursement for costs incurred during a time period. In cases where the recipient submits each request for payment to the grants officer, the DoD payment office reimburses the recipient by electronic funds transfer or check after approval of the request by the grants officer designated to do so.

(2) *Advance payments.* Under this method, a DoD Component makes a payment to a recipient based upon projections of the recipient’s cash needs. The payment generally is made upon the recipient’s request, although predetermined payment schedules may be used when the timing of the recipient’s needs to disburse funds can be predicted in advance with sufficient accuracy to ensure compliance with paragraph (b)(2)(iii) of this section.

(b) *Selecting a method.* (1) The preferred payment method is the reimbursement method, as described in paragraph (a)(1) of this section.

(2) Advance payments, as described in paragraph (a)(2) of this section, may be used in exceptional circumstances, subject to the following conditions:

(i) The grants officer, in consultation with the program official, must judge that advance payments are necessary or will materially contribute to the probability of success of the project contemplated under the award (e.g., as startup funds for a project performed by a newly formed company). The rationale for the judgment shall be documented in the award file.

(ii) Cash advances shall be limited to the minimum amounts needed to carry out the program.

(iii) Recipients and the DoD Component shall maintain procedures to ensure that the timing of cash advances is as close as is administratively fea-

sible to the recipients’ disbursements of the funds for program purposes, including direct program or project costs and the proportionate share of any allowable indirect costs.

(iv) Recipients shall maintain advance payments of Federal funds in interest-bearing accounts, and remit annually the interest earned to the administrative grants officer responsible for post-award administration (the grants officer shall forward the payment to the responsible payment office, for return to the Department of Treasury’s miscellaneous receipts account), unless one of the following applies:

(A) The recipient receives less than \$120,000 in Federal awards per year.

(B) The best reasonably available interest bearing account would not be expected to earn interest in excess of \$250 per year on Federal cash balances.

(C) 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.

(c) *Frequency of payments.* For either reimbursements or advance payments, recipients shall be authorized to submit requests for payment at least monthly.

(d) *Forms for requesting payment.* DoD Components may authorize recipients to use the SF-270,<sup>1</sup> “Request for Advance or Reimbursement;” the SF-271,<sup>2</sup> “Outlay Report and Request for Reimbursement for Construction Programs;” or prescribe other forms or formats as necessary.

<sup>1</sup>For copies of Standard Forms listed in this part, contact regional grants administration offices of the Office of Naval Research. Addresses for the offices are listed in the “DoD Directory of Contract Administration Services Components,” DLAH 4105.4, which can be obtained from either: Defense Logistics Agency, Publications Distribution Division (DASC-WDM), 8725 John J. Kingman Rd., Suite 0119, Fort Belvoir, VA 22060-6220; or the Defense Contract Management Command home page at <http://www.dcmc.dcrb.dla.mil>.

<sup>2</sup>See footnote 1 to this paragraph (d).

(e) *Timeliness of payments.* Payments normally will be made within 30 calendar days of the receipt of a recipient's request for reimbursement or advance by the office designated to receive the request (for further information about timeframes for payments, see 32 CFR 22.810(c)(3)(ii)).

(f) *Precedence of other available funds.* Recipients shall disburse funds available from program income, rebates, refunds, contract settlements, audit recoveries, and interest earned on such funds before requesting additional cash payments.

(g) *Withholding of payments.* Unless otherwise required by statute, grants officers shall not withhold payments for proper charges made by recipients during the project period for reasons other than the following:

(1) A recipient has failed to comply with project objectives, the terms and conditions of the award, or Federal reporting requirements, in which case the grants officer may suspend payments in accordance with § 34.52.

(2) The recipient is delinquent on a debt to the United States (see definitions of "debt" and "delinquent debt" in 32 CFR 22.105). In that case, the grants officer may, upon reasonable notice, withhold payments for obligations incurred after a specified date, until the debt is resolved.

#### § 34.13 Cost sharing or matching.

(a) *Acceptable contributions.* All contributions, including cash contributions and third party in-kind contributions, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria:

(1) They are verifiable from the recipient's records.

(2) They are not included as contributions for any other federally-assisted project or program.

(3) They are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) They are allowable under § 34.17.

(5) They are not paid by the Federal Government under another award, except:

(i) Costs that are authorized by Federal statute to be used for cost sharing or matching; or

(ii) Independent research and development (IR&D) costs. In accordance with the for-profit cost principle in 48 CFR 31.205-18(e), use of IR&D as cost sharing is permitted, whether or not the Government decides at a later date to reimburse any of the IR&D as allowable indirect costs. In such cases, the IR&D must meet all of the criteria in paragraphs (a) (1) through (4) and (a) (6) through (8) of this section.

(6) They are provided for in the approved budget, when approval of the budget is required by the DoD Component.

(7) If they are real property or equipment, whether purchased with recipient's funds or donated by third parties, they must have the grants officer's prior approval if the contributions' value is to exceed depreciation or use charges during the project period (paragraphs (b)(1) and (b)(4)(ii) of this section discuss the limited circumstances under which a grants officer may approve higher values). If a DoD Component requires approval of a recipient's budget (see paragraph (a)(6) of this section), the grants officer's approval of the budget satisfies this prior approval requirement, for real property or equipment items listed in the budget.

(8) They conform to other provisions of this part, as applicable.

(b) *Valuing and documenting contributions*—(1) *Valuing recipient's property or services of recipient's employees.* Values shall be established in accordance with the applicable cost principles in § 34.17, which means that amounts chargeable to the project are determined on the basis of costs incurred. For real property or equipment used on the project, the cost principles authorize depreciation or use charges. The full value of the item may be applied when the item will be consumed in the performance of the award or fully depreciated by the end of the award. In cases where the full value of a donated capital asset is to be applied as cost sharing or matching, that full value shall be the lesser of the following:

(i) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation; or

(ii) The current fair market value. However, when there is sufficient justification, the grants officer may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project. The grants officer may accept the use of any reasonable basis for determining the fair market value of the property.

(2) *Valuing services of others' employees.* When an employer other than the recipient furnishes the services of an employee, those services shall be valued at the employee's regular rate of pay plus an amount of fringe benefits and overhead (at an overhead rate appropriate for the location where the services are performed) provided these services are in the same skill for which the employee is normally paid.

(3) *Valuing volunteer services.* Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(4) *Valuing property donated by third parties.* (i) Donated supplies may include such items as office supplies or laboratory supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(ii) Normally only depreciation or use charges for equipment and buildings may be applied. However, the fair rental charges for land and the full value of equipment or other capital assets may be allowed, when they will be consumed in the performance of the award or fully depreciated by the end of the award, provided that the grants

officer has approved the charges. When use charges are applied, values shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications:

(A) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(B) The value of loaned equipment shall not exceed its fair rental value.

(5) *Documentation.* The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties:

(i) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal services and property shall be documented.

#### § 34.14 Program income.

(a) DoD Components shall apply the standards in this section to the disposition of program income from projects financed in whole or in part with Federal funds.

(b) Recipients shall have no obligation to the Government, unless the terms and conditions of the award provide otherwise, for program income earned:

(1) From license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. Note, however, that the Patent and Trademark Amendments (35 U.S.C. Chapter 18), as implemented in § 34.25, apply to inventions made under a research award.

(2) After the end of the project period. If a grants officer anticipates that an award is likely to generate program income after the end of the project period, the grants officer should indicate in the award document whether the recipient will have any obligation to the Federal Government with respect to such income.

(c) If authorized by the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided



these costs have not been charged to the award.

(d) Other than any program income excluded pursuant to paragraphs (b) and (c) of this section, program income earned during the project period shall be retained by the recipient and used in one or more of the following ways, as specified in program regulations or the terms and conditions of the award:

(1) Added to funds committed to the project by the DoD Component and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(e) If the terms and conditions of an award authorize the disposition of program income as described in paragraph (d)(1) or (d)(2) of this section, and stipulate a limit on the amounts that may be used in those ways, program income in excess of the stipulated limits shall be used in accordance with paragraph (d)(3) of this section.

(f) In the event that the terms and conditions of the award do not specify how program income is to be used, paragraph (d)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (d)(1) of this section shall apply automatically unless the terms and conditions specify another alternative or the recipient is subject to special award conditions, as indicated in § 34.4.

(g) Proceeds from the sale of property that is acquired, rather than fabricated, under an award are not program income and shall be handled in accordance with the requirements of the Property Standards (see §§ 34.20 through 34.25).

#### **§ 34.15 Revision of budget and program plans.**

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the sum of the Federal and non-Federal shares, or only the Federal share, depending upon DoD Component requirements. It shall be related to performance for program

evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) Recipients shall immediately request, in writing, prior approval from the cognizant grants officer when there is reason to believe that within the next seven calendar days a programmatic or budgetary revision will be necessary for certain reasons, as follows:

(1) The recipient always must obtain the grants officer's prior approval when a revision is necessary for either of the following two reasons (i.e., these two requirements for prior approval may never be waived):

(i) A change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(ii) A need for additional Federal funding.

(2) The recipient must obtain the grants officer's prior approval when a revision is necessary for any of the following six reasons, unless the requirement for prior approval is waived in the terms and conditions of the award (i.e., if the award document is silent, these prior approvals are required):

(i) A change in a key person specified in the application or award document.

(ii) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(iii) The inclusion of any additional costs that require prior approval in accordance with applicable cost principles for Federal funds and recipients' cost share or match, in § 34.17 and § 34.13, respectively.

(iv) The inclusion of pre-award costs. All such costs are incurred at the recipient's risk (i.e., the DoD Component is under no obligation to reimburse such costs if for any reason the recipient does not receive an award, or if the award is less than anticipated and inadequate to cover such costs).

(v) A "no-cost" extension of the project period that does not require additional Federal funds and does not

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change the approved objectives or scope of the project.

(vi) Any subaward, transfer or contracting out of substantive program performance under an award, unless described in the application and funded in the approved awards. This provision does not apply to the purchase of supplies, material, or general support services, except that procurement of equipment or other capital items of property always is subject to the grants officer's prior approval under § 34.21(a), if it is to be purchased with Federal funds, or § 34.13(a)(7), if it is to be used as cost sharing or matching.

(3) The recipient also must obtain the grants officer's prior approval when a revision is necessary for either of the following reasons, if specifically required in the terms and conditions of the award document (i.e., if the award document is silent, these prior approvals are not required):

(i) The transfer of funds among direct cost categories, functions and activities for awards in which the Federal share of the project exceeds \$100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the DoD Component. No DoD Component shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(ii) For awards that provide support for both construction and nonconstruction work, any fund or budget transfers between the two types of work supported.

(d) Within 30 calendar days from the date of receipt of the recipient's request for budget revisions, the grants officer shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the grants officer shall inform the recipient in writing of the date when the recipient may expect the decision.

### § 34.16 Audits.

(a) Any recipient that expends \$500,000 or more in a year under Federal awards shall have an audit made

for that year by an independent auditor, in accordance with paragraph (b) of this section. The audit generally should be made a part of the regularly scheduled, annual audit of the recipient's financial statements. However, it may be more economical in some cases to have the Federal awards separately audited, and a recipient may elect to do so, unless that option is precluded by award terms and conditions, or by Federal laws or regulations applicable to the program(s) under which the awards were made.

(b) The auditor shall determine and report on whether:

(1) The recipient has an internal control structure that provides reasonable assurance that it is managing Federal awards in compliance with Federal laws and regulations, and with the terms and conditions of the awards.

(2) Based on a sampling of Federal award expenditures, the recipient has complied with laws, regulations, and award terms that may have a direct and material effect on Federal awards.

(c) The recipient shall make the auditor's report available to DoD Components whose awards are affected.

(d) The requirement for an annual independent audit is intended to ascertain the adequacy of the recipient's internal financial management systems and to curtail the unnecessary duplication and overlap that usually results when Federal agencies request audits of individual awards on a routine basis. Therefore, a grants officer:

(1) Shall consider whether the independent audit satisfies his or her requirements, before requesting any additional audits; and

(2) When requesting an additional audit, shall:

(i) Limit the scope of such additional audit to areas not adequately addressed by the independent audit.

(ii) Coordinate the audit request with the Federal agency with the predominant fiscal interest in the recipient, as the agency responsible for the scheduling and distribution of audits. If DoD has the predominant fiscal interest in the recipient, the Defense Contract Management Command (DCMC) is responsible for monitoring audits, ensuring resolution of audit findings, and

distributing audit reports. When an additional audit is requested and DoD has the predominant fiscal interest in the recipient, DCMC shall, to the extent practicable, ensure that the additional audit builds upon the independent audit or other audits performed in accordance with this section.

(e) There may be instances in which Federal auditors have recently performed audits, are performing audits, or are planning to perform audits, of a recipient. In these cases, the recipient and its Federal cognizant agency should seek to have the non-Federal, independent auditors work with the Federal auditors to develop a coordinated audit approach, to minimize duplication of audit work.

(f) Audit costs (including a reasonable allocation of the costs of the audit of the recipient's financial statement, based on the relative benefit to the Government and the recipient) are allowable costs of DoD awards.

[63 FR 12204, Mar. 12, 1998, as amended at 70 FR 49477, Aug. 23, 2005]

#### § 34.17 Allowable costs.

Allowability of costs shall be determined in accordance with the cost principles applicable to the type of entity incurring the costs, as follows:

(a) *For-profit organizations.* Allowability of costs incurred by for-profit organizations that are recipients of prime awards from DoD Components, and those that are subrecipients under prime awards to other organizations, is to be determined in accordance with:

(1) The for-profit cost principles in 48 CFR parts 31 and 231 (in the Federal Acquisition Regulation, or FAR, and the Defense Federal Acquisition Regulation Supplement, or DFARS, respectively).

(2) The supplemental information on allowability of audit costs, in § 34.16(f).

(b) *Other types of organizations.* Allowability of costs incurred by other types of organizations that may be subrecipients under a prime award to a for-profit organization is determined as follows:

(1) *Institutions of higher education.* Allowability is determined in accordance

with OMB Circular A-21,<sup>3</sup> “Cost Principles for Educational Institutions.”

(2) *Other nonprofit organizations.* Allowability is determined in accordance with OMB Circular A-122,<sup>4</sup> “Cost Principles for Non-Profit Organizations.” Note that Attachment C of the Circular identifies selected nonprofit organizations for whom cost allowability is determined in accordance with the FAR cost principles for for-profit organizations.

(3) *Hospitals.* Allowability is determined in accordance with the provisions of 45 CFR part 74, Appendix E, “Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.”

(4) *Governmental organizations.* Allowability for State, local, or federally recognized Indian tribal governments is determined in accordance with OMB Circular A-87,<sup>5</sup> “Cost Principles for State and Local Governments.”

#### § 34.18 Fee and profit.

In accordance with 32 CFR 22.205(b), grants and cooperative agreements shall not:

(a) Provide for the payment of fee or profit to the recipient.

(b) Be used to carry out programs where fee or profit is necessary to achieving program objectives.

#### PROPERTY STANDARDS

#### § 34.20 Purpose of property standards.

Sections 34.21 through 34.25 set forth uniform standards for management, use, and disposition of property. DoD Components shall encourage recipients to use existing property-management systems, to the extent that the systems meet these minimum requirements.

#### § 34.21 Real property and equipment.

(a) *Prior approval for acquisition with Federal funds.* Recipients may purchase

<sup>3</sup>For copies of the Circular, contact the Office of Management and Budget, EOP Publications, 725 17th St. N.W., New Executive Office Building, Washington, D.C. 20503.

<sup>4</sup>See footnote 3 to paragraph (b)(1) of this section.

<sup>5</sup>See footnote 3 to paragraph (b)(1) of this section.

real property or equipment in whole or in part with Federal funds under an award only with the prior approval of the grants officer.

(b) *Title.* Title to such real property or equipment shall vest in the recipient upon acquisition. Unless a statute specifically authorizes a DoD Component to vest title in the recipient without further obligation to the Government, and the DoD Component elects to do so, the title shall be a conditional title. Title shall vest in the recipient subject to the conditions that the recipient:

(1) Use the real property or equipment for the authorized purposes of the project until funding for the project ceases, or until the property is no longer needed for the purposes of the project.

(2) Not encumber the property without approval of the grants officer.

(3) Use and dispose of the property in accordance with paragraphs (d) and (e) of this section.

(c) *Federal interest in real property or equipment offered as cost-share.* A recipient may offer the full value of real property or equipment that is purchased with recipient's funds or that is donated by a third party to meet a portion of any required cost sharing or matching, subject to the prior approval requirement in § 34.13(a)(7). If a recipient does so, the Government has a financial interest in the property, a share of the property value attributable to the Federal participation in the project. The property therefore shall be considered as if it had been acquired in part with Federal funds, and shall be subject to the provisions of paragraphs (b)(1), (b)(2) and (b)(3) of this section, and to the provisions of § 34.23.

(d) *Use.* If real property or equipment is acquired in whole or in part with Federal funds under an award, and the award provides that title vests conditionally in the recipient, the real property or equipment is subject to the following:

(1) During the time that the real property or equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs, if such other use will not interfere with the work on the project

or program for which the real property or equipment was originally acquired. Use of the real property or equipment on other projects will be in the following order of priority:

(i) Activities sponsored by DoD Components' grants, cooperative agreements, or other assistance awards;

(ii) Activities sponsored by other Federal agencies' grants, cooperative agreements, or other assistance awards;

(iii) Activities under Federal procurement contracts, or activities not sponsored by any Federal agency. If so used, use charges shall be assessed to those activities. For real property or equipment, the use charges shall be at rates equivalent to those for which comparable real property or equipment may be leased. The use charges shall be treated as program income.

(2) After Federal funding for the project ceases, or when the real property or equipment is no longer needed for the purposes of the project, the recipient may use the real property or equipment for other projects, insofar as:

(i) There are Federally sponsored projects for which the real property or equipment may be used. If the only use for the real property or equipment is for projects that have no Federal sponsorship, the recipient shall proceed with disposition of the real property or equipment, in accordance with paragraph (e) of this section.

(ii) The recipient obtains written approval from the grants officer to do so. The grants officer shall ensure that there is a formal change of accountability for the real property or equipment to a currently funded, Federal award.

(iii) The recipient's use of the real property or equipment for other projects is in the same order of priority as described in paragraph (d)(1) of this section.

(e) *Disposition.* (1) When an item of real property or equipment is no longer needed for Federally sponsored projects, the recipient shall proceed as follows:

(i) If the property that is no longer needed is equipment (rather than real property), the recipient may wish to replace it with an item that is needed

currently for the project. In that case, the recipient may use the original equipment as trade-in or sell it and use the proceeds to offset the costs of the replacement equipment, subject to the approval of the responsible agency (i.e., the DoD Component or the Federal agency to which the DoD Component delegated responsibility for administering the equipment).

(ii) The recipient may elect to retain title, without further obligation to the Federal Government, by compensating the Federal Government for that percentage of the current fair market value of the real property or equipment that is attributable to the Federal participation in the project.

(iii) If the recipient does not elect to retain title to real property or equipment (see paragraph (e)(1)(ii) of this section), or request approval to use equipment as trade-in or offset for replacement equipment (see paragraph (e)(1)(i) of this section), the recipient shall request disposition instructions from the responsible agency.

(2) If a recipient requests disposition instructions, in accordance with paragraph (e)(1)(iii) of this section, the responsible grants officer shall:

(i) For equipment (but not real property), consult with the Federal program manager and judge whether the age and nature of the equipment warrant a screening procedure, to determine whether the equipment is useful to a DoD Component or other Federal agency. If a screening procedure is warranted, the responsible agency shall determine whether the equipment can be used to meet a DoD Component's requirement. If no DoD requirement is found, the responsible agency shall report the availability of the equipment to the General Services Administration, to determine whether a requirement for the equipment exists in other Federal agencies.

