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diversified mutual fund or other regulated investment company that in turn owns stock in another enterprise, that financial interest is exempt from the prohibition in 5 CFR 2635.402(a).

**APPENDIX TO PART 73—CODE OF ETHICS FOR GOVERNMENT SERVICE**

Any person in Government service should: Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

Uphold the Constitution, laws, and regulations of the United States and of all governments therein and never be a party to their evasion.

Give a full day's labor for a full day's pay; giving earnest effort and best thought to the performance of duties.

Seek to find and employ more efficient and economical ways of getting tasks accomplished.

Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental duties.

Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.

Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of governmental duties.

Never use any information gained confidentially in the performance of governmental duties as a means of making private profit.

Expose corruption wherever discovered.

Uphold these principles, ever conscious that public office is a public trust.

(This Code of Ethics was unanimously passed by the United States Congress on June 27, 1980, and signed into law as Public Law 96-303 by the President on July 3, 1980.)

**PART 74—ADMINISTRATION OF GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS**

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AUTHORITY: 20 U.S.C. 1221e-3 and 3474; OMB Circular A-110, unless otherwise noted.

SOURCE: 59 FR 34724, July 6, 1994, unless otherwise noted.

### Subpart A—General

#### § 74.1 Purpose.

(a) This part establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations.

(b) The Secretary does not impose additional or inconsistent requirements, except as provided in §§ 74.4 and 74.14 or unless specifically required by Federal statute or executive order.

(c) This part applies to all recipients other than State and local governments and Indian tribal organizations. Uniform requirements for State and local governments and tribal organizations are in 34 CFR Part 80—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(d) Non-profit organizations that implement Federal programs for the States are also subject to State requirements.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.2 Definitions.

The following definitions apply to this part:

*Accrued expenditures* means 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* means 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; and

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

*Acquisition cost of equipment* means 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* means 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* means 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—

(1) Technical assistance, which provides services instead of money;

(2) Other assistance in the form of loans, loan guarantees, interest subsidies, or insurance;

(3) Direct payments of any kind to individuals; and

(4) Contracts which are required to be entered into and administered under procurement laws and regulations.

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

*Closeout* means the process by which the Secretary determines that all applicable administrative actions and all required work of the award have been completed by the recipient and Department of Education (ED).

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

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

*Date of completion* means 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* means those charges to an award that the Secretary determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

*Equipment* means 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* means property under the control of ED that is no longer required for its needs or the discharge of its responsibilities.

*Exempt property* means tangible personal property acquired in whole or in part with Federal funds, where the Secretary 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 awarding agency* means the Federal agency that provides an award to the recipient.

*Federal funds authorized* means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by ED regulations or ED implementing instructions.

*Federal share* of real property, equipment, or supplies means that percent-

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age of the property's acquisition costs and any improvement expenditures paid with Federal funds.

*Funding period* means the period of time when Federal funding is available for obligation by the recipient.

*Intangible property and debt instruments* means, 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* means 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* means 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* means 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* means written approval by an authorized official evidencing prior consent.

*Program income* means 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 § 74.24(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 ED 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* means all allowable costs, as established 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* means the period established in the award document during which Federal sponsorship begins and ends.

*Property* means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

*Real property* means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

*Recipient* means an organization receiving financial assistance directly from ED 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 non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include commercial organizations, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the discretion of the Secretary. 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* means 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 these activities utilize the same facilities as other research and development activities and where these activities are not included in the instruction function.

*Small awards* means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11) (currently \$25,000).

*Subaward* means 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 from the definition of "award" as defined in this section.

*Subrecipient* means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the Secretary.

*Supplies* means 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

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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* means an action by the Secretary that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Secretary. Suspension of an award is a separate action from suspension under 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

*Termination* means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

*Third party in-kind contributions* means 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 specifically identifiable to the project or program.

*Unliquidated obligations*, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

*Unobligated balance* means the portion of the funds authorized by the Secretary that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

*Unrecovered indirect cost* means 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* means a procedure whereby funds are advanced to the recipient to cover its estimated

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disbursement needs for a given initial period.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.3 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 are superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in § 74.4.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.4 Deviations.