(ii) For either real property or equipment, issue instructions to the recipient for disposition of the property no later than 120 calendar days after the recipient's request. The grants officer's options for disposition are to direct the recipient to:

(A) Transfer title to the real property or equipment to the Federal Government or to an eligible third party pro-

vided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the real property or equipment, plus any reasonable shipping or interim storage costs incurred. If title is transferred to the Federal Government, it shall be subject thereafter to provisions for Federally owned property in § 34.22.

(B) Sell the real property or equipment and pay the Federal Government for that percentage of the current fair market value of the property that is attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sale proceeds). When the recipient is authorized or required to sell the real property or equipment, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) If the responsible agency fails to issue disposition instructions within 120 calendar days of the recipient's request, as described in paragraph (e)(2)(ii) of this section, the recipient shall dispose of the real property or equipment through the option described in paragraph (e)(2)(ii)(B) of this section.

#### § 34.22 Federally owned property.

(a) *Annual inventory.* Recipients shall submit annually an inventory listing of all Federally owned property in their custody (property furnished by the Federal Government, rather than acquired by the recipient with Federal funds under the award), to the DoD Component or other Federal agency responsible for administering the property under the award.

(b) *Use on other activities.* (1) Use of federally owned property on other activities is permissible, if authorized by the DoD Component responsible for administering the award to which the property currently is charged.

(2) Use on other activities will be in the following order of priority:

(i) Activities sponsored by DoD Components' grants, cooperative agreements, or other assistance awards;

(ii) Activities sponsored by other Federal agencies' grants, cooperative

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agreements, or other assistance awards;

(iii) Activities under Federal procurement contracts, or activities not sponsored by any Federal agency. If so used, use charges shall be assessed to those activities. For real property or equipment, the use charges shall be at rates equivalent to those for which comparable real property or equipment may be leased. The use charges shall be treated as program income.

(c) *Disposition of property.* Upon completion of the award, the recipient shall report the property to the responsible agency. The agency may:

(1) Use the property to meet another Federal Government need (e.g., by transferring accountability for the property to another Federal award to the same recipient, or by directing the recipient to transfer the property to a Federal agency that needs the property, or to another recipient with a currently funded award).

(2) Declare the property to be excess property and either:

(i) Report the property to the General Services Administration, in accordance with the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483(b)(2)), as implemented by General Services Administration regulations at 41 CFR 101–47.202; or

(ii) Dispose of the property by alternative methods, if there is statutory authority to do so (e.g., DoD Components are authorized by 15 U.S.C. 3710(i), the Federal Technology Transfer Act, to donate research equipment to educational and nonprofit organizations for the conduct of technical and scientific education and research activities. Such donations shall be in accordance with the DoD implementation of E.O. 12999 (3 CFR, 1996 Comp., p. 180), “Educational Technology: Ensuring Opportunity for All Children in the Next Century,” as applicable.) Appropriate instructions shall be issued to the recipient by the responsible agency.

#### § 34.23 Property management system.

The recipient’s property management system shall include the following, for property that is Federally owned, and for equipment that is acquired in whole

or in part with Federal funds, or that is used as matching share:

(a) Property records shall be maintained, to include the following information:

(1) A description of the property.

(2) Manufacturer’s serial number, model number, Federal stock number, national stock number, or any other identification number.

(3) Source of the property, including the award number.

(4) Whether title vests in the recipient or the Federal Government.

(5) Acquisition date (or date received, if the property was furnished by the Federal Government) and cost.

(6) Information from which one can calculate the percentage of Federal participation in the cost of the property (not applicable to property furnished by the Federal Government).

(7) The location and condition of the property and the date the information was reported.

(8) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the Federal Government for its share.

(b) Federally owned equipment shall be marked, to indicate Federal ownership.

(c) A physical inventory shall be taken and the results reconciled with the property records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the property.

(d) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft of property shall be investigated and fully documented; if the property was owned by the Federal Government, the recipient shall promptly notify the Federal agency responsible for administering the property.

(e) Adequate maintenance procedures shall be implemented to keep the property in good condition.

**§ 34.24 Supplies.**

(a) Title shall vest in the recipient upon acquisition for supplies acquired with Federal funds under an award.

(b) Upon termination or completion of the project or program, the recipient shall retain any unused supplies. If the inventory of unused supplies exceeds \$5,000 in total aggregate value and the items are not needed for any other Federally sponsored project or program, the recipient shall retain the items for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share.

**§ 34.25 Intellectual property developed or produced under awards.**

(a) *Patents.* Grants and cooperative agreements with:

(1) Small business concerns shall comply with 35 U.S.C. Chapter 18, as implemented by 37 CFR part 401, which applies to inventions made under grants and cooperative agreements with small business concerns for research and development. 37 CFR 401.14 provides a standard clause that is required in such grants and cooperative agreements in most cases, 37 CFR 401.3 specifies when the clause shall be included, and 37 CFR 401.5 specifies how the clause may be modified and tailored.

(2) For-profit organizations other than small business concerns shall comply with 35 U.S.C. 210(c) and Executive Order 12591 (3 CFR, 1987 Comp., p. 220) (which codifies a Presidential Memorandum on Government Patent Policy, dated February 18, 1983).

(i) The Executive order states that, as a matter of policy, grants and cooperative agreements should grant to all for-profit organizations, regardless of size, title to patents made in whole or in part with Federal funds, in exchange for royalty-free use by or on behalf of the Government (i.e., it extends the applicability of 35 U.S.C. Chapter 18, to the extent permitted by law, to for-profit organizations other than small business concerns).

(ii) 35 U.S.C. 210(c) states that 35 U.S.C. Chapter 18 is not intended to limit agencies' authority to agree to the disposition of rights in inventions in accordance with the Presidential

memorandum codified by the Executive order. It also states that such grants and cooperative agreements shall provide for Government license rights required by 35 U.S.C. 202(c)(4) and march-in rights required by 35 U.S.C. 203.

(b) *Copyright, data and software rights.* Requirements concerning data and software rights are as follows:

(1) The recipient may copyright any work that is subject to copyright and was developed under an award. DoD Components reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(2) Unless waived by the DoD Component making the award, the Federal Government has the right to:

(i) Obtain, reproduce, publish or otherwise use for Federal Government purposes the data first produced under an award.

(ii) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

## PROCUREMENT STANDARDS

**§ 34.30 Purpose of procurement standards.**

Section 34.31 sets forth requirements necessary to ensure:

(a) Compliance of recipients' procurements that use Federal funds with applicable Federal statutes and executive orders.

(b) Proper stewardship of Federal funds used in recipients' procurements.

**§ 34.31 Requirements.**

The following requirements pertain to recipients' procurements funded in whole or in part with Federal funds or with recipients' cost-share or match:

(a) *Reasonable cost.* Recipients procurement procedures shall make maximum practicable use of competition, or shall use other means that ensure reasonable cost for procured goods and services.

(b) *Pre-award review of certain procurements.* Prior to awarding a procurement contract under an award, a recipient may be required to provide the grants officer administering the award with pre-award documents (e.g., requests for

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proposals, invitations for bids, or independent cost estimates) related to the procurement. Recipients will only be required to provide such documents for the grants officer's pre-award review in exceptional cases where the grants officer judges that there is a compelling need to do so. In such cases, the grants officer must include a provision in the award that states the requirement.

(c) *Contract provisions.* (1) Contracts in excess of the simplified acquisition threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(2) All contracts in excess of the simplified acquisition threshold shall contain suitable provisions for termination for default by the recipient or for termination due to circumstances beyond the control of the contractor.

(3) All negotiated contracts in excess of the simplified acquisition threshold shall include a provision permitting access of the Department of Defense, the Comptroller General of the United States, or any of their duly authorized representatives, to any books, documents, papers, and records of the contractor that are directly pertinent to a specific program, for the purpose of making audits, examinations, excerpts, and transcriptions.

(4) All contracts, including those for amounts less than the simplified acquisition threshold, awarded by recipients and their contractors shall contain the procurement provisions of Appendix A to this part, as applicable.

### REPORTS AND RECORDS

#### § 34.40 Purpose of reports and records.

Sections 34.41 and 34.42 prescribe requirements for monitoring and reporting financial and program performance and for records retention.

#### § 34.41 Monitoring and reporting program and financial performance.

Grants officers may use the provisions of 32 CFR 32.51 and 32.52 for awards to for-profit organizations, or may include equivalent technical and financial reporting requirements that

ensure reasonable oversight of the expenditure of appropriated funds. As a minimum, equivalent requirements must include:

(a) Periodic reports (at least annually, and no more frequently than quarterly) addressing both program status and business status, as follows:

(1) The program portions of the reports must address progress toward achieving program performance goals, including current issues, problems, or developments.

(2) The business portions of the reports shall provide summarized details on the status of resources (federal funds and non-federal cost sharing or matching), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations.

(3) When grants officers previously authorized advance payments, pursuant to § 34.12(a)(2), they should consult with the program official and consider whether program progress reported in the periodic report, in relation to reported expenditures, is sufficient to justify continued authorization of advance payments.

(b) Unless inappropriate, a final performance report that addresses all major accomplishments under the award.

#### § 34.42 Retention and access requirements for records.

(a) This section sets forth requirements for records retention and access to records for awards to recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.



(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the DoD Component that made the award, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, and related records, for which retention requirements are specified in § 34.42(g).

(c) Copies of original records may be substituted for the original records if authorized by the grants officer.

(d) The grants officer shall request that recipients transfer certain records to DoD Component custody when he or she determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, a grants officer may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) DoD Components, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, no DoD Component shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the DoD Component can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the DoD Component making the award.

(g) Indirect cost proposals, cost allocation plans, and other cost accounting documents (such as documents related

to computer usage chargeback rates), along with their supporting records, shall be retained for a 3-year period, as follows:

(1) If a recipient is required to submit an indirect-cost proposal, cost allocation plan, or other computation to the cognizant Federal agency, for purposes of negotiating an indirect cost rate or other rates, the 3-year retention period starts on the date of the submission. This retention requirement also applies to subrecipients submitting similar documents for negotiation to the recipient.

(2) If the recipient or the subrecipient is not required to submit the documents or supporting records for negotiating an indirect cost rate or other rates, the 3-year retention period for the documents and records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(h) If the information described in this section is maintained on a computer, recipients shall retain the computer data on a reliable medium for the time periods prescribed. Recipients may transfer computer data in machine readable form from one reliable computer medium to another. Recipients' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Recipients shall also maintain an audit trail describing the data transfer. For the record retention time periods prescribed in this section, recipients shall not destroy, discard, delete, or write over such computer data.

#### TERMINATION AND ENFORCEMENT

##### § 34.50 Purpose of termination and enforcement.

Sections 34.51 through 34.53 set forth uniform procedures for suspension, termination, enforcement, and disputes.

##### § 34.51 Termination.

(a) Awards may be terminated in whole or in part only in accordance with one of the following:

(1) By the grants officer, if a recipient materially fails to comply with the terms and conditions of an award.

## § 34.52

(2) By the grants officer with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the grants officer written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. The recipient must provide such notice at least 30 calendar days prior to the effective date of the termination. However, if the grants officer determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purposes for which the award was made, he or she may terminate the award in its entirety.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 34.61(b), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

### § 34.52 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the grants officer may, in addition to imposing any of the special conditions outlined in § 34.4, take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the grants officer and DoD Component.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award. In the case of termination, the recipient will be reimbursed for allowable costs incurred prior to termination, with the possible exception of those for activities and ac-

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tions described in paragraph (a)(2) of this section.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, the grants officer and DoD Component shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved (see § 34.53 and 32 CFR 22.815).

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the grants officer expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if the costs:

(1) Result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable; and

(2) Would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under 2 CFR part 1125.

[63 FR 12188, Mar. 12, 1998, as amended at 72 FR 34998, June 26, 2007]

### § 34.53 Disputes and appeals.

Recipients have the right to appeal certain decisions by grants officers. In resolving such issues, DoD policy is to use Alternative Dispute Resolution (ADR) techniques, to the maximum practicable extent. See 32 CFR 22.815 for standards for DoD Components' dispute resolution and formal, administrative appeal procedures.

### Subpart C—After-the-Award Requirements

#### § 34.60 Purpose.

Sections 34.61 through 34.63 contain procedures for closeout and for subsequent disallowances and adjustments.

#### § 34.61 Closeout procedures.

(a) The cognizant grants officer shall, at least six months prior to the expiration date of the award, contact the recipient to establish:

(1) All steps needed to close out the award, including submission of financial and performance reports, liquidation of obligations, and decisions on property disposition.

(2) A schedule for completing those steps.

(b) The following provisions shall apply to the closeout:

(1) The responsible grants officer and payment office shall expedite completion of steps needed to close out awards and make prompt, final payments to a recipient for allowable reimbursable costs under the award being closed out.

(2) The recipient shall promptly refund any unobligated balances of cash that the DoD Component has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. For unreturned amounts that become delinquent debts, see 32 CFR 22.820.

(3) When authorized by the terms and conditions of the award, the grants officer shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(4) The recipient shall account for any real property and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 34.21 through 34.25.

(5) If a final audit is required and has not been performed prior to the closeout of an award, the DoD Component shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

#### § 34.62 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of the Department of Defense to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 34.16.

(4) Property management requirements in §§ 34.21 through 34.25.

(5) Records retention as required in § 34.42.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the grants officer and the recipient, provided the responsibilities of the recipient referred to in § 34.61(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

#### § 34.63 Collection of amounts due.

Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. Procedures for issuing the demand for payment and pursuing administrative offset and other remedies are described in 32 CFR 22.820.

#### APPENDIX A TO PART 34—CONTRACT PROVISIONS

All contracts awarded by a recipient, including those for amounts less than the simplified acquisition threshold, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246 (3 CFR, 1964–1965 Comp., p. 339), “Equal Employment Opportunity,” as amended by E.O. 11375 (3 CFR, 1966–1970 Comp., p. 684), “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and as supplemented by regulations at 41 CFR chapter 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”

2. *Copeland “Anti-Kickback” Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subawards in excess of \$2000 for construction or

repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the responsible DoD Component.

3. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)*—Where applicable, all contracts awarded by recipients in excess of \$100,000 for construction and other purposes that involve the employment of mechanics or laborers shall include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

4. *Rights to Inventions Made Under a Contract, Grant or Cooperative Agreement*—Contracts, grants, or cooperative agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.”

5. *Clean Air Act (42 U.S.C. 7401 et seq.)* and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended—Contracts and subawards of amounts in excess of \$100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water

Pollution Control Act as amended (33 U.S.C. 1251 et seq.). Violations shall be reported to the responsible DoD Component and the Regional Office of the Environmental Protection Agency (EPA).

6. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*—Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

7. *Debarment and Suspension (E.O.s 12549 and 12689)*—A contract award with an amount expected to equal or exceed \$25,000 and certain other contract awards (see 2 CFR 1125.220, which implements OMB guidance at 2 CFR 180.220) shall not be made to parties listed on the Governmentwide Excluded Parties List System, in accordance with the DoD adoption at 2 CFR part 1125 of the OMB guidance implementing E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), “Debarment and Suspension.” The Excluded Parties List System accessible on the Internet at [www.epls.gov](http://www.epls.gov) contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than E.O. 12549.

[63 FR 12204, Mar. 12, 1998, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34998, June 26, 2007]

## PART 37—TECHNOLOGY INVESTMENT AGREEMENTS

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APPENDIX E TO PART 37—WHAT PROVISIONS MAY A PARTICIPANT NEED TO INCLUDE WHEN PURCHASING GOODS OR SERVICES UNDER A TIA?

AUTHORITY: 5 U.S.C. 301 and 10 U.S.C. 113.

SOURCE: 68 FR 47160, Aug. 7, 2003, unless otherwise noted.

### Subpart A—General

#### § 37.100 What does this part do?

This part establishes uniform policies and procedures for the DoD Components' award and administration of technology investment agreements (TIAs).

#### § 37.105 Does this part cover all types of instruments that 10 U.S.C. 2371 authorizes?

No, this part covers only TIAs, some of which use the authority of 10 U.S.C. 2371 (see appendix B to this part). This part does not cover assistance instruments other than TIAs that use the authority of 10 U.S.C. 2371. It also does not cover acquisition agreements for prototype projects that use 10 U.S.C. 2371 authority augmented by the authority in section 845 of Public Law 103-160, as amended.

#### § 37.110 What type of instruments are technology investment agreements (TIAs)?

TIAs are assistance instruments used to stimulate or support research. As discussed in appendix B to this part, a TIA may be either a kind of cooperative agreement or a type of assistance transaction other than a grant or cooperative agreement.

## § 37.115

### **§ 37.115 For what purposes are TIAs used?**

The ultimate goal for using TIAs, like other assistance instruments used in defense research programs, is to foster the best technologies for future defense needs. TIAs differ from and complement other assistance instruments available to agreements officers, in that TIAs address the goal by fostering civil-military integration (*see* appendix A to this part). TIAs therefore are designed to:

(a) Reduce barriers to commercial firms' participation in defense research, to give the Department of Defense (DoD) access to the broadest possible technology and industrial base.

(b) Promote new relationships among performers in both the defense and commercial sectors of that technology and industrial base.

(c) Stimulate performers to develop, use, and disseminate improved practices.

### **§ 37.120 Can my organization award or administer TIAs?**

Your office may award or administer TIAs if it has a delegation of the authorities in 10 U.S.C. 2371, as well as 10 U.S.C. 2358. If your office is in a Military Department, it must have a delegation of the authority of the Secretary of that Military Department under those statutes. If your office is in a Defense Agency, it must have a delegation of the authority of the Secretary of Defense under 10 U.S.C. 2358 and 2371. Your office needs those authorities to be able to:

(a) Enter into cooperative agreements to stimulate or support research, using the authority of 10 U.S.C. 2358, as well as assistance transactions other than grants or cooperative agreements, using the authority of 10 U.S.C. 2371. The reason that both authorities are needed is that a TIA, depending upon its patent rights provision (*see* appendix B to this part), may be either a cooperative agreement or a type of assistance transaction other than a grant or cooperative agreement.

(b) Recover funds from a recipient and reuse the funds for program purposes, as authorized by 10 U.S.C. 2371 and described in § 37.580.

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(c) Exempt certain information received from proposers from disclosure under the Freedom of Information Act, as authorized by 10 U.S.C. 2371 and described in § 37.420.

### **§ 37.125 May I award or administer TIAs if I am authorized to award or administer other assistance instruments?**

(a) You must have specific authorization to award or administer TIAs. Being authorized to award or administer grants and cooperative agreements is not sufficient; a grants officer is an agreements officer only if the statement of appointment also authorizes the award or administration of TIAs.

(b) You receive that authorization in the same way that you receive authority to award other assistance instruments, as described in 32 CFR 21.425 and 21.435 through 21.445.

### **§ 37.130 Which other parts of the DoD Grant and Agreement Regulations apply to TIAs?**

(a) TIAs are explicitly covered in this part and part 21 of the DoD Grant and Agreement Regulations (DoDGARs). Part 21 (32 CFR part 21) addresses deviation procedures and other general matters that relate to the DoDGARs, to DoD Components' authorities and responsibilities for assistance instruments, and to requirements for reporting information about assistance awards.

(b) Two additional parts of the DoDGARs apply to TIAs, although they do not mention TIAs explicitly. They are:

(1) Part 1125 (2 CFR part 1125) on nonprocurement debarment and suspension, which applies because it covers nonprocurement instruments in general;

(2) Part 26 (32 CFR part 26), on drug-free workplace requirements, which applies because it covers financial assistance in general; and

(3) Part 28 (32 CFR part 28), on lobbying restrictions, which applies by law (31 U.S.C. 1352) to TIAs that are cooperative agreements and as a matter of DoD policy to all other TIAs.

(c) Portions of four other DoDGARs parts apply to TIAs only as cited by reference in this part. Those parts of



the DoDGARs are parts 22, 32, 33, and 34 (32 CFR parts 22, 32, 33, and 34).