The Secretary, after consultation with the Office of Management and Budget (OMB), may grant exceptions for classes of grants or recipients subject to the requirements of this part when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this part are permitted only in unusual circumstances. The Secretary may apply more restrictive requirements to a class of recipients when approved by OMB. The Secretary may apply less restrictive requirements when awarding small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by the Secretary.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.5 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 the subrecipients are institutions of higher education, hospitals, or other non-profit organizations. State and local government subrecipients are subject to the provisions of 34 CFR Part 80—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

### Subpart B—Pre-Award Requirements

#### § 74.10 Purpose.

Sections 74.11 through 74.17 prescribes forms and instructions and other pre-award matters to be used in applying for awards.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.11 Pre-award policies.

(a) *Use of grants and cooperative agreements, and contracts.* In each instance, the Secretary decides on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301-08) governs the use of grants, cooperative agreements, and contracts. 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. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, substantial involvement is expected between ED and the recipient when carrying out the activity contemplated in the agreement. Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public notice and priority setting.* The Secretary notifies the public of intended funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.12 Forms for applying for Federal assistance.

(a) The Secretary complies with the applicable report clearance requirements of 5 CFR Part 1320—Controlling Paperwork Burdens on the Public—with regard to all forms used by ED in place of or as a supplement to the Standard Form 424 (SF-424) series.

(b) Applicants shall use the SF-424 series or those forms and instructions prescribed by the Secretary.

(c) For Federal programs covered by E.O. 12372—Intergovernmental Review of Federal Programs (implemented by the Secretary in 34 CFR Part 79—Intergovernmental Review of Department of Education Programs and Activities)—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 Secretary or the *Catalog of Federal Domestic Assistance* (available from the Superintendent of Documents, Government Printing Office). The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) If ED does not use the SF-424 form, the Secretary may indicate whether the application is subject to review by the State under E.O. 12372.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

#### § 74.13 Debarment and suspension.

The Secretary and recipients shall comply with the nonprocurement debarment and suspension common rule (implemented by the Secretary in 34 CFR part 85). This common rule restricts subawards and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.14 Special award conditions.

(a) The Secretary may impose special award conditions, 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.

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(b) If special award conditions are established under paragraph (a) of this section, the Secretary notifies the applicant or recipient of—

(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 are promptly removed once the conditions that prompted them have been corrected.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

### § 74.15 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. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. The Secretary follows the provisions of E.O. 12770—Metric Usage in Federal Government Programs.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

### § 74.16 Resource Conservation and Recovery Act.

Under the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94-580 codified at 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 of the RCRA. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing

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recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247-254). Accordingly, recipients 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.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

### § 74.17 Certifications and representations.

Unless prohibited by statute or codified regulation, the Secretary allows 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 ED. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

## Subpart C—Post-Award Requirements

### FINANCIAL AND PROGRAM MANAGEMENT

#### § 74.20 Purpose of financial and program management.

Sections 74.21 through 74.28 prescribe standards for financial management systems, methods for making payments and rules for—

(a) Satisfying cost sharing and matching requirements;

(b) Accounting for program income;

(c) Approving budget revisions;

(d) Making audits;

(e) Determining allowability of cost; and

(f) Establishing fund availability.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.21 Standards for financial management systems.

(a) Recipients shall relate financial data to performance data and develop unit cost information whenever practical.

(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 in accordance with the reporting requirements established in § 74.52. If the Secretary 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 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 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 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.

(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 shall 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 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 Secretary 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 Secretary may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required under paragraphs (a) and (b) of this section, 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.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

#### § 74.22 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 CMIA agreements or default procedures codified at 31 CFR part 205.

(b)(1) Recipients are paid in advance, provided they maintain or demonstrate the willingness to maintain—

(i) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient; and

(ii) Financial management systems that meet the standards for fund control and accountability as established in § 74.21.

(2) Cash advances to a recipient organization are limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate



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cash requirements of the recipient organization in carrying out the purpose of the approved program or project.