[68 FR 47160, Aug. 7, 2003, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34999, June 26, 2007]

### **Subpart B—Appropriate Use of Technology Investment Agreements**

#### **§ 37.200 What are my responsibilities as an agreements officer for ensuring the appropriate use of TIAs?**

You must ensure that you use TIAs only in appropriate situations. To do so, you must conclude that the use of a TIA is justified based on:

- (a) The nature of the project, as discussed in § 37.205;
- (b) The type of recipient, addressed in § 37.210;
- (c) The recipient's commitment and cost sharing, as described in § 37.215;
- (d) The degree of involvement of the Government program official, as discussed in § 37.220; and
- (e) Your judgment that the use of a TIA could benefit defense research objectives in ways that likely would not happen if another type of assistance instrument were used. Your answers to the four questions in § 37.225 should be the basis for your judgment.

#### **§ 37.205 What judgments must I make about the nature of the project?**

You must:

- (a) Conclude that the principal purpose of the project is stimulation or support of research (*i.e.*, assistance), rather than acquiring goods or services for the benefit of the Government (*i.e.*, acquisition);
- (b) Decide that the basic, applied, or advanced research project is relevant to the policy objective of civil-military integration (*see* appendix A of this part); and
- (c) Ensure that, to the maximum extent practicable, any TIA that uses the authority of 10 U.S.C. 2371 (*see* appendix B of this part) does not support research that duplicates other research being conducted under existing programs carried out by the Department of Defense. This is a statutory requirement of 10 U.S.C. 2371.
- (d) When your TIA is a type of assistance transaction other than a grant or

cooperative agreement, satisfy the condition in 10 U.S.C. 2371 to judge that the use of a standard grant or cooperative agreement for the research project is not feasible or appropriate. As discussed in appendix B to this part:

(1) This situation arises if your TIA includes a patent provision that is less restrictive than is possible under the Bayh-Dole statute (because the patent provision is what distinguishes a TIA that is a cooperative agreement from a TIA that is an assistance transaction other than a grant or cooperative agreement).

(2) You satisfy the requirement to judge that a standard cooperative agreement is not feasible or appropriate when you judge that execution of the research project warrants a less restrictive patent provision than is possible under Bayh-Dole.

#### **§ 37.210 To what types of recipients may I award a TIA?**

(a) As a matter of DoD policy, you may award a TIA only when one or more for-profit firms are to be involved either in the:

- (1) Performance of the research project; or
- (2) The commercial application of the research results. In that case, you must determine that the nonprofit performer has at least a tentative agreement with specific for-profit partners who plan on being involved when there are results to transition. You should review the agreement between the nonprofit and for-profit partners, because the for-profit partners' involvement is the basis for using a TIA rather than another type of assistance instrument.

(b) Consistent with the goals of civil-military integration, TIAs are most appropriate when one or more commercial firms (as defined at § 37.1250) are to be involved in the project.

(c) You are encouraged to make awards to consortia (a consortium may include one or more for-profit firms, as well as State or local government agencies, institutions of higher education, or other nonprofit organizations). The reasons are that:

(1) When multiple performers are participating as a consortium, they are more equal partners in the research performance than usually is the case

with a prime recipient and subawards. All of them therefore are more likely to be directly involved in developing and revising plans for the research effort, reviewing technical progress, and overseeing financial and other business matters. That feature makes consortia well suited to building new relationships among performers in the defense and commercial sectors of the technology and industrial base, a principal objective for the use of TIAs.

(2) In addition, interactions among the participants within a consortium potentially provide a self-governance mechanism. The potential for additional self-governance is particularly good when a consortium includes multiple for-profit participants that normally are competitors within an industry.

(d) TIAs also may be used for carrying out research performed by single firms or multiple performers in prime award-subaward relationships. In awarding TIAs in those cases, however, you should consider providing for greater involvement of the program official or a way to increase self-governance (*e.g.*, a prime award with multiple subawards arranged so as to give the subrecipients more insight into and authority and responsibility for programmatic and business aspects of the overall project than they usually have).

**§ 37.215 What must I conclude about the recipient's commitment and cost sharing?**

(a) You should judge that the recipient has a strong commitment to and self-interest in the success of the project. You should find evidence of that commitment and interest in the proposal, in the recipient's management plan, or through other means. A recipient's self-interest might be driven, for example, by a research project's potential for fostering technology to be incorporated into products and processes for the commercial marketplace.

(b) You must seek cost sharing. The purpose of cost share is to ensure that the recipient incurs real risk that gives it a vested interest in the project's success; the willingness to commit to meaningful cost sharing therefore is

one good indicator of a recipient's self-interest. The requirements are that:

(1) To the maximum extent practicable, the non-Federal parties carrying out a research project under a TIA are to provide at least half of the costs of the project. Obtaining this cost sharing, to the maximum extent practicable, is a statutory condition for any TIA under the authority of 10 U.S.C. 2371, and is a matter of DoD policy for all other TIAs.

(2) The parties must provide the cost sharing from non-Federal resources that are available to them unless there is specific authority to use other Federal resources for that purpose (*see* § 37.530(f)).

(c) You may consider whether cost sharing is impracticable in a given case, unless there is a non-waivable, statutory requirement for cost sharing that applies to the particular program under which the award is to be made. Before deciding that cost sharing is impracticable, you should carefully consider whether there are other factors that demonstrate the recipient's self-interest in the success of the current project.

**§ 37.220 How involved should the Government program official be in the project?**

(a) TIAs are used to carry out cooperative relationships between the Federal Government and the recipient, which requires a greater level of involvement of the Government program official in the execution of the research than the usual oversight of a research grant or procurement contract. For example, program officials will participate in recipients' periodic reviews of research progress and will be substantially involved with the recipients in the resulting revisions of plans for future effort. That increased programmatic involvement before and during program execution with a TIA can reduce the need for some Federal financial requirements that are problematic for commercial firms.

(b) Some aspects of their involvement require program officials to have greater knowledge about and participation in business matters that traditionally would be your exclusive responsibility as the agreements officer. TIAs

therefore also require closer cooperation between program officials and you, as the one who decides business matters.

**§ 37.225 What judgment must I make about the benefits of using a TIA?**

Before deciding that a TIA is appropriate, you also must judge that using a TIA could benefit defense research objectives in ways that likely would not happen if another type of assistance instrument were used (*e.g.*, a cooperative agreement subject to all of the requirements of 32 CFR part 34). You, in conjunction with Government program officials, must consider the questions in paragraphs (a) through (d) of this section, to help identify the benefits that may justify using a TIA and reducing some of the usual requirements. In accordance with § 37.1030, you will report your answers to these questions to help the DoD measure the Department-wide benefits of using TIAs and meet requirements to report to the Congress. Note that you must give full concise answers only to questions that relate to the benefits that you perceive for using the TIA, rather than another type of funding instrument, for the particular research project. A simple “no” or “not applicable” is a sufficient response for other questions. The questions are:

(a) Will the use of a TIA permit the involvement in the research of any commercial firms or business units of firms that would not otherwise participate in the project? If so:

(1) What are the expected benefits of those firms’ or divisions’ participation (*e.g.*, is there a specific technology that could be better, more readily available, or less expensive)?

(2) Why would they not participate if an instrument other than a TIA were used? You should identify specific provisions of the TIA or features of the TIA award process that enable their participation.

(b) Will the use of a TIA allow the creation of new relationships among participants at the prime or subtier levels, among business units of the same firm, or between non-Federal participants and the Federal Government that will help the DoD get better technology in the future? If so:

(1) Why do these new relationships have the potential for helping the DoD get technology in the future that is better, more affordable, or more readily available?

(2) Are there provisions of the TIA or features of the TIA award process that enable these relationships to form? If so, you should be able to identify specifically what they are. If not, you should be able to explain specifically why you think that the relationships could not be created if an assistance instrument other than a TIA were used.

(c) Will the use of a TIA allow firms or business units of firms that traditionally accept Government awards to use new business practices in the execution of the research that will help us get better technology, help us get new technology more quickly or less expensively, or facilitate partnering with commercial firms? If so:

(1) What specific benefits will the DoD potentially get from the use of these new practices? You should be able to explain specifically why you foresee a potential for those benefits.

(2) Are there provisions of the TIA or features of the TIA award process that enable the use of the new practices? If so, you should be able to identify those provisions or features and explain why you think that the practices could not be used if the award were made using an assistance instrument other than a TIA.

(d) Are there any other benefits of the use of a TIA that could help the Department of Defense better meet its objectives in carrying out the research project? If so, you should be able to identify specifically what they are, how they can help meet defense objectives, what features of the TIA or award process enable the DoD to realize them, and why the benefits likely would not be realized if an assistance instrument other than a TIA were used.

**§ 37.230 May I use a TIA if a participant is to receive fee or profit?**

In accordance with 32 CFR 22.205(b), you may not use a TIA if any participant is to receive fee or profit. Note that this policy extends to all performers of the research project carried

out under the TIA, including any sub-awards for substantive program performance, but it does not preclude participants' or subrecipients' payment of reasonable fee or profit when making purchases from suppliers of goods (*e.g.*, supplies and equipment) or services needed to carry out the research.

### Subpart C—Expenditure-Based and Fixed-Support Technology Investment Agreements

#### § 37.300 What is the difference between an expenditure-based and fixed-support TIA?

The fundamental difference between an expenditure-based and fixed-support TIA is that:

(a) For an expenditure-based TIA, the amounts of interim payments or the total amount ultimately paid to the recipient are based on the amounts the recipient expends on project costs. If a recipient completes the project specified at the time of award before it expends all of the agreed-upon Federal funding and recipient cost sharing, the Federal Government may recover its share of the unexpended balance of funds or, by mutual agreement with the recipient, amend the agreement to expand the scope of the research project. An expenditure-based TIA therefore is analogous to a cost-type procurement contract or grant.

(b) For a fixed-support TIA, the amount of assistance established at the time of award is not meant to be adjusted later if the research project is carried out to completion. In that sense, a fixed-support TIA is somewhat analogous to a fixed-price procurement contract (although “price,” a concept appropriate to a procurement contract for buying a good or service, is not appropriate for a TIA or other assistance instrument for stimulation or support of a project).

#### § 37.305 When may I use a fixed-support TIA?

You may use a fixed-support TIA if:

(a) The agreement is to support or stimulate research with outcomes that are well defined, observable, and verifiable;

(b) You can reasonably estimate the resources required to achieve those outcomes well enough to ensure the desired level of cost sharing (*see* example in § 37.560(b)); and

(c) Your TIA does not require a specific amount or percentage of recipient cost sharing. In cases where the agreement does require a specific amount or percentage of cost sharing, a fixed-support TIA is not practicable because the agreement has to specify cost principles or standards for costs that may be charged to the project; require the recipient to track the costs of the project; and provide access for audit to allow verification of the recipient's compliance with the mandatory cost sharing. You therefore must use an expenditure-based TIA if you:

- (1) Have a non-waivable requirement (*e.g.*, in statute) for a specific amount or percentage of recipient cost sharing; or
- (2) Have otherwise elected to include in the TIA a requirement for a specific amount or percentage of cost sharing.

#### § 37.310 When would I use an expenditure-based TIA?

In general, you must use an expenditure-based TIA under conditions other than those described in § 37.305. Reasons for any exceptions to this general rule must be documented in the award file and must be consistent with the policy in § 37.230 that precludes payment of fee or profit to participants.

#### § 37.315 What are the advantages of using a fixed-support TIA?

In situations where the use of fixed-support TIAs is permissible (*see* §§ 37.305 and 37.310), their use may encourage some commercial firms' participation in the research. With a fixed-support TIA, you can eliminate or reduce some post-award requirements that sometimes are cited as disincentives for those firms to participate. For example, a fixed-support TIA need not:

- (a) Specify minimum standards for the recipient's financial management system.
- (b) Specify cost principles or standards stating the types of costs the recipient may charge to the project.

(c) Provide for financial audits by Federal auditors or independent public accountants of the recipient's books and records.

(d) Set minimum standards for the recipient's purchasing system.

(e) Require the recipient to prepare financial reports for submission to the Federal Government.

### Subpart D—Competition Phase

#### § 37.400 Must I use competitive procedures to award TIAs?

DoD policy is to award TIAs using merit-based, competitive procedures, as described in 32 CFR 22.315:

(a) In every case where required by statute; and

(b) To the maximum extent practicable in all other cases.

#### § 37.405 What must my announcement or solicitation include?

Your announcement, to be considered as part of a competitive procedure, must include the basic information described in 32 CFR 22.315(a). Additional elements for you to consider in the case of a program that may use TIAs are described in §§ 37.410 through 37.420.

#### § 37.410 Should my announcement or solicitation state that TIAs may be awarded?

Yes, once you consider the factors described in subpart B of this part and decide that TIAs are among the types of instruments that you may award pursuant to a solicitation, it is important for you to state that fact in the solicitation. You also should state that TIAs are more flexible than traditional Government funding instruments and that provisions are negotiable in areas such as audits and intellectual property rights that may cause concern for commercial firms. Doing so should increase the likelihood that commercial firms will be willing to submit proposals.

#### § 37.415 Should I address cost sharing in the announcement or solicitation?

To help ensure a competitive process that is fair and equitable to all potential proposers, you should state clearly in the solicitation:

(a) That, to the maximum extent practicable, the non-Federal parties carrying out a research project under a TIA are to provide at least half of the costs of the project (see § 37.215(b)).

(b) The types of cost sharing that are acceptable;

(c) How any in-kind contributions will be valued, in accordance with §§ 37.530 through 37.555; and

(d) Whether you will give any consideration to alternative approaches a proposer may offer to demonstrate its strong commitment to and self-interest in the project's success, in accordance with § 37.215.

#### § 37.420 Should I tell proposers that we will not disclose information that they submit?

Your solicitation should tell potential proposers that:

(a) For all TIAs, information described in paragraph (b) of this section is exempt from disclosure requirements of the Freedom of Information Act (FOIA)(codified at 5 U.S.C. 552) for a period of five years after the date on which the DoD Component receives the information from them.

(b) As provided in 10 U.S.C. 2371, disclosure is not required, and may not be compelled, under FOIA during that period if:

(1) A proposer submits the information in a competitive or noncompetitive process that could result in their receiving a cooperative agreement for basic, applied, or advanced research under the authority of 10 U.S.C. 2358 or any other type of transaction authorized by 10 U.S.C. 2371 (as explained in appendix B to this part, that includes all TIAs); and

(2) The type of information is among the following types that are exempt:

(i) Proposals, proposal abstracts, and supporting documents; and

(ii) Business plans and technical information submitted on a confidential basis.

(c) If proposers desire to protect business plans and technical information for five years from FOIA disclosure requirements, they must mark them with a legend identifying them as documents submitted on a confidential

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basis. After the five-year period, information may be protected for longer periods if it meets any of the criteria in 5 U.S.C. 552(b) (as implemented by the DoD in subpart C of 32 CFR part 286) for exemption from FOIA disclosure requirements.

### Subpart E—Pre-Award Business Evaluation

#### § 37.500 What must my pre-award business evaluation address?

(a) You must determine the qualification of the recipient, as described in §§ 37.510 and 37.515.

(b) As the business expert working with the program official, you also must address the financial aspects of the proposed agreement. You must:

(1) Determine that the total amount of funding for the proposed effort is reasonable, as addressed in § 37.520.

(2) Assess the value and determine the reasonableness of the recipient's proposed cost sharing contribution, as discussed in §§ 37.525 through 37.555.

(3) If you are contemplating the use of a fixed-support rather than expenditure-based TIA, ensure that its use is justified, as explained in §§ 37.560 and 37.565.

(4) Address issues of inconsistent cost accounting by traditional Government contractors, should they arise, as noted in § 37.570.

(5) Determine amounts for milestone payments, if you use them, as discussed in § 37.575.

#### § 37.505 What resources are available to assist me during the pre-award business evaluation?

Administrative agreements officers of the Defense Contract Management Agency and the Office of Naval Research can share lessons learned from administering other TIAs. Program officials can be a source of information when you are determining the reasonableness of proposed funding (*e.g.*, on labor rates, as discussed in § 37.520) or establishing observable and verifiable technical milestones for payments (*see* § 37.575). Auditors at the Defense Contract Audit Agency can act in an advisory capacity to help you determine the reasonableness of proposed

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amounts, including values of in-kind contributions toward cost sharing.

### RECIPIENT QUALIFICATION

#### § 37.510 What are my responsibilities for determining that a recipient is qualified?

Prior to award of a TIA, your responsibilities for determining that the recipient is qualified are the same as those of a grants officer who is awarding a grant or cooperative agreement. Those responsibilities are described in subpart D of 32 CFR part 22. When the recipient is a consortium that is not formally incorporated, you have the additional responsibility described in § 37.515.

#### § 37.515 Must I do anything additional to determine the qualification of a consortium?

(a) When the prospective recipient of a TIA is a consortium that is not formally incorporated, your determination that the recipient meets the standard at 32 CFR 22.415(a) requires that you, in consultation with legal counsel, review the management plan in the consortium's collaboration agreement. The purpose of your review is to ensure that the management plan is sound and that it adequately addresses the elements necessary for an effective working relationship among the consortium members. An effective working relationship is essential to increase the research project's chances of success.

(b) The collaboration agreement, commonly referred to as the articles of collaboration, is the document that sets out the rights and responsibilities of each consortium member. It binds the individual consortium members together, whereas the TIA binds the Government and the consortium as a group (or the Government and a consortium member on behalf of the consortium, as explained in § 37.1015). The document should discuss, among other things, the consortium's:

(1) Management structure.

(2) Method of making payments to consortium members.

(3) Means of ensuring and overseeing members' efforts on the project.

(4) Provisions for members' cost sharing contributions.

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(5) Provisions for ownership and rights in intellectual property developed previously or under the agreement.

### TOTAL FUNDING

#### **§ 37.520 What is my responsibility for determining that the total project funding is reasonable?**

In cooperation with the program official, you must assess the reasonableness of the total estimated budget to perform the research that will be supported by the agreement. Additional guidance follows for:

(a) *Labor*. Much of the budget likely will involve direct labor and associated indirect costs, which may be represented together as a “loaded” labor rate. The program official is an essential advisor on reasonableness of the overall level of effort and its composition by labor category. You also may rely on your experience with other awards as the basis for determining reasonableness. If you have any unresolved questions, two of the ways that you might find helpful in establishing reasonableness are to:

(1) Consult the administrative agreements officers or auditors identified in § 37.505.

(2) Compare loaded labor rates of for-profit firms that do not have expenditure-based Federal procurement contracts or assistance awards with a standard or average for the particular industry. Note that the program official may have knowledge about customary levels of direct labor charges in the particular industry that is involved. You may be able to compare associated indirect charges with Government-approved indirect cost rates that exist for many nonprofit and for-profit organizations that have Federal procurement contracts or assistance awards (note the requirement in § 37.630 for a for-profit participant to use Federally approved provisional indirect cost rates, if it has them).

(b) *Real property and equipment*. In almost all cases, the project costs may include only depreciation or use charges for real property and equipment of for-profit participants, in accordance with § 37.685. Remember that the budget for an expenditure-based TIA may not include depreciation of a

participant’s property as a direct cost of the project if that participant’s practice is to charge the depreciation of that type of property as an indirect cost, as many organizations do.

### COST SHARING

#### **§ 37.525 What is my responsibility for determining the value and reasonableness of the recipient’s cost sharing contribution?**

You must:

(a) Determine that the recipient’s cost sharing contributions meet the criteria for cost sharing and determine values for them, in accordance with §§ 37.530 through 37.555. In doing so, you must:

(1) Ensure that there are affirmative statements from any third parties identified as sources of cash contributions.

(2) Include in the award file an evaluation that documents how you determined the values of the recipient’s contributions to the funding of the project.

(b) Judge that the recipient’s cost sharing contribution, as a percentage of the total budget, is reasonable. To the maximum extent practicable, the recipient must provide at least half of the costs of the project, in accordance with § 37.215.