(3) The timing and amount of cash advances are 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 are consolidated to cover anticipated cash needs for all awards made by the Secretary.

(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 are 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—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 automatically through the use of a predetermined payment schedule or if precluded by ED instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. The Secretary 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 Secretary makes payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients are authorized to submit request 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 Secretary has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the Secretary may provide cash on a working capital advance basis. Under

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this procedure, the Secretary advances cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursing cycle. Thereafter, the Secretary reimburses the recipient for its actual cash disbursements. The working capital advance method of payment is not 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 these funds before requesting additional cash payments.

(h) Unless otherwise required by statute, the Secretary does 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 as defined in OMB Circular A-129—Managing Federal Credit Programs. Under these conditions, the Secretary may, upon reasonable notice, inform the recipient that ED does not make payments for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) The 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, the Secretary does 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.

(1) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, Rockville, MD 20852. Interest amounts up to \$250 per year may be retained by the recipient for administrative expense. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Secretary, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this part, only the following forms are authorized for the recipients in requesting advances and reimbursements. The Secretary does not require more than an original and two copies of the following:

(1) SF-270—Request for Advance or Reimbursement. The Secretary adopts the SF-270 as a standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. The Secretary may, however, use this form for construction programs in lieu of the SF-271—Outlay Report and Request for Reimbursement for Construction Programs.

(2) SF-271—Outlay Report and Request for Reimbursement for Construction Programs. The Secretary adopts the SF-271 as the standard form to be used for requesting reimbursement for construction programs. However, the Secretary may substitute the SF-270 when the Secretary determines that it provides adequate information to meet Federal needs.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.23 Cost sharing or matching.

(a) All contributions, including cash and third party in-kind, are accepted as part of the recipient's cost sharing or matching when contributions meet 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 Secretary.

(7) Conform to other provisions of this part, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the Secretary.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If the Secretary 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, if there is sufficient justification, the Secretary may approve the use of the current fair market value of

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the donated property, even if it exceeds the certified value at the time of donation to the project.

(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 approved project or program. Rates for volunteer services must 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 must 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 expendable equipment, 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.

(1) If the purpose of the award is to 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.

(2) If the purpose of the award is to 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 equip-

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ment or other capital assets and fair rental charges for land may be allowed, provided that the Secretary has approved the charges.

(h) The value of donated property must be determined in accordance with the usual accounting policies of the recipient, with the following qualifications:

(1) The value of donated land and buildings may 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 may 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 may 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.

(5) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties:

(i) Volunteer services must 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 service, material, equipment, buildings, and land must be documented.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

### § 74.24 Program income.

(a) The Secretary applies the standards contained 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 must be retained by the recipient and, in accordance with ED regulations or the terms and conditions of the award,

must be used in one or more of the following ways:

(1) Added to funds committed to the project by the Secretary 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 the Secretary 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 the Secretary does not specify in program regulations or the terms and conditions of the award how program income is to be used, paragraph (b)(3) of this section applies automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section applies automatically unless the Secretary indicates in the terms and conditions another alternative on the award or the recipient is subject to special award conditions, as indicated in § 74.14.

(e) Unless ED regulations or the terms and conditions of the award provide otherwise, recipients have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by ED 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 §§ 74.30 through 74.37).

(h) Unless ED regulations or the terms and condition of the award provide otherwise, recipients 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. However,

Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.25 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 Federal and non-Federal share, or only the Federal share, depending upon ED 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) For nonconstruction awards, recipients shall request prior approvals from ED 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 Secretary.

(6) The inclusion, unless waived by the Secretary, of costs that require prior approval in accordance with OMB Circular A-21—Cost Principles for Institutions of Higher Education, OMB Circular A-122—Cost Principles for Non-Profit Organizations, or 45 CFR part 74, appendix E—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.

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(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.

(d) No other prior approval requirements for specific items are imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, the Secretary may waive cost-related and administrative prior written approvals required by this part and OMB Circulars A-21 and A-122. These waivers may authorize recipients to do any one or more of the following:

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Secretary. All pre-award costs are incurred at the recipient's risk (i.e., the Secretary is under no obligation to reimburse these costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover these costs).

(2)(i) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one or more of the following conditions apply:

(A) The terms and conditions of award prohibit the extension.

(B) The extension requires additional Federal funds.

(C) The extension involves any change in the approved objectives or scope of the project.

(ii) For one-time extensions, the recipient shall notify the Secretary in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the Secretary provides otherwise in the award or in ED's regula-

tions, the prior approval requirements described in paragraph (e) of this section are automatically waived (i.e., recipients need not obtain prior approvals) unless one of the conditions included in paragraph (e)(2)(i) of this section applies.

(f) The Secretary may restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds \$100,000 and the cumulative amount of the transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Secretary. The Secretary does not 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.

(g) All other changes to nonconstruction budgets, except for the changes described in paragraph (j) of this section, do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from the Secretary 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 § 74.27.

(i) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(j) When the Secretary makes an award that provides support for both construction and nonconstruction work, the Secretary may require the recipient to request prior approval from the Secretary before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, recipients shall notify the Secretary in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the

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project period by more than \$5,000 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.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the Secretary indicates a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, the Secretary 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 Secretary informs the recipient in writing of the date when the recipient may expect the decision.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

**§ 74.26 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, "Audits of States,

Local Governments, and Non-Profit Organizations."

(b) State and local governments 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) For-profit hospitals not covered by the audit provisions of revised OMB Circular A-133 shall be subject to the audit requirements of the Federal awarding agencies.

(d) Commercial organizations are subject to the audit requirements established by the Secretary or the prime recipient as incorporated into the award document.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 62 FR 45939, 45943, Aug. 29, 1997]

**§ 74.27 Allowable costs.**

(a) For each kind of recipient, there is a set of cost principles for determining allowable costs. Allowability of costs are determined in accordance with the cost principles applicable to the entity incurring the costs, as specified in the following chart.

NOTE: OMB circulars are available from the Office of Management and Budget, Publication Office, Room 2200, New Executive Office Building, Washington, DC 20503 (202) 395-7332.)

For the cost of a—	Use the principles in—
Private nonprofit organization other than (1) An institution of higher education; (2) a hospital; or (3) an organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122.
Educational institution .....	OMB Circular A-21.
Hospital .....	Appendix E to 45 CFR part 74.
Commercial for-profit organization other than a hospital and an educational institution.	48 CFR part 31 Contract Cost Principles and Procedures or uniform cost accounting standards that comply with cost principles acceptable to ED.

(b) The cost principles applicable to a State, a local government, or Federally recognized Indian tribal government are specified at 34 CFR § 80.22.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the Secretary.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

**§ 74.28 Period of availability of funds.**

Where a funding period is specified, a recipient may charge to the grant only

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### PROPERTY STANDARDS

#### § 74.30 Purpose of property standards.

Sections 74.31 through 74.37 establish uniform standards governing management and disposition of property furnished by ED whose cost was charged to a project supported by a Federal award. Recipients shall observe these standards under awards. The Secretary does 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 §§ 74.31 through 74.37.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.31 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.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.32 Real property.

The Secretary prescribes requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, the minimum requirements provide the following:

(a) Title to real property must 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 Secretary.

(b) The recipient shall obtain written approval by the Secretary 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) that have purposes consistent with

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those authorized for support by the Secretary.

(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 ED or its successor Federal awarding agency. The Secretary observes 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 Secretary 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 must 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. The recipient is entitled to compensation for its attributable percentage of the current fair market value of the property.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.33 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 Secretary. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to the Secretary for further ED utilization.

(2) If ED has no further need for the property, it shall be declared excess and reported to the General Services

Administration, unless the Secretary has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (I)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821—Improving Mathematics and Science Education in Support of the National Education Goals. Appropriate instructions shall be issued to the recipient by the Secretary.