#### **§ 37.530 What criteria do I use in deciding whether to accept a recipient’s cost sharing?**

You may accept any cash or in-kind contributions that meet all of the following criteria:

(a) In your judgment, they represent meaningful cost sharing that demonstrates the recipient’s commitment to the success of the research project. Cash contributions clearly demonstrate commitment and they are strongly preferred over in-kind contributions.

(b) They are necessary and reasonable for accomplishment of the research project’s objectives.

(c) They are costs that may be charged to the project under § 37.625 and § 37.635, as applicable to the participant making the contribution.

(d) They are verifiable from the recipient’s records.

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(e) They are not included as cost sharing contributions for any other Federal award.

(f) They are not paid by the Federal Government under another award, except:

(1) Costs that are authorized by Federal statute to be used for cost sharing; or

(2) Independent research and development (IR&D) costs, as described at 32 CFR 34.13(a)(5)(ii), that meet all of the criteria in paragraphs (a) through (e) of this section. IR&D is acceptable as cost sharing, even though it may be reimbursed by the Government through other awards. It is standard business practice for all for-profit firms, including commercial firms, to recover their research and development (R&D) costs (which for Federal procurement contracts is recovered as IR&D) through prices charged to their customers. Thus, the cost principles at 48 CFR part 31 allow a for-profit firm that has expenditure-based, Federal procurement contracts to recover through those procurement contracts the allocable portion of its R&D costs associated with a technology investment agreement.

## § 37.535 How do I value cost sharing related to real property or equipment?

You rarely should accept values for cost sharing contributions of real property or equipment that are in excess of depreciation or reasonable use charges, as discussed in § 37.685 for for-profit participants. You may accept the full value of a donated capital asset if the real property or equipment is to be dedicated to the project and you expect that it will have a fair market value that is less than \$5,000 at the project's end. In those cases, you should value the donation at the lesser of:

(a) The value of the property as shown in the recipient's accounting records (*i.e.*, purchase price less accumulated depreciation); or

(b) The current fair market value. You may accept the use of any reasonable basis for determining the fair market value of the property. If there is a justification to do so, you may accept the current fair market value even if it

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exceeds the value in the recipient's records.

## § 37.540 May I accept fully depreciated real property or equipment as cost sharing?

You should limit the value of any contribution of a fully depreciated asset to a reasonable use charge. In determining what is reasonable, you must consider:

- (a) The original cost of the asset;
- (b) Its estimated remaining useful life at the time of your negotiations;
- (c) The effect of any increased maintenance charges or decreased performance due to age; and
- (d) The amount of depreciation that the participant previously charged to Federal awards.

## § 37.545 May I accept costs of prior research as cost sharing?

No, you may not count any participant's costs of prior research as a cost sharing contribution. Only the additional resources that the recipient will provide to carry out the current project (which may include pre-award costs for the current project, as described in § 37.830) are to be counted.

## § 37.550 May I accept intellectual property as cost sharing?

(a) In most instances, you should not count costs of patents and other intellectual property (*e.g.*, copyrighted material, including software) as cost sharing, because:

(1) It is difficult to assign values to these intangible contributions;

(2) Their value usually is a manifestation of prior research costs, which are not allowed as cost share under § 37.545; and

(3) Contributions of intellectual property rights generally do not represent the same cost of lost opportunity to a recipient as contributions of cash or tangible assets. The purpose of cost share is to ensure that the recipient incurs real risk that gives it a vested interest in the project's success.

(b) You may include costs associated with intellectual property if the costs are based on sound estimates of market value of the contribution. For example, a for-profit firm may offer the use of commercially available software for



which there is an established license fee for use of the product. The costs of the development of the software would not be a reasonable basis for valuing its use.

**§ 37.555 How do I value a recipient's other contributions?**

For types of participant contributions other than those addressed in §§ 37.535 through 37.550, the general rule is that you are to value each contribution consistently with the cost principles or standards in § 37.625 and § 37.635 that apply to the participant making the contribution. When valuing services and property donated by parties other than the participants, you may use as guidance the provisions of 32 CFR 34.13(b)(2) through (5).

**FIXED-SUPPORT OR EXPENDITURE-BASED APPROACH**

**§ 37.560 Must I be able to estimate project expenditures precisely in order to justify use of a fixed-support TIA?**

(a) To use a fixed-support TIA, rather than an expenditure-based TIA, you must have confidence in your estimate of the expenditures required to achieve well-defined outcomes. Therefore, you must work carefully with program officials to select outcomes that, when the recipient achieves them, are reliable indicators of the amount of effort the recipient expended. However, your estimate of the required expenditures need not be a precise dollar amount, as illustrated by the example in paragraph (b) of this section, if:

(1) The recipient is contributing a substantial share of the costs of achieving the outcomes, which must meet the criteria in § 37.305(a); and

(2) You are confident that the costs of achieving the outcomes will be at least a minimum amount that you can specify and the recipient is willing to accept the possibility that its cost sharing percentage ultimately will be higher if the costs exceed that minimum amount.

(b) To illustrate the approach, consider a project for which you are confident that the recipient will have to expend at least \$800,000 to achieve the specified outcomes. You must deter-

mine, in conjunction with program officials, the minimum level of recipient cost sharing that you want to negotiate, based on the circumstances, to demonstrate the recipient's commitment to the success of the project. For purposes of this illustration, let that minimum recipient cost sharing be 40% of the total project costs. In that case, the Federal share should be no more than 60% and you could set a fixed level of Federal support at \$480,000 (60% of \$800,000). With that fixed level of Federal support, the recipient would be responsible for the balance of the costs needed to complete the project.

(c) Note, however, that the level of recipient cost sharing you negotiate is to be based solely on the level needed to demonstrate the recipient's commitment. You may not use a shortage of Federal Government funding for the program as a reason to try to persuade a recipient to accept a fixed-support TIA, rather than an expenditure-based instrument, or to accept responsibility for a greater share of the total project costs than it otherwise is willing to offer. If you lack sufficient funding to provide an appropriate Federal Government share for the entire project, you instead should rescope the effort covered by the agreement to match the available funding.

**§ 37.565 May I use a hybrid instrument that provides fixed support for only a portion of a project?**

Yes, for a research project that is to be carried out by a number of participants, you may award a TIA that provides for some participants to perform under fixed-support arrangements and others to perform under expenditure-based arrangements. This approach may be useful, for example, if a commercial firm that is a participant will not accept an agreement with all of the post-award requirements of an expenditure-based award. Before using a fixed-support arrangement for that firm's portion of the project, you must judge that it meets the criteria in § 37.305.

## § 37.570

### ACCOUNTING, PAYMENTS, AND RECOVERY OF FUNDS

#### **§ 37.570 What must I do if a CAS-covered participant accounts differently for its own and the Federal Government shares of project costs?**

(a) If a participant has Federal procurement contracts that are subject to the Cost Accounting Standards (CAS) in part 30 of the Federal Acquisition Regulation (FAR) and the associated FAR Appendix (48 CFR part 30 and 48 CFR 9903.201-1, respectively), you must alert the participant during the pre-award negotiations to the potential for a CAS violation, as well as the cognizant administrative contracting officer (ACO) for the participant's procurement contracts, if you learn that the participant plans to account differently for its own share and the Federal Government's share of project costs under the TIA. This may arise, for example, if a for-profit firm or other organization subject to the FAR cost principles in 48 CFR parts 31 and 231 proposes to charge:

(1) Its share of project costs as independent research and development (IR&D) costs to enable recovery of the costs through Federal Government procurement contracts, as allowed under the FAR cost principles; and

(2) The Federal Government's share to the project, rather than as IR&D costs.

(b) The reason for alerting the participant and the ACO is that the inconsistent charging of the two shares could cause a noncompliance with Cost Accounting Standard (CAS) 402. Noncompliance with CAS 402 is a potential issue only for a participant that has CAS-covered Federal procurement contracts (note that CAS requirements do not apply to a for-profit participant's TIAs).

(c) For for-profit participants with CAS-covered procurement contracts, the cognizant ACO in most cases will be an individual within the Defense Contract Management Agency (DCMA). You can identify a cognizant ACO at the DCMA by querying the contract administration team locator that matches contractors with their ACOs (currently on the World Wide Web at <http://alerts.dcmdw.dcm.mil/support>, a

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site that also can be accessed through the DCMA home page at <http://www.dcm.mil>).

#### **§ 37.575 What are my responsibilities for determining milestone payment amounts?**

(a) If you select the milestone payment method (*see* § 37.805), you must assess the reasonableness of the estimated amount for reaching each milestone. This assessment enables you to set the amount of each milestone payment to approximate the Federal share of the anticipated resource needs for carrying out that phase of the research effort.

(b) The Federal share at each milestone need not be the same as the Federal share of the total project. For example, you might deliberately set payment amounts with a larger Federal share for early milestones if a project involves a start-up company with limited resources.

(c) For an expenditure-based TIA, if you have minimum percentages that you want the recipient's cost sharing to be at the milestones, you should indicate those percentages in the agreement or in separate instructions to the post-award administrative agreements officer. That will help the administrative agreements officer decide when a project's expenditures have fallen too far below the original projections, requiring adjustments of future milestone payment amounts (*see* § 37.1105(c)).

(d) For fixed-support TIAs, the milestone payments should be associated with the well-defined, observable and verifiable technical outcomes (*e.g.*, demonstrations, tests, or data analysis) that you establish for the project in accordance with §§ 37.305(a) and 37.560(a).

#### **§ 37.580 What is recovery of funds and when should I consider including it in my TIA?**

(a) Recovery of funds refers to the use of the authority in 10 U.S.C. 2371 to include a provision in certain types of agreements, including TIAs, that require a recipient to make payments to the Department of Defense or another Federal agency as a condition of the agreement. Recovery of funds is a good

tool in the right circumstances, at the discretion of the agreements officer and the awarding organization, but its purpose is not to augment program budgets. It may be used to recover funds provided to a recipient through a TIA or another Federal procurement or assistance instrument, and the recovery should not exceed the amounts provided. Recovery of funds is distinct from program income, as described in § 37.835.

(b) In accordance with 10 U.S.C. 2371, as implemented by policy guidance from the Office of the Under Secretary of Defense (Comptroller), the payment amounts may be credited to an existing account of the Department of Defense and used for the same program purposes as other funds in that account.

(c) Before you use the authority to include a provision for recovery of funds, note that 10 U.S.C. 2371 requires you to judge that it would not be feasible or appropriate to use for the research project a standard grant or cooperative agreement (in this instance, a “standard cooperative agreement” means a cooperative agreement without a provision for recovery of funds). You satisfy that 10 U.S.C. 2371 requirement when you judge that execution of the research project warrants inclusion of a provision for recovery of funds.

## **Subpart F—Award Terms Affecting Participants’ Financial, Property, and Purchasing Systems**

### **§ 37.600 Which administrative matters are covered in this subpart?**

This subpart addresses “systemic” administrative matters that place requirements on the operation of a participant’s financial management, property management, or purchasing system. Each participant’s systems are organization-wide and do not vary with each agreement. Therefore, all TIAs should address systemic requirements in a uniform way for each type of participant organization.

### **§ 37.605 What is the general policy on participants’ financial, property, and purchasing systems?**

The general policy for expenditure-based TIAs is to avoid requirements that would force participants to use

different financial management, property management, and purchasing systems than they currently use for:

(a) Expenditure-based Federal procurement contracts and assistance awards in general, if they receive them; or

(b) Commercial business, if they have no expenditure-based Federal procurement contracts and assistance awards.

### **§ 37.610 Must I tell participants what requirements they are to flow down for subrecipients’ systems?**

If it is an expenditure-based award, your TIA must require participants to flow down the same financial management, property management, and purchasing systems requirements to a subrecipient that would apply if the subrecipient were a participant. For example, a for-profit participant would flow down to a university subrecipient the requirements that apply to a university participant. Note that this policy applies to subawards for substantive performance of portions of the research project supported by the TIA, and not to participants’ purchases of goods or services needed to carry out the research.

## **FINANCIAL MATTERS**

### **§ 37.615 What standards do I include for financial systems of for-profit firms?**

(a) To avoid causing needless changes in participants’ financial management systems, your expenditure-based TIAs will make for-profit participants that currently perform under other expenditure-based Federal procurement contracts or assistance awards subject to the same standards for financial management systems that apply to those other awards. Therefore, if a for-profit participant has expenditure-based DoD assistance awards other than TIAs, your TIAs are to apply the standards in 32 CFR 34.11. You may grant an exception and allow a for-profit participant that has other expenditure-based Federal Government awards to use an alternative set of standards that meets the minimum criteria in paragraph (b) of this section, if there is a compelling programmatic or business reason to do so. For each case in which you grant an

exception, you must document the reason in the award file.

(b) For an expenditure-based TIA, you are to allow and encourage each for-profit participant that does not currently perform under expenditure-based Federal procurement contracts or assistance awards (other than TIAs) to use its existing financial management system as long as the system, as a minimum:

(1) Complies with Generally Accepted Accounting Principles.

(2) Effectively controls all project funds, including Federal funds and any required cost share. The system must have complete, accurate, and current records that document the sources of funds and the purposes for which they are disbursed. It also must have procedures for ensuring that project funds are used only for purposes permitted by the agreement (*see* § 37.625).

(3) Includes, if advance payments are authorized under § 37.805, procedures to minimize the time elapsing between the payment of funds by the Government and the firm's disbursement of the funds for program purposes.

**§ 37.620 What financial management standards do I include for nonprofit participants?**

So as not to force system changes for any State, local government, institution of higher education, or other nonprofit organization, your expenditure-based TIA's requirements for the financial management system of any nonprofit participant are the same as those that apply to the participant's other Federal assistance awards. Specifically, the requirements are those in:

(a) 32 CFR 33.20 for State and local governments; and

(b) 32 CFR 32.21(b) for other nonprofit organizations, with the exception of Government-owned, contractor-operated (GOCO) facilities and Federally Funded Research and Development Centers (FFRDCs) that are excepted from the definition of "recipient" in 32 CFR part 32. Although it should occur infrequently, if a nonprofit GOCO or FFRDC is a participant, you must specify appropriate standards that conform as much as practicable with re-

quirements in that participant's other Federal awards.

**§ 37.625 What cost principles or standards do I require for for-profit participants?**

(a) So as not to require any firm to needlessly change its cost-accounting system, your expenditure-based TIAs are to apply the Government cost principles in 48 CFR parts 31 and 231 to for-profit participants that currently perform under expenditure-based Federal procurement contracts or assistance awards (other than TIAs) and therefore have existing systems for identifying allowable costs under those principles. If there are programmatic or business reasons to do otherwise, you may grant an exception from this requirement and use alternative standards as long as the alternative satisfies the conditions described in paragraph (b) of this section; if you do so, you must document the reasons in your award file.

(b) For other for-profit participants, you may establish alternative standards in the agreement as long as that alternative provides, as a minimum, that Federal funds and funds counted as recipients' cost sharing will be used only for costs that:

(1) A reasonable and prudent person would incur in carrying out the research project contemplated by the agreement. Generally, elements of cost that appropriately are charged are those identified with research and development activities under the Generally Accepted Accounting Principles (*see* Statement of Financial Accounting Standards Number 2, "Accounting for Research and Development Costs," October 1974<sup>1</sup>). Moreover, costs must be allocated to DoD and other projects in accordance with the relative benefits the projects receive. Costs charged to DoD projects must be given consistent treatment with costs allocated to the

<sup>1</sup>Copies may be obtained from the Financial Accounting Standards Board (FASB), 401 Merritt 7, P.O. Box 5116, Norwalk, CT 06856-5116. Information about ordering also may be found at the Internet site <http://www.fasb.org> or by telephoning the FASB at (800) 748-0659.

participants' other research and development activities (*e.g.*, activities supported by the participants themselves or by non-Federal sponsors).

(2) Are consistent with the purposes stated in the governing Congressional authorizations and appropriations. You are responsible for ensuring that provisions in the award document address any requirements that result from authorizations and appropriations.

**§ 37.630 Must I require a for-profit firm to use Federally approved indirect cost rates?**

In accordance with the general policy in § 37.605, you must require a for-profit participant that has Federally approved indirect cost rates for its Federal procurement contracts to use those rates to accumulate and report costs under an expenditure-based TIA. This includes both provisional and final rates that are approved up until the time that the TIA is closed out. You may grant an exception from this requirement if there are programmatic or business reasons to do otherwise (*e.g.*, the participant offers you a lower rate). If you grant an exception, the participant must accumulate and report the costs using an accounting system and practices that it uses for other customers (*e.g.*, its commercial customers). Also, you must document the reason for the exception in your award file.

**§ 37.635 What cost principles do I require a nonprofit participant to use?**

So as not to force financial system changes for any nonprofit participant, your expenditure-based TIA will provide that costs to be charged to the research project by any nonprofit participant must be determined to be allowable in accordance with:

(a) OMB Circular A-87,<sup>2</sup> if the participant is a State or local governmental organization.

<sup>2</sup>Electronic copies may be obtained at Internet site <http://www.whitehouse.gov/OMB>. For paper copies, contact the Office of Management and Budget, EOP Publications, 725 17th St. NW., New Executive Office Building, Washington, DC 20503.

(b) OMB Circular A-21,<sup>3</sup> if the participant is an institution of higher education.

(c) 45 CFR part 74, appendix E, if the participant is a hospital.

(d) OMB Circular A-122, if the participant is any other type of nonprofit organization (the cost principles in 48 CFR parts 31 and 231 are to be used by any nonprofit organization that is identified in Circular A-122 as being subject to those cost principles).

**§ 37.640 Must I include a provision for audits of for-profit participants?**

If your TIA is an expenditure-based award, you must include in it an audit provision that addresses, for each for-profit participant:

(a) Whether the for-profit participant must have periodic audits, in addition to any award-specific audits, as described in § 37.645. Note that the DCAA or the Office of the Inspector General, DoD (OIG, DoD), can provide advice on the types and scope of audits that may be needed in various circumstances.

(b) Whether the DCAA or an independent public accountant (IPA) will perform required audits, as discussed in § 37.650.

(c) How frequently any periodic audits are to be performed, addressed in § 37.655.

(d) Other matters described in § 37.660, such as audit coverage, allowability of audit costs, auditing standards, and remedies for noncompliance.

**§ 37.645 Must I require periodic audits, as well as award-specific audits, of for-profit participants?**

You need to consider requirements for both periodic audits and award-specific audits (as defined in § 37.1325 and § 37.1235, respectively). The way that your expenditure-based TIA addresses the two types of audits will vary, depending upon the type of for-profit participant.

(a) For for-profit participants that are audited by the DCAA or other Federal auditors, as described in §§ 37.650(b) and 37.655, you need not add specific requirements for periodic audits because the Federal audits should be sufficient to address whatever may be needed.

<sup>3</sup>See footnote 2 to § 37.635(a).

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Your inclusion in the TIA of the standard access-to-records provision for those for-profit participants, as discussed in § 37.915(a), gives the necessary access in the event that you or administrative agreements officers later need to request audits to address award-specific issues that arise.

(b) For each other for-profit participant, you:

(1) Should require that the participant have an independent auditor (*i.e.*, the DCAA or an independent public accountant) conduct periodic audits of its systems if it expends \$500,000 or more per year in TIAs and other Federal assistance awards. A prime reason for including this requirement is that the Federal Government, for an expenditure-based award, necessarily relies on amounts reported by the participant's systems when it sets payment amounts or adjusts performance outcomes. The periodic audit provides some assurance that the reported amounts are reliable.

(2) Must ensure that the award provides an independent auditor the access needed for award-specific audits, to be performed at the request of the cognizant administrative agreements officer if issues arise that require audit support. However, consistent with the government-wide policies on single audits that apply to nonprofit participants (see § 37.665), you should rely on periodic audits to the maximum extent possible to resolve any award-specific issues.