(b) *Exempt property.* When statutory authority exists, the Secretary may vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the Secretary considers appropriate. This property is “exempt property.” Should the Secretary not establish conditions, title to exempt property upon acquisition vests in the recipient without further obligation to the Federal Government.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.34 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 may 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 may not encumber the property without approval of the Secretary. 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) Activities sponsored by the Federal awarding agency which funded the original project; and then

(2) Activities sponsored by other Federal awarding 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 other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for other use shall be given to other projects or programs sponsored by the Federal awarding agency that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal awarding agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the Federal awarding agency. 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 Secretary.

(f) The recipient’s property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following:

(1) Equipment records shall be maintained accurately and shall include the following information:

(i) A description of the equipment.  
(ii) Manufacturer’s serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the equipment 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 equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.



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(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 ED for its share.

(2) Equipment owned by the Federal Government must be identified to indicate Federal ownership.

(3) A physical inventory of equipment must 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 must 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.

(4) A control system must be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Secretary.

(5) Adequate maintenance procedures must be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures must 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 \$5000 or more, the recipient may retain the equipment for other uses provided that compensation is made to ED 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 Secretary. The Secretary shall determine whether the equipment can be used to

meet ED requirements. If no requirement exists within ED, the availability of the equipment shall be reported to the General Services Administration by the Secretary to determine whether a requirement for the equipment exists in other Federal agencies. The Secretary issues instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures govern:

(i) 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 ED 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.

(ii) If the recipient is instructed to ship the equipment elsewhere, the recipient is reimbursed by ED 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 shipping or interim storage costs incurred.

(iii) If the recipient is instructed to otherwise dispose of the equipment, the recipient is reimbursed by ED for costs incurred in its disposition.

(iv) The Secretary may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when the third party is otherwise eligible under existing statutes. This transfer shall be subject to the following standards:

(A) The equipment must be appropriately identified in the award or otherwise made known to the recipient in writing.

(B) The Secretary issues disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory must list all equipment acquired with grant funds and federally-owned equipment. If the Secretary does not issue disposition instructions within the 120 calendar day period, the

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recipient shall apply the standards of this section, as appropriate.

(C) When the Secretary exercises the right to take title, the equipment is subject to the provisions for federally-owned equipment.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

### § 74.35 Supplies and other expendable property.

(a) Title to supplies and other expendable property 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 may not use supplies 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 as long as the Federal Government retains an interest in the supplies.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

### § 74.36 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. ED and any other Federal awarding agency 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 government-wide 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, ED 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 ED 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 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

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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 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 Secretary. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 74.34(g).

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 65 FR 14407, 14416, Mar. 16, 2000]

### § 74.37 Property trust relationship.

Real property, equipment, intangible property, and debt instruments that are acquired or improved with Federal funds must 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. The Secretary 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.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

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### PROCUREMENT STANDARDS

#### § 74.40 Purpose of procurement standards.

Sections 74.41 through 74.48 contain 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 designed to ensure that these materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. The Secretary does not impose additional procurement standards or requirements upon recipients, unless specifically required by Federal statute or executive order or as authorized in § 74.4 or § 74.14.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.41 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 Secretary, 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 Federal, State or local authority that may have proper jurisdiction.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.42 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. 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 these standards by officers, employees, or agents of the recipient.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.43 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 or requests for proposals shall be excluded from competing for procurements. Awards must 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 establish all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.44 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These

procedures must provide for, 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 for the Federal Government; or

(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, 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 these 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.

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(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 organizations such 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 must 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 must not be used.

(d) Contracts are made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration is given to 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 E.O. 12549 (implemented by the Secretary in 34 CFR Part 85) and E.O. 12689—Debarment and Suspension.

(e) Recipients shall, on request, make available for the Secretary, pre-award review and procurement documents, such as request for proposals or invitations 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 small purchase threshold fixed at 41 U.S.C. 403 (11) (currently

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\$25,000) 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 small purchase threshold, specifies a "brand name" product.

(4) The proposed award over the small purchase 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 small purchase threshold.

(f)(1)(i) A faith-based organization is eligible to contract with recipients on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible.