### **§ 37.650 Who must I identify as the auditor for a for-profit participant?**

The auditor that you will identify in the expenditure-based TIA to perform periodic and award-specific audits of a for-profit participant depends on the circumstances, as follows:

(a) You may provide that an IPA will be the auditor for a for-profit participant that does not meet the criteria in paragraph (b) of this section, but only if the participant will not agree to give the DCAA access to the necessary books and records for audit purposes. Note that the allocable portion of the costs of the IPA's audit may be reimbursable under the TIA, as described in § 37.660(b). The IPA should be the one that the participant uses to perform other audits (*e.g.*, of its financial state-

ment), to minimize added burdens and costs. You must document in the award file the participant's unwillingness to give the DCAA access. The DCAA is to be the auditor if the participant grants the necessary access.

(b) Except as provided in paragraph (c) of this section, you must identify the DCAA as the auditor for any for-profit participant that is subject to DCAA audits because it is currently performing under a Federal award that is subject to the:

(1) Cost principles in 48 CFR part 31 of the Federal Acquisition Regulation (FAR) and 48 CFR part 231 of the Defense FAR Supplement; or

(2) Cost Accounting Standards in 48 CFR chapter 99.

(c) If there are programmatic or business reasons that justify the use of an auditor other than the DCAA for a for-profit participant that meets the criteria in paragraph (b) of this section, you may provide that an IPA will be the auditor for that participant if you obtain prior approval from the Office of the Inspector General, DoD. You must submit requests for prior approval to the Assistant Inspector General (Auditing), 400 Army-Navy Drive, Arlington, VA 22202. Your request must include the name and address of the business unit(s) for which IPAs will be used. It also must explain why you judge that the participant will not give the DCAA the necessary access to records for audit purposes (*e.g.*, you may submit a statement to that effect from the participant). The OIG, DoD, will respond within five working days of receiving the request for prior approval, either by notifying you of the decision (approval or disapproval) or giving you a date by which they will notify you of the decision.

### **§ 37.655 Must I specify the frequency of IPAs' periodic audits of for-profit participants?**

If your expenditure-based TIA provides for periodic audits of a for-profit participant by an IPA, you must specify the frequency for those audits. You should consider having an audit performed during the first year of the award, when the participant has its IPA do its next financial statement audit, unless the participant already

had a systems audit due to other Federal awards within the past two years. The frequency thereafter may vary depending upon the dollars the participant is expending annually under the award, but it is not unreasonable to require an updated audit every two to three years to reverify that the participant's systems are reliable (the audit then would cover the two or three-year period between audits). The DCAA is a source of advice on audit frequencies if your TIA provides for audits by IPAs.

**§ 37.660 What else must I specify concerning audits of for-profit participants by IPAs?**

If your expenditure-based TIA provides for audits of a for-profit participant by an IPA, you also must specify:

(a) What periodic audits are to cover. It is important that you specify audit coverage that is only as broad as needed to provide reasonable assurance of the participant's compliance with award terms that have a direct and material effect on the research project. Appendix C to this part provides guidance to for-profit participants and their IPAs that you may use for this purpose. The DCAA and the OIG, DoD, also can provide advice to help you set appropriate limits on audit objectives and scope.

(b) Who will pay for periodic and award-specific audits. The allocable portion of the costs of any audits by IPAs may be reimbursable under the TIA. The costs may be direct charges or allocated indirect costs, consistent with the participant's accounting system and practices.

(c) The auditing standards that the IPA will use. Unless you receive prior approval from the OIG, DoD, to do otherwise, you must provide that the IPA will perform the audits in accordance with the Generally Accepted Government Auditing Standards.<sup>4</sup>

(d) The available remedies for non-compliance. The agreement must provide that the participant may not charge costs to the award for any audit

that the agreements officer, with the advice of the OIG, DoD, determines was not performed in accordance with the Generally Accepted Government Auditing Standards or other terms of the agreement. It also must provide that the Government has the right to require the participant to have the IPA take corrective action and, if corrective action is not taken, that the agreements officer has recourse to any of the remedies for noncompliance identified in 32 CFR 34.52(a).

(e) The remedy if it later is found that the participant, at the time it entered into the TIA, was performing on a procurement contract or other Federal award subject to the Cost Accounting Standards at 48 CFR part 30 and the cost principles at 48 CFR part 31. Unless the OIG, DoD, approves an exception (see § 37.650(c)), the TIA's terms must provide that the DCAA will perform the audits for the agreement if it later is found that the participant, at the time the TIA was awarded, was performing under awards described in § 37.650(b) that gave the DCAA audit access to the participant's books and records.

(f) Where the IPA is to send audit reports. The agreement must provide that the IPA is to submit audit reports to the administrative agreements officer and the OIG, DoD. It also must require that the IPA report instances of fraud directly to the OIG, DoD.

(g) The retention period for the IPA's working papers. You must specify that the IPA is to retain working papers for a period of at least three years after the final payment, unless the working papers relate to an audit whose findings are not fully resolved within that period or to an unresolved claim or dispute (in which case, the IPA must keep the working papers until the matter is resolved and final action taken).

(h) Who will have access to the IPA's working papers. The agreement must provide for Government access to working papers.

**§ 37.665 Must I require nonprofit participants to have periodic audits?**

Yes, expenditure-based TIAs are assistance instruments subject to the Single Audit Act (31 U.S.C. 7501-7507), so nonprofit participants are subject to

<sup>4</sup>The electronic document may be accessed at [www.gao.gov](http://www.gao.gov). Printed copies may be purchased from the U.S. Government Printing Office; for ordering information, call (202) 512-1800 or access the Internet site at [www.gpo.gov](http://www.gpo.gov).

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their usual requirements under that Act and OMB Circular A-133.<sup>5</sup> Specifically, the requirements are those in:

(a) 32 CFR 33.26 for State and local governments; and

(b) 32 CFR 32.26 for other nonprofit organizations. Note that those requirements also are appropriate for Government-owned, contractor-operated (GOCO) facilities and Federally Funded Research and Development Centers (FFRDCs) that are excluded from the definition of “recipient” in 32 CFR part 32, because nonprofit GOCOs and FFRDCs are subject to the Single Audit Act.

### **§ 37.670 Must I require participants to flow down audit requirements to subrecipients?**

(a) Yes, in accordance with § 37.610, your expenditure-based TIA must require participants to flow down the same audit requirements to a subrecipient that would apply if the subrecipient were a participant.

(b) For example, a for-profit participant that is audited by the DCAA:

(1) Would flow down to a university subrecipient the Single Audit Act requirements that apply to a university participant.

(2) Could enter into a subaward allowing a for-profit participant, under the circumstances described in § 37.650(a), to use an IPA to do its audits.

(c) This policy applies to subawards for substantive performance of portions of the research project supported by the TIA, and not to participants’ purchases of goods or services needed to carry out the research.

### **§ 37.675 Must I report when I enter into a TIA allowing a for-profit firm to use an IPA?**

Yes, you must include that information with the data you provide for your DoD Component’s annual submission to the Defense Technical Information Center (DTIC), as provided in § 37.1030(c).

<sup>5</sup>See footnote 2 to § 37.635(a).

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### **§ 37.680 Must I require a participant to report when it enters into a subaward allowing a for-profit firm to use an IPA?**

Yes, your expenditure-based TIA must require participants to report to you when they enter into any subaward allowing a for-profit subawardee to use an IPA, as described in § 37.670(b)(2). You must provide that information about the new subaward under the TIA for your DoD Component’s annual submission to the DTIC, even though the TIA may have been reported in a prior year and does not itself have to be reported again.

## PROPERTY

### **§ 37.685 May I allow for-profit firms to purchase real property and equipment with project funds?**

(a) With the two exceptions described in paragraph (b) of this section, you must require a for-profit firm to purchase real property or equipment with its own funds that are separate from the research project. You should allow the firm to charge to an expenditure-based TIA only depreciation or use charges for real property or equipment (and your cost estimate for a fixed-support TIA only would include those costs). Note that the firm must charge depreciation consistently with its usual accounting practice. Many firms treat depreciation as an indirect cost. Any firm that usually charges depreciation indirectly for a particular type of property must not charge depreciation for that property as a direct cost to the TIA.

(b) In two situations, you may grant an exception and allow a for-profit firm to use project funds, which includes both the Federal Government and recipient shares, to purchase real property or equipment (*i.e.*, to charge to the project the full acquisition cost of the property). The two circumstances, which should be infrequent for equipment and extremely rare for real property, are those in which you either:

(1) Judge that the real property or equipment will be dedicated to the project and have a current fair market value that is less than \$5,000 by the time the project ends; or



(2) Give prior approval for the firm to include the full acquisition cost of the real property or equipment as part of the cost of the project (see § 37.535).

(c) If you grant an exception in either of the circumstances described in paragraphs (b)(1) and (2) of this section, you must make the real property or equipment subject to the property management standards in 32 CFR 34.21(b) through (d). As provided in those standards, the title to the real property or equipment will vest conditionally in the for-profit firm upon acquisition. Your TIA, whether it is a fixed-support or expenditure-based award, must specify that any item of equipment that has a fair market value of \$5,000 or more at the conclusion of the project also will be subject to the disposition process in 32 CFR 34.21(e), whereby the Federal Government will recover its interest in the property at that time.

**§ 37.690 How are nonprofit participants to manage real property and equipment?**

For nonprofit participants, your TIA's requirements for vesting of title, use, management, and disposition of real property or equipment acquired under the award are the same as those that apply to the participant's other Federal assistance awards. Specifically, the requirements are those in:

(a) 32 CFR 33.31 and 33.32, for participants that are States and local governmental organizations.

(b) 32 CFR 32.32 and 32.33, for other nonprofit participants, with the exception of nonprofit GOCOs and FFRDCs that are exempted from the definition of "recipient" in 32 CFR part 32. Although it should occur infrequently, if a nonprofit GOCO or FFRDC is a participant, you must specify appropriate standards that conform as much as practicable with requirements in that participant's other Federal awards. Note also that:

(1) If the TIA is a cooperative agreement (see appendix B to this part), 31 U.S.C. 6306 provides authority to vest title to tangible personal property in a nonprofit institution of higher education or in a nonprofit organization whose primary purpose is conducting scientific research, without further ob-

ligation to the Federal Government; and

(2) Your TIA therefore must specify any conditions on the vesting of title to real property or equipment acquired by any such nonprofit participant, or the title will vest in the participant without further obligation to the Federal Government, as specified in 32 CFR 32.33(b)(3).

**§ 37.695 What are the requirements for Federally owned property?**

If you provide Federally owned property to any participant for the performance of research under a TIA, you must require that participant to account for, use, and dispose of the property in accordance with:

(a) 32 CFR 34.22, if the participant is a for-profit firm.

(b) 32 CFR 33.32(f), if the participant is a State or local governmental organization. Note that 32 CFR 33.32(f) requires you to provide additional information to the participant on the procedures for managing the property.

(c) 32 CFR 32.33(a) and 32.34(f), if the participant is a nonprofit organization other than a GOCO or FFRDC (requirements for nonprofit GOCOs and FFRDCs should conform with the property standards that apply to their Federal procurement contracts).

**§ 37.700 What are the requirements for supplies?**

Your expenditure-based TIA's provisions should permit participants to use their existing procedures to account for and manage supplies. A fixed-support TIA should not include requirements to account for or manage supplies.

**PURCHASING**

**§ 37.705 What standards do I include for purchasing systems of for-profit firms?**

(a) If your TIA is an expenditure-based award, it should require for-profit participants that currently perform under DoD assistance instruments subject to the purchasing standards in 32 CFR 34.31 to use the same requirements for TIAs, unless there are programmatic or business reasons to do otherwise (in which case you must document the reasons in the award file).

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(b) You should allow other for-profit participants under expenditure-based TIAs to use their existing purchasing systems, as long as they flow down the applicable requirements in Federal statutes, Executive orders or Governmentwide regulations (see appendix E to this part for a list of those requirements).

(c) If your TIA is a fixed-support award, you need only require for-profit participants to flow down the requirements listed in appendix F to this part.

### **§ 37.710 What standards do I include for purchasing systems of nonprofit organizations?**

(a) So as not to force system changes for any nonprofit participant, your expenditure-based TIA will provide that each nonprofit participant's purchasing system comply with:

(1) 32 CFR 33.36, if the participant is a State or local governmental organization.

(2) 32 CFR 32.40 through 32.49 if the participant is a nonprofit organization other than a GOCO or FFRDC that is excepted from the definition of "recipient" in 32 CFR part 32. Although it should occur infrequently, if a nonprofit GOCO or FFRDC is a participant, you must specify appropriate standards that conform as much as practicable with requirements in that participant's other Federal awards.

(b) If your TIA is a fixed-support award, you need only require nonprofit participants to flow down the requirements listed in appendix E to this part.

## **Subpart G—Award Terms Related to Other Administrative Matters**

### **§ 37.800 Which administrative matters are covered in this subpart?**

This subpart addresses "non-systemic" administrative matters that do not impose organization-wide requirements on a participant's financial management, property management, or purchasing system. Because an organization does not have to redesign its systems to accommodate award-to-award variations in these requirements, a TIA that you award may differ from other TIAs in the non-systemic requirements that it specifies for a given participant, based on the cir-

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cumstances of the particular research project. To eliminate needless administrative complexity, you should handle some non-systemic requirements, such as the payment method, in a uniform way for the agreement as a whole.

### **PAYMENTS**

### **§ 37.805 If I am awarding a TIA, what payment methods may I specify?**

Your TIA may provide for:

(a) *Reimbursement*, as described in 32 CFR 34.12(a)(1), if it is an expenditure-based award.

(b) *Advance payments*, as described in 32 CFR 34.12(a)(2), subject to the conditions in 32 CFR 34.12(b)(2)(i) through (iii).

(c) *Payments based on payable milestones*. These are payments made according to a schedule that is based on predetermined measures of technical progress or other payable milestones. This approach relies upon the fact that, as research progresses throughout the term of the agreement, observable activity will be taking place. The recipient is paid upon the accomplishment of the predetermined measure of progress. Fixed-support TIAs must use this payment method and each measure of progress appropriately would be one of the well-defined outcomes that you identify in the agreement (this does not preclude use of an initial advance payment, if there is no alternative to meeting immediate cash needs). There are cash management considerations when this payment method is used as a means of financing for an expenditure-based TIA (see § 37.575 and § 37.1105).

### **§ 37.810 What should my TIA's provisions specify for the method and frequency of recipients' payment requests?**

The procedure and frequency for payment requests depend upon the payment method, as follows:

(a) For either reimbursements or advance payments, your TIA must allow recipients to submit requests for payment at least monthly. You may authorize the recipients to use the forms or formats described in 32 CFR 34.12(d).

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(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. The agreement administrator may approve payment to the recipient after receiving validation from the program manager that the milestone was successfully reached.

### **§ 37.815 May the Government withhold payments?**

Your TIA must provide that the administrative agreements officer may withhold payments in the circumstances described in 32 CFR 34.12(g), but not otherwise.

### **§ 37.820 Must I require a recipient to return interest on advance payments?**

If your 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 administrative agreements officer.

## REVISION OF BUDGET AND PROGRAM PLANS

### **§ 37.825 Must I require the recipient to obtain prior approval from the Government for changes in plans?**

If it is an expenditure-based award, your agreement must require the recipient to obtain the agreement administrator's prior approval if there is to be a change in plans that results 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.

### **§ 37.830 May I let a recipient charge pre-award costs to the agreement?**

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 agreements officer. All pre-award costs are incurred at the recipient's risk (*i.e.*, no DoD Component is 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

### **§ 37.835 What requirements do I include for program income?**

Your TIA should apply the standards of 32 CFR 34.14 for program income that may be generated. Note the need to specify whether the recipient is to have any obligation to the Federal Government with respect to program income generated after the end of the project period (the period, as established in the award document, during which Federal support is provided). Doing so is especially important if the TIA includes a provision for the recipient to return any amounts to the Federal Government (see § 37.580).

## INTELLECTUAL PROPERTY

### **§ 37.840 What general approach should I take in negotiating data and patent rights?**

(a) You should confer with program officials and legal 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 any intellectual property the Government is furnishing and any pre-existing proprietary information that the recipient is furnishing, as well as data

and inventions that may be generated under the award (recognizing that new data and inventions may be less valuable without pre-existing information). All pre-existing intellectual property, both the Government's and the recipient's, should be marked to give notice of its status.

(b) Because TIAs entail substantial cost sharing by recipients, you must use discretion in negotiating Government rights to data and patentable inventions resulting from research under the agreements. The considerations in §§ 37.845 through 37.875 are intended to serve as guidelines, within which you necessarily have considerable latitude to negotiate provisions appropriate to a wide variety of circumstances that may arise. Your goal should be a good balance between DoD interests in:

(1) Gaining access to the best technologies for defense needs, including technologies available in the commercial marketplace, and promoting commercialization of technologies resulting from the research. Either of these interests may be impeded if you negotiate excessive rights for the Government. One objective of TIAs is to help incorporate defense requirements into the development of what ultimately will be commercially available technologies, an objective that is best served by reducing barriers to commercial firms' participation in the research. In that way, the commercial technology and industrial base can be a source of readily available, reliable, and affordable components, subsystems, computer software, and other technological products and manufacturing processes for military systems.

(2) Providing adequate protection of the Government's investment, which may be weakened if the Government's rights are inadequate. You should consider whether the Government may require access to data or inventions for Governmental purposes, such as a need to develop defense-unique products or processes that the commercial marketplace likely will not address.

**§ 37.845 What data rights should I obtain?**

(a) You should seek to obtain what you, with the advice of legal counsel, judge is needed to ensure future Gov-

ernment use of technology that emerges from the research, as long as doing so is consistent with the balance between DoD interests described in § 37.840(b). You should consider data in which you wish to obtain license rights and data that you may wish to be delivered; since TIAs are assistance instruments rather than acquisition instruments, however, it is not expected that data would be delivered in most cases. What generally is needed is an irrevocable, world-wide license for the Government to use, modify, reproduce, release, or disclose for Governmental purposes the data that are generated under TIAs (including any data, such as computer software, in which a recipient may obtain a copyright). A Governmental purpose is any activity in which the United States Government participates, but a license for Governmental purposes does not include the right to use, or have or permit others to use, modify, reproduce, release, or disclose data for commercial purposes.

(b) You may negotiate licenses of different scope than described in paragraph (a) of this section when necessary to accomplish program objectives or to protect the Government's interests. Consult with legal counsel before negotiating a license of different scope.

(c) In negotiating data rights, you should consider the rights in background data that are necessary to fully utilize technology that is expected to result from the TIA, in the event the recipient does not commercialize the technology or chooses to protect any invention as a trade secret rather than by a patent. If a recipient intends to protect any invention as a trade secret, you should consult with your intellectual property counsel before deciding what information related to the invention the award should require the recipient to report.

**§ 37.850 Should I require recipients to mark data?**

To protect the recipient's interests in data, your TIA should require the recipient to mark any particular data that it wishes to protect from disclosure with a legend identifying the data

as licensed data subject to use, release, or disclosure restrictions.

**§ 37.855 How should I handle protected data?**

Prior to releasing or disclosing data marked with a restrictive legend (as described in § 37.850) to third parties, you should require those parties to agree in writing that they will:

- (a) Use the data only for governmental purposes; and
- (b) Not release or disclose the data without the permission of the licensor (*i.e.*, the recipient).

**§ 37.860 What rights should I obtain for inventions?**

(a) You should negotiate rights in inventions that represent a good balance between the Government's interests (*see* § 37.840(b)) and the recipient's interests. As explained in appendix B to this part:

(1) You have the flexibility to negotiate patent rights provisions that vary from what the Bayh-Dole statute (Chapter 18 of Title 35, U.S.C.) requires in many situations. You have that flexibility because TIAs include not only cooperative agreements, but also assistance transactions other than grants or cooperative agreements.

(2) Your TIA becomes an assistance instrument other than a grant or cooperative agreement if its patent rights provision varies from what Bayh-Dole requires in your situation. However, you need not consider that difference in the type of transaction until the agreement is finalized, and it should not affect the provision you negotiate.

(b) As long as it is consistent with the balance between DoD interests described in § 37.840(b) and the recipient's interests, you should seek to obtain for the Government, when an invention is conceived or first actually reduced to practice under a TIA, a nonexclusive, nontransferrable, irrevocable, paid-up license to practice the invention, or to have it practiced, for or on behalf of the United States throughout the world. The license is for Governmental purposes, and does not include the right to practice the invention for commercial purposes.

(c) To provide for the license described in paragraph (b) of this section,

your TIA generally would include the patent-rights clause that 37 CFR 401.14 specifies to implement the Bayh-Dole statute's requirements. Note that:

(1) The clause is designed specifically for grants, contracts, and cooperative agreements awarded to small businesses and nonprofit organizations, the types of funding instruments and recipients to which the entire Bayh-Dole statute applies. As explained in appendix B to this part, only two Bayh-Dole requirements (in 35 U.S.C. sections 202(c)(4) and 203) apply to cooperative agreements with other performers, by virtue of an amendment to Bayh-Dole at 35 U.S.C. 210(c).

(2) You may use the same clause, suitably modified, in cooperative agreements with performers other than small businesses and nonprofit organizations. Doing so is consistent with a 1983 Presidential memorandum that calls for giving other performers rights in inventions from Federally supported research that are at least as great as the rights that Bayh-Dole gives to small businesses and nonprofit organizations (*see* appendix B to this part for details). That Presidential memorandum is incorporated by reference in Executive Order 12591 (52 FR 13414, 3 CFR, 1987 Comp., p. 220), as amended by Executive Order 12618 (52 FR 48661, 3 CFR, 1987 Comp., p. 262).

(3) The clause provides for flow-down of Bayh-Dole patent-rights provisions to subawards with small businesses and nonprofit organizations.

(4) There are provisions in 37 CFR part 401 stating when you must include the clause (37 CFR 401.3) and, in cases when it is required, how you may modify and tailor it (37 CFR 401.5).

(d) You may negotiate Government rights of a different scope than the standard patent-rights provision described in paragraph (c) of this section when necessary to accomplish program objectives and foster the Government's interests. If you do so:

(1) With the help of the program manager and legal counsel, you must decide what best represents a reasonable arrangement considering the circumstances, including past investments, contributions under the current TIA, and potential commercial markets. Taking past investments as an

example, you should consider whether the Government or the recipient has contributed more substantially to the prior research and development that provides the foundation for the planned effort. If the predominant past contributor to the particular technology has been:

(i) The Government, then the TIA's patent-rights provision should be at or close to the standard Bayh-Dole provision.

(ii) The recipient, then a less restrictive patent provision may be appropriate, to allow the recipient to benefit more directly from its investments.

(2) You should keep in mind that obtaining a nonexclusive license at the time of award, as described in paragraph (b) of this section, is valuable if the Government later requires access to inventions to enable development of defense-unique products or processes that the commercial marketplace is not addressing. If you do not obtain a license at the time of award, you should consider alternative approaches to ensure access, such as negotiating a priced option for obtaining nonexclusive licenses in the future to inventions that are conceived or reduced to practice under the TIA.

(3) You also may consider whether you want to provide additional flexibility by giving the recipient more time than the standard patent-rights provision does to:

(i) Notify the Government of an invention, from the time the inventor discloses it within the for-profit firm.

(ii) Inform the Government whether it intends to take title to the invention.

(iii) Commercialize the invention, before the Government license rights in the invention become effective.

**§ 37.865 Should my patent provision include march-in rights?**

Your TIA's patent rights provision should include the Bayh-Dole march-in rights clause at paragraph (j)(1) of 37 CFR 401.14, or an equivalent clause, concerning actions that the Government may take to obtain the right to use subject inventions, if the recipient fails to take effective steps to achieve practical application of the subject inventions within a reasonable time. The

march-in provision may be modified to best meet the needs of the program. However, only infrequently should the march-in provision be entirely removed (*e.g.*, you may wish to do so if a recipient is providing most of the funding for a research project, with the Government providing a much smaller share).

**§ 37.870 Should I require recipients to mark documents related to inventions?**

To protect the recipient's interest in inventions, your TIA should require the recipient to mark documents disclosing inventions it desires to protect by obtaining a patent. The recipient should mark the documents with a legend identifying them as intellectual property subject to public release or public disclosure restrictions, as provided in 35 U.S.C. 205.

**§ 37.875 Should my TIA include a provision concerning foreign access to technology?**

(a) Consistent with the objective of enhancing the national security by increasing DoD reliance on the U.S. commercial technology and industrial bases, you must include a provision in the TIA that addresses foreign access to technology developed under the TIA.

(b) The provision must provide, as a minimum, that any transfer of the:

(1) Technology must be consistent with the U.S. export laws, regulations and policies (*e.g.*, the International Traffic in Arms Regulation at chapter I, subchapter M, title 22 of the CFR (22 CFR parts 120 through 130), the DoD Industrial Security Regulation in DoD 5220.22-R,<sup>6</sup> and the Department of Commerce Export Regulation at chapter VII, subchapter C, title 15 of the CFR (15 CFR parts 730 through 774), as applicable.

(2) Exclusive right to use or sell the technology in the United States must, unless the Government grants a waiver, require that products embodying the technology or produced through

<sup>6</sup>Electronic copies may be obtained at the Washington Headquarters Services Internet site <http://www.dtic.mil/whs/directives>. Paper copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

the use of the technology will be manufactured substantially in the United States. The provision may further provide that:

(i) In individual cases, the Government may waive the requirement of substantial manufacture in the United States upon a showing by the recipient that reasonable but unsuccessful efforts have been made to transfer the technology under similar terms to those likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(ii) In those cases, the DoD Component may require a refund to the Government of some or all the funds paid under the TIA for the development of the transferred technology.

(c) You may, but are not required to, seek to negotiate a domestic manufacture condition for transfers of non-exclusive rights to use or sell the technology in the United States, to parallel the one described for exclusive licenses in paragraph (b)(2) of this section, if you judge that nonexclusive licenses for foreign manufacture could effectively preclude the establishment of domestic sources of the technology for defense purposes.

#### FINANCIAL AND PROGRAMMATIC REPORTING

#### **§ 37.880 What requirements must I include for periodic reports on program and business status?**

Your TIA must include either:

(a) The requirements in 32 CFR 32.51 and 32.52 for status reports on programmatic performance and, if it is an expenditure-based award, on financial performance; or

(b) Alternative requirements that, as a minimum, include periodic reports addressing program and, if it is an expenditure-based award, business status. You must require submission of the reports at least annually, and you may require submission as frequently as quarterly (this does not preclude a recipient from electing to submit more frequently than quarterly the financial information that is required to process payment requests if the award is an expenditure-based TIA that uses reimbursement or advance payments under

§ 37.810(a)). The requirements for the content of the reports are as follows:

(1) The program portions of the reports must address progress toward achieving program performance goals, including current issues, problems, or developments.

(2) The business portions of the reports, applicable only to expenditure-based awards, must provide summarized details on the status of resources (federal funds and non-federal cost sharing), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations. You may require a recipient to separately identify in these reports the expenditures for each participant in a consortium and for each programmatic milestone or task, if you, after consulting with the program official, judge that those additional details are needed for good stewardship.

#### **§ 37.885 May I require updated program plans?**

In addition to reports on progress to date, your TIA may include a provision requiring the recipient to annually prepare updated technical plans for the future conduct of the research effort. If your TIA does include a requirement for annual program plans, you also must require the recipient to submit the annual program plans to the agreements officer responsible for administering the TIA.

#### **§ 37.890 Must I require a final performance report?**

You need not require a final performance report that addresses all major accomplishments under the TIA. If you do not do so, however, there must be an alternative that satisfies the requirement in DoD Instruction 3200.14<sup>7</sup> to document all DoD Science and Technology efforts and disseminate the results through the Defense Technical Information Center (DTIC). An example

<sup>7</sup>See footnote 6 to § 37.875(b)(1).

of an alternative would be periodic reports throughout the performance of the research that collectively cover the entire project.

**§ 37.895 How is the final performance report to be sent to the Defense Technical Information Center?**

(a) Whether your TIA requires a final performance report or uses an alternative means under § 37.890,<sup>8</sup> you may include an award term or condition or otherwise instruct the recipient to submit the documentation, electronically if available, either:

- (1) Directly to the DTIC; or
- (2) To the office that is administering the award (for subsequent transmission to the DTIC).

(b) If you specify that the recipient is to submit the report directly to the DTIC, you also:

(1) Must instruct the recipient to include a fully completed Standard Form 298, “Report Documentation Page,” with each document, so that the DTIC can recognize the document as being related to the particular award and properly record its receipt; and

(2) Should advise the recipient to provide a copy of the completed Standard Form 298 to the agreements officer responsible for administering the TIA.

**§ 37.900 May I tell a participant that information in financial and programmatic reports will not be publicly disclosed?**

You may tell a participant that:

(a) We may exempt from disclosure under the Freedom of Information Act (FOIA) a trade secret or commercial and financial information that a participant provides after the award, if the information is privileged or confidential information. The DoD Component that receives the FOIA request will review the information in accordance with DoD procedures at 32 CFR 286.23(h) (and any DoD Component supplementary procedures) to determine whether it is privileged or confidential information under the FOIA exemption at 5 U.S.C. 552(b)(4), as implemented by the DoD at 32 CFR 286.12(d).

<sup>8</sup>Additional information on electronic submission to the DTIC can be found online, currently at [http://www.dtic.mil/dtic/submitting/elec\\_subm.html](http://www.dtic.mil/dtic/submitting/elec_subm.html).

(b) If the participant also provides information in the course of a competition prior to award, there is a statutory exemption for five years from FOIA disclosure requirements for certain types of information submitted at that time (see § 37.420).

**§ 37.905 Must I make receipt of the final performance report a condition for final payment?**

If a final report is required, your TIA should make receipt of the report a condition for final payment. If the payments are based on payable milestones, the submission and acceptance of the final report by the Government representative will be incorporated as an event that is a prerequisite for one of the payable milestones.

**RECORDS RETENTION AND ACCESS REQUIREMENTS**

**§ 37.910 How long must I require participants to keep records related to the TIA?**

Your TIA must require participants to keep records related to the TIA (for which the agreement provides Government access under § 37.915) for a period of three years after submission of the final financial status report for an expenditure-based TIA or final programmatic status report for a fixed-support TIA, with the following exceptions:

(a) The participant must keep records longer than three years after submission of the final financial status report if the records relate to an audit, claim, or dispute that begins but does not reach its conclusion within the 3-year period. In that case, the participant must keep the records until the matter is resolved and final action taken.

(b) Records for any real property or equipment acquired with project funds under the TIA must be kept for three years after final disposition.

**§ 37.915 What requirement for access to a for-profit participant’s records do I include in a TIA?**

(a) If a for-profit participant currently grants access to its records to the DCAA or other Federal Government auditors, your TIA must include



for that participant the standard access-to-records requirements at 32 CFR 34.42(e). If the agreement is a fixed-support TIA, the language in 32 CFR 34.42(e) may be modified to provide access to records concerning the recipient's technical performance, without requiring access to the recipient's financial or other records. Note that any need to address access to technical records in this way is in addition to, not in lieu of, the need to address rights in data (*see* § 37.845).

(b) For other for-profit participants that do not currently give the Federal Government direct access to their records and are not willing to grant full access to records pertinent to the award, there is no set requirement to include a provision in your TIA for Government access to records. If the audit provision of an expenditure-based TIA gives an IPA access to the recipient's financial records for audit purposes, the Federal Government must have access to the IPA's reports and working papers and you need not include a provision requiring direct Government access to the recipient's financial records. For both fixed-support and expenditure-based TIAs, you may wish to negotiate Government access to recipient records concerning technical performance. Should you negotiate a provision giving access only to specific Government officials (*e.g.*, the agreements officer), rather than a provision giving Government access generally, it is important to let participants know that the OIG, DoD, has a statutory right of access to records and other materials to which other DoD Component officials have access.

**§ 37.920 What requirement for access to a nonprofit participant's records do I include in a TIA?**

Your TIA must include for any nonprofit participant the standard access-to-records requirement at:

(a) 32 CFR 33.42(e), for a participant that is a State or local governmental organization.

(b) 32 CFR 32.53(e), for a participant that is a nonprofit organization. The same requirement applies to any nonprofit GOCO or FFRDC, even though nonprofit GOCOs and FFRDCs are ex-

empted from the definition of "recipient" in 32 CFR part 32.

TERMINATION AND ENFORCEMENT

**§ 37.925 What requirements do I include for termination and enforcement?**

Your TIA must apply the standards of 32 CFR 34.51 for termination, 32 CFR 34.52 for enforcement, and your organization's procedures implementing 32 CFR 22.815 for disputes and appeals.

**Subpart H—Executing the Award**

**§ 37.1000 What are my responsibilities at the time of award?**

At the time of the award, you must:

(a) Ensure that the award document contains the appropriate terms and conditions and is signed by the appropriate parties, in accordance with §§ 37.1005 through 37.1015.

(b) Document your analysis of the agreement in the award file, as discussed in § 37.1020.

(c) Provide information about the award to offices responsible for reporting, as described in §§ 37.1025 through 37.1035.

(d) Distribute copies of the award document, as required by § 37.1045.

THE AWARD DOCUMENT

**§ 37.1005 What are my general responsibilities concerning the award document?**

You are responsible for ensuring that the award document is complete and accurate. Your objective is to create a document that:

(a) Addresses all issues;

(b) States requirements directly. It is not helpful to readers to incorporate statutes or rules by reference, without sufficient explanation of the requirements. You generally should not incorporate clauses from the Federal Acquisition Regulation (48 CFR parts 1–53) or Defense Federal Acquisition Regulation Supplement (48 CFR parts 201–253), because those provisions are designed for procurement contracts that are used to acquire goods and services, rather than for TIAs or other assistance instruments.

(c) Is written in clear and concise language, to minimize potential ambiguity.

**§ 37.1010 What substantive issues should my award document address?**

You necessarily will design and negotiate a TIA individually to meet the specific requirements of the particular project, so the complete list of substantive issues that you will address in the award document may vary. Every award document must address:

(a) *Project scope.* The scope is an overall vision statement for the project, including a discussion of the project's purpose, objectives, and detailed military and commercial goals. It is a critical provision because it provides a context for resolving issues that may arise during post-award administration. In a fixed-support TIA, you also must clearly specify the well-defined outcomes that reliably indicate the amount of effort expended and serve as the basis for the level of the fixed support (see §§ 37.305 and 37.560(a)).

(b) *Project management.* You should describe the nature of the relationship between the Federal Government and the recipient; the relationship among the participants, if the recipient is an unincorporated consortium; and the overall technical and administrative management of the project. TIAs are used to carry out collaborative relationships between the Federal Government and the recipient. Consequently, there must be substantial involvement of the DoD program official (see § 37.220) and usually the administrative agreements officer. The program official provides technical insight, which differs from the usual technical oversight of a project. The management provision also should discuss how you and the recipient will make any modifications to the TIA.

(c) *Termination, enforcement, and disputes.* Your TIA must provide for termination, enforcement remedies, and disputes and appeals procedures, in accordance with § 37.925.

(d) *Funding.* You must:

(1) Show the total amount of the agreement and the total period of performance.

(2) If the TIA is an expenditure-based award, state the Government's and recipient's agreed-upon cost shares. The award document should identify values for any in-kind contributions, determined in accordance with §§ 37.530 through 37.555, to preclude later disagreements about them.

(3) Specify the amount of Federal funds obligated and the performance period for those obligated funds.

(4) State, if the agreement is to be incrementally funded, that the Government's obligation for additional funding is contingent upon the availability of funds and that no legal obligation on the part of the Government exists until additional funds are made available and the agreement is amended. You also must include a prior approval requirement for changes in plans requiring additional Government funding, in accordance with § 37.825.

(e) *Payment.* You must choose the payment method and tell the recipient how, when, and where to submit payment requests, as discussed in §§ 37.805 through 37.815. Your payment method must take into account sound cash management practices by avoiding unwarranted cash advances. For an expenditure-based TIA, your payment provision must require the return of interest should excess cash balances occur, in accordance with § 37.820. For any TIA using the milestone payment method described in § 37.805(c), you must include language notifying the recipient that post-award administrators may adjust amounts of future milestone payments if a project's expenditures fall too far below the projections that were the basis for setting the amounts (see § 37.575(c) and § 37.1105(c)).

(f) *Records retention and access to records.* You must include the records retention requirement at § 37.910. You also must provide for access to for-profit and nonprofit participants' records, in accordance with § 37.915 and § 37.920.

(g) *Patents and data rights.* In designing the patents and data rights provision, you must set forth the minimum required Federal Government rights in intellectual property generated under the award and address related matters, as provided in §§ 37.840 through 37.875. It

is important to define all essential terms in the patent rights provision.

(h) *Foreign access to technology.* You must include a provision, in accordance with § 37.875, concerning foreign access and domestic manufacture of products using technology generated under the award.

(i) *Title to, management of, and disposition of tangible property.* Your property provisions for for-profit and nonprofit participants must be in accordance with §§ 37.685 through 37.700.

(j) *Financial management systems.* For an expenditure-based award, you must specify the minimum standards for financial management systems of both for-profit and nonprofit participants, in accordance with §§ 37.615 and 37.620.

(k) *Allowable costs.* If the TIA is an expenditure-based award, you must specify the standards that both for-profit and nonprofit participants are to use to determine which costs may be charged to the project, in accordance with §§ 37.625 through 37.635, as well as § 37.830.

(l) *Audits.* If your TIA is an expenditure-based award, you must include an audit provision for both for-profit and nonprofit participants and subrecipients, in accordance with §§ 37.640 through 37.670 and § 37.680.

(m) *Purchasing system standards.* You should include a provision specifying the standards in §§ 37.705 and 37.710 for purchasing systems of for-profit and nonprofit participants, respectively.

(n) *Program income.* You should specify requirements for program income, in accordance with § 37.835.

(o) *Financial and programmatic reporting.* You must specify the reports that the recipient is required to submit and tell the recipient when and where to submit them, in accordance with §§ 37.880 through 37.905.

(p) *Assurances for applicable national policy requirements.* You must incorporate assurances of compliance with applicable requirements in Federal statutes, Executive orders, or regulations (except for national policies that require certifications). Appendix D to this part contains a list of commonly applicable requirements that you need to augment with any specific requirements that apply in your particular circumstances (*e.g.*, general provisions

in the appropriations act for the specific funds that you are obligating).

(q) *Other routine matters.* The agreement should address any other issues that need clarification, including who in the Government will be responsible for post-award administration and the statutory authority or authorities for entering into the TIA (*see* appendix B to this part for a discussion of statutory authorities). In addition, the agreement must specify that it takes precedence over any inconsistent terms and conditions in collateral documents such as attachments to the TIA or the recipient's articles of collaboration.

**§ 37.1015 How do I decide who must sign the TIA if the recipient is an unincorporated consortium?**

(a) If the recipient is a consortium that is not formally incorporated and the consortium members prefer to have the agreement signed by all of them individually, you may execute the agreement in that manner.

(b) If they wish to designate one consortium member to sign the agreement on behalf of the consortium as a whole, you should not decide whether to execute the agreement in that way until you review the consortium's articles of collaboration with legal counsel.

(1) The purposes of the review are to:

(i) Determine whether the articles properly authorize one participant to sign on behalf of the other participants and are binding on all consortium members with respect to the research project; and

(ii) Assess the risk that otherwise could exist when entering into an agreement signed by a single member on behalf of a consortium that is not a legal entity. For example, you should assess whether the articles of collaboration adequately address consortium members' future liabilities related to the research project (*i.e.*, whether they will have joint and severable liability).

(2) After the review, in consultation with legal counsel, you should determine whether it is better to have all of the consortium members sign the agreement individually or to allow them to designate one member to sign on all members' behalf.

## § 37.1020

## 32 CFR Ch. I (7–1–12 Edition)

### REPORTING INFORMATION ABOUT THE AWARD

#### § 37.1020 What must I document in my award file?

You should include in your award file an agreements analysis in which you:

(a) Briefly describe the program and detail the specific military and commercial benefits that should result from the project supported by the TIA. If the recipient is a consortium that is not formally incorporated, you should attach a copy of the signed articles of collaboration.

(b) Describe the process that led to the award of the TIA, including how you and program officials solicited and evaluated proposals and selected the one supported through the TIA.

(c) Explain how you decided that a TIA was the most appropriate instrument, in accordance with the factors in Subpart B of this part. Your explanation must include your answers to the relevant questions in § 37.225(a) through (d).

(d) Explain how you valued the recipient's cost sharing contributions, in accordance with §§ 37.530 through 37.555. For a fixed-support TIA, you must document the analysis you did (*see* § 37.560) to set the fixed level of Federal support; the documentation must explain how you determined the recipient's minimum cost share and show how you estimated the expenditures required to achieve the project outcomes.

(e) Document the results of your negotiation, addressing all significant issues in the TIA's provisions. For example, this includes specific explanations if you:

(1) Specify requirements for a participant's systems that vary from the standard requirements in §§ 37.615(a), 37.625(a), 37.630, or 37.705(a) in cases where those sections provide flexibility for you to do so.

(2) Provide that any audits are to be performed by an IPA, rather than the DCAA, where permitted under § 37.650. Your documentation must include:

(i) The names and addresses of business units for which IPAs will be the auditors;

(ii) Estimated amounts of Federal funds expected under the award for those business units; and

(iii) The basis (*e.g.*, a written statement from the recipient) for your judging that the business units do not currently perform under types of awards described in § 37.650(b)(1) and (2) and are not willing to grant the DCAA audit access.

(3) Include an intellectual property provision that varies from Bayh-Dole requirements.

(4) Determine that cost sharing is impracticable.

#### § 37.1025 Must I report information to the Defense Assistance Awards Data System?

Yes, you must give the necessary information about the award to the office in your organization that is responsible for preparing DD Form 2566, "DoD Assistance Award Action Report," reports for the Defense Assistance Award Data System, to ensure timely and accurate reporting of data required by 31 U.S.C. 6101–6106 (*see* 32 CFR part 21, subpart E).

#### § 37.1030 What information must I report to the Defense Technical Information Center?

(a) For any TIA, you must give your answers to the questions in § 37.225(a) through (d) to the office in your DoD Component that is responsible for providing data on TIAs to the DTIC. Contact DTIC staff either by electronic mail at [aq@dtic.mil](mailto:aq@dtic.mil), by telephone at 1–800–225–3842, or at DTIC-OCA, 8725 John J. Kingman Rd., Suite 0944, Fort Belvoir, VA 22060–6218, if you are unsure about the responsible office in your DoD Component. The DTIC compiles the information to help the Department of Defense measure the Department-wide benefits of using TIAs and assess the instruments' value in helping to meet the policy objectives described in § 37.205(b) and appendix A to this part.

(b) If the TIA uses the authority of 10 U.S.C. 2371, as described in § 37.1035, your information submission for the DTIC under paragraph (a) of this section must include the additional data required for the DoD's annual report to Congress.

(c) If, as permitted under § 37.650, the TIA includes a provision allowing a for-

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## § 37.1100

profit participant to have audits performed by an IPA, rather than the DCAA, you must report that fact with the other information you submit about the TIA. Note that you also must include information about any use of IPAs permitted by subawards that participants make to for-profit firms, as provided in § 37.670. Information about a subaward under the TIA must be reported even if you receive the information in a subsequent year, when information about the TIA itself does not need to be reported.

(d) The requirements in this section to report information to the DTIC should not be confused with the post-award requirement to forward copies of technical reports to the DTIC, as described at §§ 37.890 and 37.895. The reporting requirements in this section are assigned the Report Control Symbol DD-AT&L(A) 1936.

### **§ 37.1035 How do I know if my TIA uses the 10 U.S.C. 2371 authority and I must report additional data under § 37.1030(b)?**

As explained in appendix B to this part, a TIA uses the authority of 10 U.S.C. 2371 and therefore must be included in the DoD's annual report to Congress on the use of 10 U.S.C. 2371 authorities if it:

(a) Is an assistance transaction other than a grant or cooperative agreement, by virtue of its patent rights provision; or

(b) Includes a provision to recover funds from a recipient, as described at § 37.580.

### **§ 37.1040 When and how do I report information required by § 37.1035?**

Information that you report, in accordance with § 37.1030, to the office that your DoD Component designates as the central point for reporting to the DTIC must be:

(a) Submitted by the dates that your central point establishes (which is consistent with the schedule DTIC specifies to DoD Components).

(b) In the format that your central point provides (which is consistent with the format that the DTIC specifies to DoD Components).

## DISTRIBUTING COPIES OF THE AWARD DOCUMENT

### **§ 37.1045 To whom must I send copies of the award document?**

You must send a copy of the award document to the:

(a) Recipient. You must include on the first page of the recipient's copy a prominent notice about the current DoD requirements for payment by electronic funds transfer (EFT).

(b) Office you designate to administer the TIA. You are strongly encouraged to delegate post-award administration to the regional office of the Defense Contract Management Agency or Office of Naval Research that administers awards to the recipient. When delegating, you should clearly indicate on the cover sheet or first page of the award document that the award is a TIA, to help the post-award administrator distinguish it from other types of assistance instruments.

(c) Finance and accounting office designated to make the payments to the recipient.

## Subpart I—Post-Award Administration

### **§ 37.1100 What are my responsibilities generally as an administrative agreements officer for a TIA?**

As the administrative agreements officer for a TIA, you have the responsibilities that your office agreed to accept in the delegation from the office that made the award. Generally, you will have the same responsibilities as a post-award administrator of a grant or cooperative agreement, as described in 32 CFR 22.715. Responsibilities for TIAs include:

(a) Advising agreements officers before they award TIAs on how to establish award terms and conditions that better meet research programmatic needs, facilitate effective post-award administration, and ensure good stewardship of Federal funds.

(b) Participating as the business partner to the DoD program official to ensure the Government's substantial involvement in the research project. This may involve attendance with program officials at kickoff meetings or post-award conferences with recipients.

It also may involve attendance at the consortium management's periodic meetings to review technical progress, financial status, and future program plans.

(c) Tracking and processing of reports required by the award terms and conditions, including periodic business status reports, programmatic progress reports, and patent reports.

(d) Handling payment requests and related matters. For a TIA using advance payments, that includes reviews of progress to verify that there is continued justification for advancing funds, as discussed in § 37.1105(b). For a TIA using milestone payments, it includes making any needed adjustments in future milestone payment amounts, as discussed in § 37.1105(c).

(e) Coordinating audit requests and reviewing audit reports for both single audits of participants' systems and any award-specific audits that may be needed, as discussed in §§ 37.1115 and 37.1120.

(f) Responding, after coordination with program officials, to recipient requests for permission to sell or exclusively license intellectual property to entities that do not agree to manufacture substantially in the United States, as described in § 37.875(b). Before you grant approval for any technology, you must secure assurance that the Government will be able to use the technology (*e.g.*, a reasonable license for Government use, if the recipient is selling the technology) or seek reimbursement of the Government's investments.

(g) Notifying the agreements officer who made the award if a participant informs you about a subaward allowing a for-profit subrecipient to have audits performed by an IPA, rather than the DCAA. You should alert the awarding official that he or she must report the information, as required by § 37.1030(c).

**§ 37.1105 What additional duties do I have as the administrator of a TIA with advance payments or payable milestones?**

Your additional post-award responsibilities as an administrative agreements officer for an expenditure-based TIA with advance payments or payable

milestones are to ensure good cash management. To do so, you must:

(a) For any expenditure-based TIA with advance payments or payable milestones, forward to the responsible payment office any interest that the recipient remits in accordance with § 37.820(b). The payment office will return the amounts to the Department of the Treasury's miscellaneous receipts account.

(b) For any expenditure-based TIA with advance payments, consult with the program official and consider whether program progress reported in periodic reports, in relation to reported expenditures, is sufficient to justify your continued authorization of advance payments under § 37.805(b).

(c) For any expenditure-based TIA using milestone payments, work with the program official at the completion of each payable milestone or upon receipt of the next business status report to:

(1) Compare the total amount of project expenditures, as recorded in the payable milestone report or business status report, with the projected budget for completing the milestone; and

(2) Adjust future payable milestones, as needed, if expenditures lag substantially behind what was originally projected and you judge that the recipient is receiving Federal funds sooner than necessary for program purposes. Before making adjustments, you should consider how large a deviation is acceptable at the time of the milestone. For example, suppose that the first milestone payment for a TIA you are administering is \$50,000, and that the awarding official set the amount based on a projection that the recipient would have to expend \$100,000 to reach the milestone (*i.e.*, the original plan was for the recipient's share at that milestone to be 50% of project expenditures). If the milestone payment report shows \$90,000 in expenditures, the recipient's share at this point is 44% (\$40,000 out of the total \$90,000 expended, with the balance provided by the \$50,000 milestone payment of Federal funds). For this example, you should adjust future milestones if you judge that a 6% difference in the recipient's share at the first milestone is too large, but not otherwise. Remember

that milestone payment amounts are not meant to track expenditures precisely at each milestone and that a recipient's share will increase as it continues to perform research and expend funds, until it completes another milestone to trigger the next Federal payment.

**§ 37.1110 What other responsibilities related to payments do I have?**

If you are the administrative agreements officer, you have the responsibilities described in 32 CFR 22.810(c), regardless of the payment method. You also must ensure that you do not withhold payments, except in one of the circumstances described in 32 CFR 34.12(g).

**§ 37.1115 What are my responsibilities related to participants' single audits?**

For audits of for-profit participant's systems, under §§ 37.640 through 37.660, you are the focal point within the Department of Defense for ensuring that participants submit audit reports and for resolving any findings in those reports. Nonprofit participants send their single audit reports to a Government-wide clearinghouse. For those participants, the Office of the Assistant Inspector General (Auditing) should receive any DoD-specific findings from the clearinghouse and refer them to you for resolution, if you are the appropriate official to do so.

**§ 37.1120 When and how may I request an award-specific audit?**

Guidance on when and how you should request additional audits for expenditure-based TIAs is identical to the guidance for grants officers in 32 CFR 34.16(d). If you require an award-specific examination or audit of a for-profit participant's records related to a TIA, you must use the auditor specified in the award terms and conditions, which should be the same auditor who performs periodic audits of the participant. The DCAA and the OIG, DoD, are possible sources of advice on audit-related issues, such as appropriate audit objectives and scope.

**Subpart J—Definitions of Terms Used in This Part**

**§ 37.1205 Advance.**

A payment made to a recipient before the recipient disburses the funds for program purposes. Advance payments may be based upon recipients' requests or predetermined payment schedules.

**§ 37.1210 Advanced research.**

Research that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way. Advanced research is most closely analogous to precompetitive technology development in the commercial sector (*i.e.*, early phases of research and development on which commercial competitors are willing to collaborate, because the work is not so coupled to specific products and processes that the results of the work must be proprietary). It does not include development of military systems and hardware where specific requirements have been defined. It is typically funded in Research, Development, Test and Evaluation programs within Budget Activity 3, Advanced Technology Development.

**§ 37.1215 Agreements officer.**

An official with the authority to enter into, administer, and/or terminate TIAs (*see* § 37.125).

**§ 37.1220 Applied research.**

Efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology such as new materials, devices, methods and processes. It typically is funded in Research, Development, Test and Evaluation programs within Budget Activity 2, Applied Research (also known informally as research category 6.2) programs. Applied research normally follows basic research but may not be fully distinguishable from the related basic research. The term does not include efforts whose principal aim is the design, development, or testing of specific products, systems or processes to be considered for sale or acquisition; these efforts are within the definition of "development."

## **§ 37.1225**

### **§ 37.1225 Articles of collaboration.**

An agreement among the participants in a consortium that is not formally incorporated as a legal entity, by which they establish their relative rights and responsibilities (*see* § 37.515).

### **§ 37.1230 Assistance.**

The transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States (*see* 31 U.S.C. 6101(3)). Grants, cooperative agreements, and technology investment agreements are examples of legal instruments used to provide assistance.

### **§ 37.1235 Award-specific audit.**

An audit of a single TIA, usually done at the cognizant agreements officer's request, to help resolve issues that arise during or after the performance of the research project. An award-specific audit of an individual award differs from a periodic audit of a participant (as defined in § 37.1325).

### **§ 37.1240 Basic research.**

Efforts directed toward increasing knowledge and understanding in science and engineering, rather than the practical application of that knowledge and understanding. It typically is funded within Research, Development, Test and Evaluation programs in Budget Activity 1, Basic Research (also known informally as research category 6.1).

### **§ 37.1245 Cash contributions.**

A recipient's cash expenditures made as contributions toward cost sharing, including expenditures of money that third parties contributed to the recipient.

### **§ 37.1250 Commercial firm.**

A for-profit firm or segment of a for-profit firm (*e.g.*, a division or other business unit) that does a substantial portion of its business in the commercial marketplace.

### **§ 37.1255 Consortium.**

A group of research-performing organizations that either is formally incorporated or that otherwise agrees to jointly carry out a research project

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(*see* definition of “articles of collaboration,” in § 37.1225).

### **§ 37.1260 Cooperative agreement.**

A legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (*see* definition of “grant,” in § 37.1295), except that substantial involvement is expected between the Department of Defense and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include “cooperative research and development agreements” as defined in 15 U.S.C. 3710a.

### **§ 37.1265 Cost sharing.**

A portion of project costs that are borne by the recipient or non-Federal third parties on behalf of the recipient, rather than by the Federal Government.

### **§ 37.1270 Data.**

Recorded information, regardless of form or method of recording. The term includes technical data, which are data of a scientific or technical nature, and computer software. It does not include financial, cost, or other administrative information related to the administration of a TIA.

### **§ 37.1275 DoD Component.**

The Office of the Secretary of Defense, a Military Department, a Defense Agency, or a DoD Field Activity.

### **§ 37.1280 Equipment.**

Tangible property, other than real property, that has a useful life of more than one year and an acquisition cost of \$5,000 or more per unit.

### **§ 37.1285 Expenditure-based award.**

A Federal Government contract or assistance award for which the amounts of interim payments or the total amount ultimately paid (*i.e.*, the sum of interim payments and final payment) are subject to redetermination or adjustment, based on the amounts expended by the recipient in carrying out the purposes for which the award was made. Most Federal Government grants and cooperative agreements are expenditure-based awards.



**Office of the Secretary of Defense****§37.1310****§37.1290 Expenditures or outlays.**

a cash or accrual basis, as shown in the following table:

Charges made to the project or program. They may be reported either on

If reports are prepared on a . . .	Expenditures are the sum of . . .
(a) Cash basis	(1) Cash disbursements for direct charges for goods and services;  (2) The amount of indirect expense charged;  (3) The value of third party in-kind contributions applied; and  (4) The amount of cash advances and payments made to any other organizations for the performance of a part of the research effort.
(b) Accrual basis	(1) Cash disbursements for direct charges for goods and services;  (2) The amount of indirect expense incurred;  (3) The value of in-kind contributions applied; and  (4) The net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, and other payees and other amounts becoming owed under programs for which no current services or performance are required.

**§37.1295 Grant.**

A legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Department of Defense's direct benefit or use.

(b) In which substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated by the grant.

**§37.1300 In-kind contributions.**

The value of non-cash contributions made by a recipient or non-Federal third parties toward cost sharing.

**§37.1305 Institution of higher education.**

An educational institution that:

(a) Meets the criteria in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001); and

(b) Is subject to the provisions of OMB Circular A-110, "Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," as implemented by the Department of Defense at 32 CFR part 32.

**§37.1310 Intellectual property.**

Inventions, data, works of authorship, and other intangible products of intellectual effort that can be owned by a person, whether or not they are patentable or may be copyrighted. The term also includes mask works, such as

## **§ 37.1315**

those used in microfabrication, whether or not they are tangible.

### **§ 37.1315 Nonprofit organization.**

(a) Any corporation, trust, association, cooperative or other organization that:

(1) Is operated primarily for scientific, educational, service, or similar purposes in the public interest.

(2) Is not organized primarily for profit; and

(3) Uses its net proceeds to maintain, improve, or expand the operations of the organization.

(b) The term includes any nonprofit institution of higher education or nonprofit hospital.

### **§ 37.1320 Participant.**

A consortium member or, in the case of an agreement with a single for-profit entity, the recipient. Note that a for-profit participant may be a firm or a segment of a firm (*e.g.*, a division or other business unit).

### **§ 37.1325 Periodic audit.**

An audit of a participant, performed at an agreed-upon time (usually a regular time interval), to determine whether the participant as a whole is managing its Federal awards in compliance with the terms of those awards. Appendix C to this part describes what such an audit may cover. A periodic audit of a participant differs from an award-specific audit of an individual award (as defined in § 37.1235).

### **§ 37.1330 Procurement contract.**

A Federal Government procurement contract. It is a legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal Government and a State, a local government, or other recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government. See the more detailed definition of the term “contract” at 48 CFR 2.101.

### **§ 37.1335 Program income.**

Gross income earned by the recipient or a participant that is generated by a supported activity or earned as a direct result of a TIA. Program income in-

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cludes but is not limited to: income from fees for performing services; the use or rental of real property, equipment, or supplies acquired under a TIA; the sale of commodities or items fabricated under a TIA; and license fees and royalties on patents and copyrights. Interest earned on advances of Federal funds is not program income.

### **§ 37.1340 Program official.**

A Federal Government program manager, scientific officer, or other individual who is responsible for managing the technical program being carried out through the use of a TIA.

### **§ 37.1345 Property.**

Real property, equipment, supplies, and intellectual property, unless stated otherwise.

### **§ 37.1350 Real property.**

Land, including land improvements, structures and appurtenances thereto, but excluding movable machinery and equipment.

### **§ 37.1355 Recipient.**

An organization or other entity that receives a TIA from a DoD Component. Note that a for-profit recipient may be a firm or a segment of a firm (*e.g.*, a division or other business unit).

### **§ 37.1360 Research.**

Basic, applied, and advanced research, as defined in this subpart.

### **§ 37.1365 Supplies.**

Tangible property other than real property and equipment. Supplies have a useful life of less than one year or an acquisition cost of less than \$5,000 per unit.

### **§ 37.1370 Termination.**

The cancellation of a TIA, in whole or in part, at any time prior to either:

(a) The date on which all work under the TIA is completed; or

(b) The date on which Federal sponsorship ends, as given in the award document or any supplement or amendment thereto.

**Office of the Secretary of Defense**

**§ 37.1375**

**§ 37.1375 Technology investment agreements.**

A special class of assistance instruments used to increase involvement of commercial firms in defense research programs and for other purposes (described in appendix A to this part) related to integrating the commercial and defense sectors of the nation's

technology and industrial base. A technology investment agreement may be a cooperative agreement with provisions tailored for involving commercial firms (as distinct from a cooperative agreement subject to all of the requirements in 32 CFR part 34), or another kind of assistance transaction (*see* appendix B to this part).

APPENDIX A TO PART 37—WHAT IS THE CIVIL-MILITARY INTEGRATION POLICY THAT  
IS THE BASIS FOR TECHNOLOGY INVESTMENT AGREEMENTS?

**Appendix A to Part 37-What is the Civil-Military Integration  
Policy that is the Basis for Technology Investment Agreements?**

A. TIAs complement other funding instruments that are available to agreements officers in that they are designed to foster civil-military integration in DoD Science and Technology (S&T) programs. Civil-military integration creates a single, national technology and industrial base upon which the DoD can draw to meet its needs. Achieving civil-military integration is a national policy objective, as stated in 10 U.S.C. 2501.

B. Civil-military integration includes:

1. Removing barriers to participation in DoD programs by commercial firms, firms that deal primarily in the commercial marketplace. In recent years, some commercial firms judged that it would be overly burdensome and costly for them to comply with Government-unique requirements. That belief caused some firms to decline to do cost-type business with the Federal Government. It caused other firms to create divisions for Government business that are separate and isolated from their divisions for commercial business. TIAs give agreements officers flexibility to tailor Government requirements and lower or remove barriers to firms' participation, where the tailoring of requirements can be done consistently with good stewardship of Federal Government funds.
2. Creating new business relationships among the performers in the technology and industrial base. Collaborations among commercial firms, firms that regularly perform defense programs, and nonprofit organizations can create wholes that are greater than the sums of the parts. The collaborations can enhance overall quality and productivity.
3. Promoting the development and use of new business practices and disseminating current best practices throughout the technology and industrial base.

C. The use of TIAs to promote civil-military integration will help defense S&T programs achieve their primary mission. That mission is to develop superior technology and help transition the technology to applications that enable affordable, decisive military capability. The use of TIAs to increase access to

commercial firms, to create new relationships, and to promote better business practices will help:

1. Increase technological sophistication. The DoD and firms that currently perform defense programs will benefit from technology in the commercial marketplace that often is more advanced than what is available in the defense-specific sector.
2. Reduce DoD's life-cycle costs for buying, operating, and maintaining weapon and support systems. The intent is that the DoD and firms that currently perform defense programs will be able to take advantage of the economies of scale of the commercial marketplace, which has a much larger volume of business for many high-technology products and processes than the Federal Government's share alone.

APPENDIX B TO PART 37—WHAT TYPE OF INSTRUMENT IS A TIA AND WHAT  
STATUTORY AUTHORITIES DOES IT USE?

**Appendix B to Part 37-What Type of Instrument is a TIA  
and What Statutory Authorities Does it Use?**

A. A TIA may be either a type of cooperative agreement or a type of "assistance transaction other than a grant or cooperative agreement," depending on its patent-rights provision. It is awarded under the statutory authority of 10 U.S.C. 2358, 10 U.S.C. 2371, or both, as explained in the paragraphs B through E of this Appendix and illustrated in the table below.

	The TIA's patent provision complies with Bayh-Dole	The TIA's patent provision varies from what is possible under Bayh-Dole
1. The TIA does not include recovery of funds provision	The TIA is a type of cooperative agreement, under 10 U.S.C. 2358(b)(1).	The TIA is a type of assistance transaction other than a grant or cooperative agreement, under 10 U.S.C. 2371.
2. The TIA includes recovery of funds provision	The TIA is a type of cooperative agreement, under 10 U.S.C. 2358(b)(1). It uses recovery of funds authority of 10 U.S.C. 2371.	The TIA is a type of assistance transaction other than a grant or cooperative agreement, under 10 U.S.C. 2371. It also uses the recovery of funds authority of 10 U.S.C. 2371.

B. A TIA is a type of cooperative agreement whenever its patent-rights provision complies with the Bayh-Dole statute (Chapter 18 of Title 35, U.S.C.), as shown in the preceding table. The authority to award the TIA is 10 U.S.C. 2358, in addition to any program-specific statute that may provide authority to award cooperative agreements. The TIA also may use the authority of 10 U.S.C. 2371 to include a recovery of funds provision that requires the recipient, as a condition for receiving support under the agreement, to make payments to the Department of Defense or other Federal agency.

C. A TIA becomes a type of assistance transaction other than a grant or cooperative agreement when its patent-rights provision is less restrictive than is possible under Bayh-Dole. The authority to award the instrument is 10 U.S.C. 2371, as well as any program-specific authority to provide assistance. Note that the agreements officer's judgment that the execution of the research project warrants a less restrictive patent provision than is possible under Bayh-Dole is sufficient to satisfy the statutory condition in 10 U.S.C. 2371 for use of an assistance transaction other than a cooperative agreement or grant (i.e., that it is not feasible or appropriate to use a standard grant or cooperative agreement to carry out the project). The TIA also may include a recovery of funds provision, as authorized by 10 U.S.C. 2371.

D. From a practical point of view, an agreements officer need not decide while he or she is negotiating the terms and conditions with the recipient whether a TIA is a cooperative agreement or an assistance transaction other than a grant or cooperative agreement. The agreements officer must make that decision when the agreement is finalized, based upon a comparison of the patent provision with what is required by Bayh-Dole.

E. In making that comparison, the agreements officer should consult with legal counsel and remember that most Bayh-Dole requirements apply only to small business firms and nonprofit organizations (note that a consortium that is not formally incorporated is neither a small business firm nor a nonprofit organization). There are only two requirements of Bayh-Dole, in 35 U.S.C. 202(c)(4) and 203 that directly apply to cooperative agreements with other than small business firms and nonprofit organizations. A 1984 amendment to Bayh-Dole, at 35 U.S.C. 210(c), makes those two portions apply. The 1984 amendment otherwise states that Bayh-Dole does not preclude agencies from complying with a 1983 Presidential Statement of Government Patent Policy (incorporated by reference in Executive Order 12591). The President in that statement authorized Federal agencies to tailor cooperative agreements with for-profit firms other than small businesses, in ways that would waive rights of the Government or obligations of the performer under Bayh-Dole, if they determined that:

1. "The interests of the United States and the general public will be better served thereby as, for example, where this is necessary to obtain a uniquely or highly qualified performer; or"

2. "The award involves co-sponsored, cost sharing, or joint venture research and development, and the performer, co-sponsor or joint venturer is making substantial contribution of funds, facilities or equipment to the work performed under the award."



APPENDIX C TO PART 37—WHAT IS THE DESIRED COVERAGE FOR PERIODIC AUDITS OF  
FOR-PROFIT PARTICIPANTS TO BE AUDITED BY IPAS?

**Appendix C to Part 37-What is the Desired Coverage for  
Periodic Audits of For-Profit Participants to be  
Audited by IPAs?**

You may provide the following guidance to a for-profit participant and its IPA on the desired coverage of periodic audits.

**COVERAGE OF INDEPENDENT AUDITS OF FOR-PROFIT FIRMS**

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**PART 1. GENERAL INFORMATION**

**What is the purpose of this document?**

This document provides guidance for an independent public accountant (IPA) who is asked by a for-profit firm to conduct an audit of its systems, due to the firm's having received a technology investment agreement from the Department of Defense (DoD).

**Why does the Federal Government need an audit?**

Federal officials are accountable to the public for the resources provided to carry out Government programs. Financial auditing contributes to accountability by providing an independent assessment to assure that recipients are handling Government funds properly.

**Can the audit be integrated with the regular audit of a firm's financial statements?**

Yes, the intent is to cause the minimum possible disruption to the firm's activities, so the IPA is encouraged to do the needed transaction sampling for DoD awards as part of the regularly scheduled audit of the firm's financial statements. In some cases, it may be even more efficient and economical to separately audit the individual DoD awards, and the firm may elect to have the IPA do so.

**What are the objectives of the audit?**

The auditor is to determine and report on whether:

- The firm has an internal control structure that provides reasonable assurance that it is managing DoD awards in compliance with the award terms and conditions, including applicable Federal laws and regulations.
- Based on a sampling of DoD award expenditures, the firm has complied with award terms and conditions, including applicable Federal laws and regulations, that may have a direct and material effect on DoD awards.

**What is the source of the requirement for the audit?**

The source of the requirement stated in the award document stems from sections 37.640 through 37.660 of 32 CFR part 37, which is part 37 of the DoD Grant and Agreement Regulations (DoDGARs).

**What should the IPA do if he or she finds that the Defense Contract Audit Agency is performing audits of the firm?**

The IPA should consult with officials of the firm to ensure that:

- DoD agreements officers were aware of the DCAA audit presence at the time they made awards; and
- The DoD agreements authorize the IPA to perform the audit, rather than requiring that the DCAA do so. If the IPA is authorized to perform the audit, he or she must consider the nature, timing, and extent of his or her own auditing procedures, to avoid unnecessary duplication of the DCAA effort.

**PART 2. AUDIT OBJECTIVES AND COMPLIANCE REQUIREMENTS**

**A. ALLOWABLE COSTS**

**What is the objective of this portion of the audit?**

The objective is to determine, by testing a sample of transactions, whether the firm complied with the requirements concerning allowability of costs charged to DoD awards.

**What standards or cost principles determine the costs that are allowable as charges to the award?**

Each technology investment agreement should specify the standards or cost principles that the for-profit firm is to use to determine the costs that it is allowed to charge to that award. While the TIA may specify use of the for-profit cost principles in the Federal Acquisition Regulation (FAR, at 48 CFR part 31) and Defense FAR Supplement (DFARS, at 48 CFR part 231), it more likely will specify an alternative standard. The minimum standard in the latter case is that Federal funds and the firm's cost sharing contributions will be used only for costs that a reasonable and prudent person would incur in carrying out the research project contemplated by the agreement.

**What compliance requirements for allowability of costs should the audit address?**

For a firm that is subject to the cost principles in the FAR and DFARS, the IPA should determine and report on whether costs charged to DoD awards are in compliance with those cost principles and indirect cost rates are applied in accordance with approved rate agreements.

For a firm that is subject to alternative standards that may be used for a TIA, the IPA should determine and report on whether costs charged to the DoD awards are:

- Necessary and reasonable for the performance of the research projects supported by the awards, or for related administration. Generally, elements of cost that appropriately are charged are those identified with research and development activities under the Generally Accepted Accounting Principles (see Statement of Financial Accounting Standards Number 2, "Accounting for Research and Development Costs," October 1974).

- Allocable to the research projects (i.e., costs are charged to DoD projects in a manner that is in accordance with the benefits the projects received).
- Given consistent treatment with costs allocated to the firm's other research and development activities (e.g., activities supported by the firm itself or by non-Federal sponsors).
- In conformance with any limitations in the award documents or regulations that they cite (e.g., any restrictions on types or amounts of costs, or requirements for prior approval of DoD agreements officers).
- Supported by appropriate documentation in the firm's records. The documentation may be in electronic form.

#### **B. COST SHARING**

##### **What is the objective of this portion of the audit?**

The objective is to determine, by testing a sample of cost sharing contributions, whether the firm made the contributions that the agreements required.

##### **What are the compliance requirements for cost sharing?**

The provisions of the award documents will specify requirements for the firm's cost sharing, which may be contributions of a specified amount or a percentage of total project costs. The cost sharing may be in the form of allowable costs incurred or in-kind contributions (including third-party in-kind contributions).

The values of the firm's contributions are determined in accordance with sections 37.530 through 37.555 of 32 CFR part 37, which is part 37 of the DoDGARs.

**C. FINANCIAL REPORTING**

**What are the objectives of this portion of the audit?**

The primary objective is to determine whether the firm's financial reports for DoD awards:

- Fairly and completely represent the expenditures and status of resources for projects supported by those awards; and
- Are supported by applicable accounting records and the accounting basis used (e.g., cash or accrual).

**What are the compliance requirements for financial reporting?**

The agreements will specify the frequency and content of the financial reports. They may specify the use of standard forms (e.g., the Standard Form 269 or 269A, "Financial Status Report," or Standard Form 272, "Report of Federal Cash Transactions). Alternatively, the agreements may specify an equivalent approach of periodic reports, and the reports may include information on both programmatic and business status. The requirements are in section 37.880 of 32 CFR part 37, which is part 37 of the DoDGARS.

Each financial report (and the business portion of any report that also has programmatic information) will contain at least summarized details on the status of resources (Federal funds and any non-Federal cost sharing that the agreements require), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from these schedules; and discuss actions that will be taken to address the deviations.

**D. EQUIPMENT AND REAL PROPERTY MANAGEMENT**

**Is a review of a firm's property management system usually required?**

No, the IPA needs to review the property management system only if:

- There is Federally owned property associated with the award; or

- The firm charged the full purchase price of any equipment or real property as project costs (i.e., to Federal funds or the firm's funds that are counted toward required cost sharing); and
- The award under which the property was purchased provides for a continuing Federal interest in the property.

Note that the IPA generally will not need to review the property management system because most DoD awards will not have Federally owned property associated with them and will allow the firm to charge to the project only depreciation or use charges for real property or equipment.

**What are the objectives of the review?**

The objectives are to determine whether the firm:

- Obtained the necessary prior approval for the equipment or real property purchase from the grants officer or agreements officer.
- Keeps proper records for equipment and adequately safeguards and maintains equipment.
- Handles disposition or encumbrance of equipment or real property acquired under DoD awards in accordance with the applicable requirements.

**What are the compliance requirements for Federally owned property and for equipment or real property purchased under DoD awards?**

To protect the Federal interest in property, the DoD Grant and Agreement Regulations include standards for the firm's property management, use, and disposition, as shown in this table:

If the property is . . .	Then the property management standards for the for-profit firm are in . . .
Real property or equipment purchased under a TIA,	Section 37.685 of 32 CFR part 37.
Federally owned property,	Section 37.695 of 32 CFR part 37.

Note that a for-profit firm may include the full acquisition cost of real property or equipment as a charge to the project only with the prior approval of the grants officer or the agreements officer. The title to the real property or equipment vests conditionally in the for-profit firm upon acquisition, and there is a continuing Federal interest in the property unless an awarding office has statutory authority to do otherwise and elects to use that authority for a particular award. The Federal Government recovers its interest in the property through the disposition process at the project's end.

#### **E. PROGRAM INCOME**

##### **Is an audit of program income usually required?**

No, most awards will not involve any program income.

##### **What is program income?**

Program income is gross income earned by the recipient that is generated by a supported activity or earned as a result of the award. For example, if the purpose of an award is to support the firm's delivery of services and the firm collects fees for doing so, those fees are program income. As another example, if samples of materials or biological specimens are generated as a result of a supported research effort, and the firm sells samples to other research organizations, the proceeds of those sales would be program income. If authorized by the terms and conditions of the award costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

##### **What is the objective of this portion of the audit?**

The objective is to determine whether program income is correctly recorded and used in accordance with the award terms and applicable standards.

##### **What are the applicable standards for program income?**

The standards for program income are in section 37.835 of 32 CFR part 37, which is part 37 of the DoDGARs.

#### **APPENDIX D TO PART 37—WHAT COMMON NATIONAL POLICY REQUIREMENTS MAY APPLY AND NEED TO BE INCLUDED IN TIAS?**

Whether your TIA is a cooperative agreement or another type of assistance transaction, as discussed in Appendix B to this

part, the terms and conditions of the agreement must provide for recipients' compliance with applicable Federal statutes and regulations. This appendix lists some of the more common requirements to aid you in identifying ones that apply to your TIA. The list is not intended to be all-inclusive, however, and you may need to consult legal



counsel to verify whether there are others that apply in your situation (*e.g.*, due to a provision in the appropriations act for the specific funds that you are using or due to a statute or rule that applies to a particular program or type of activity).

#### A. Certifications

One requirement that applies to all TIAs currently requires you to obtain a certification at the time of proposal. That requirement is in a Governmentwide common rule about lobbying prohibitions, which is implemented by the DoD at 32 CFR part 28. The prohibitions apply to all financial assistance. Appendix A to 32 CFR part 22 includes a sample provision that you may use, to have proposers incorporate the certification by reference into their proposals.

#### B. Assurances That Apply to All TIAs

DoD policy is to use a certification, as described in the preceding paragraph, only for a national policy requirement that specifically requires one. The usual approach to communicating other national policy requirements to recipients is to incorporate them as award terms or conditions, or assurances. Appendix B to 32 CFR part 22 lists national policy requirements that commonly apply to grants and cooperative agreements. It also has suggested language for assurances to incorporate the requirements in award documents. Of those requirements, the following six apply to all TIAs:

1. Requirements concerning debarment and suspension in the OMB guidance in 2 CFR part 180, as implemented by the DoD at 2 CFR part 1125. The requirements apply to all nonprocurement transactions.

2. Requirements concerning drug-free workplace in the Governmentwide common rule that the DoD has codified at 32 CFR part 26. The requirements apply to all financial assistance.

3. Prohibitions on discrimination on the basis of race, color, or national origin in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*). These apply to all financial assistance. They require recipients to flow down the prohibitions to any subrecipients performing a part of the substantive research program (as opposed to suppliers from whom recipients purchase goods or services). For further information, see item a. under the heading “Nondiscrimination” in Appendix B to 32 CFR part 22.

4. Prohibitions on discrimination on the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, *et seq.*). They apply to all financial assistance and require flow down to subrecipients. For further information, see item d. under the heading “Nondiscrimination” in Appendix B to 32 CFR part 22.

5. Prohibitions on discrimination on the basis of handicap, in section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). They apply to all financial assistance and require flow down to subrecipients. For further information, see item e.1. under the heading “Nondiscrimination” in Appendix B to 32 CFR part 22.

6. Preferences for use of U.S.-flag air carriers in the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118), which apply to uses of U.S. Government funds.

#### C. OTHER ASSURANCES

Additional requirements listed in Appendix B to 32 CFR part 22 may apply in certain circumstances, as follows:

1. If construction work is to be done under a TIA or its subawards, it is subject to the prohibitions in Executive Order 11246 on discrimination on the basis of race, color, religion, sex, or national origin. For further information, see item b. under the heading “Nondiscrimination” in Appendix B to 32 CFR part 22.

2. If the research involves human subjects or animals, it is subject to the requirements in item a. or b., respectively, under the heading “Live organisms” in Appendix B to 32 CFR part 22.

3. If the research involves actions that may affect the environment, it is subject to the National Environmental Policy Act, which is item b.1. under the heading “Environmental Standards” in Appendix B to 32 CFR part 22. It also may be subject to one or more of the other requirements in items b.2. through b.6. under that heading, which concern flood-prone areas, coastal zones, coastal barriers, wild and scenic rivers, and underground sources of drinking water.

4. If the project may impact a historic property, it is subject to the National Historic Preservation Act of 1966 (16 U.S.C. 470, *et seq.*), as described under the heading “National Historic Preservation” in Appendix B to 32 CFR part 22.

[68 FR 47160, Aug. 7, 2003, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34999, June 26, 2007]

#### APPENDIX E TO PART 37—WHAT PROVISIONS MAY A PARTICIPANT NEED TO INCLUDE WHEN PURCHASING GOODS OR SERVICES UNDER A TIA?

A. As discussed in §37.705, you must inform recipients of any national policy requirements that flow down to their purchases of goods or services (*e.g.*, supplies or equipment) under their TIAs. Note that purchases of goods or services differ from subawards, which are for substantive research program performance.

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B. Appendix A to 32 CFR part 34 lists seven national policy requirements that commonly apply to firms' purchases under grants or cooperative agreements. Of those seven, two that apply to all recipients' purchases under TIAs are:

1. *Byrd Anti-Lobbying Amendment* (31 U.S.C. 1352). A contractor submitting a bid to the recipient for a contract award of \$100,000 or more must file a certification with the recipient that it has not and will not use Federal appropriations for certain lobbying purposes. The contractor also must disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. For further details, see 32 CFR part 28, the DoD's codification of the Governmentwide common rule implementing this amendment.

2. *Debarment and suspension*. A contract award with an amount expected to equal or exceed \$25,000 and certain other contract awards (see 2 CFR 1125.220, which implements OMB guidance in 2 CFR 180.220) shall not be made to parties listed on the Governmentwide Excluded Parties List System, in accordance with the DoD adoption at 2 CFR part 1125 of the OMB guidance implementing

E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), "Debarment and Suspension." The Excluded Parties List System accessible on the Internet at [www.epls.gov](http://www.epls.gov) contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than E.O. 12549.

C. One other requirement applies only in cases where construction work is to be performed under the TIA with Federal funds or recipient funds counted toward required cost sharing:

1. *Equal Employment Opportunity*. Although construction work should happen rarely under a TIA, the agreements officer in that case should inform the recipient that Department of Labor regulations at 41 CFR 60-1.4(b) prescribe a clause that must be incorporated into construction awards and subawards. Further details are provided in Appendix B to Part 22 of the DoDGARs (32 CFR part 22), in section b. under the heading "Nondiscrimination."

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