(ii) In the selection of goods and services providers, recipients shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(2) The provisions of §§ 75.532 and 76.532 applicable to grantees and subgrantees apply to a faith-based organization that contracts with a recipient, unless the faith-based organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(3) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a contract with a recipient, and participation in any such inherently religious activities by beneficiaries of the programs supported by the contract must be voluntary, unless the organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(4)(i) A faith-based organization that contracts with a recipient may retain its independence, autonomy, right of

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expression, religious character, and authority over its governance.

(ii) A faith-based organization may, among other things—

(A) Retain religious terms in its name;

(B) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(C) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(D) Select its board members and otherwise govern itself on a religious basis; and

(E) Include religious references in its mission statement and other chartering or governing documents.

(5) A private organization that contracts with a recipient shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(6) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization contracts with a recipient.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995; 69 FR 31710, June 4, 2004]

### § 74.45 Cost and price analysis.

Some form of cost or price analysis must 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.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

### § 74.46 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold must 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;

(c) Basis for award cost or price.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

### § 74.47 Contract administration.

A system for contract administration must be maintained to ensure contractor conformance with the terms, 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.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

### § 74.48 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 must also be applied to subcontracts:

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which

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a contractor violates or breaches the contract terms, and provide for remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase 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, contracts must 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 must 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 Secretary may accept the bonding policy and requirements of the recipient, provided the Secretary has made a determination that the Federal Government's interest is adequately protected. If a determination has not been made, the minimum requirements are as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" must 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 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 a 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.

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(4) Where bonds are required, the bonds must 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 small purchase threshold) awarded by recipients must include a provision to the effect that the recipient, ED, the Comptroller General of the United States, or any of their duly authorized representatives, must 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 small purchases, awarded by recipients and their contractors must contain the procurement provisions of appendix A to this part, as applicable.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

### REPORTS AND RECORDS

#### § 74.50 Purpose of reports and records.

Sections 74.51 through 74.53 establish the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also establish record retention requirements.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.51 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 in § 74.26.

(b) The Secretary prescribes the frequency with which the performance reports shall be submitted. Except as provided in § 74.51(f), performance reports are not required more frequently than quarterly or, less frequently than annually. Annual reports are due 90 calendar days after the grant year; quarterly or semi-annual reports are due 30 days after the reporting period.

The Secretary 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 is not required after completion of the project.

(d) When required, performance reports must 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, this quantitative data should be related to cost data for computation of unit costs.

(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 are not required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the Secretary of developments that have a significant impact on the award-supported activities. Also, notification must 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 must include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) The Secretary may make site visits, as needed.

(h) The Secretary complies with the clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

#### § 74.52 Financial reporting.

(a) The following forms or other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) *SF-269 or SF-269A—Financial Status Report.* (i) Recipients are required to use the SF-269 or SF-269A to report the status of funds for all nonconstruction projects or programs. The Secretary may not require the SF-269 or SF-269A when, the Secretary determines that SF-270—Request for Advance or Reimbursement, or SF-272—Report of Federal Cash Transactions—provides adequate information to meet the Department's needs, except that a final SF-269 or SF-269A is required at the completion of the project when the SF-270 is used only for advances.

(ii) The Secretary prescribes whether the report is on a cash or accrual basis. If the Secretary requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient is not required to convert its accounting system, but shall develop accrual information through best estimates based on an analysis of the documentation on hand.

(iii) The Secretary determines 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 is not required more frequently than quarterly or less frequently than annually. A final report is required at the completion of the agreement.

(iv) The Secretary requires recipients to submit the SF-269 or SF-269A (an original and no more than two copies) no later than 30 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 Secretary upon request of the recipient.

(2) *SF-272—Report of Federal Cash Transactions.* (i) When funds are advanced to recipients the Secretary requires each recipient to submit the SF-272 and, when necessary, its continuation sheet, SF-272a. The Secretary



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uses this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) The Secretary may require forecasts of Federal cash requirements in the "Remarks" section of the report.

(iii) When practical and deemed necessary, the Secretary may require recipients to report in the "Remarks" section the amount of cash advances received in excess of three 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. The Secretary may require a monthly report from those recipients receiving advances totaling \$1 million or more per year.

(v) The Secretary 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 advances are monitored through other forms contained in this section;

(B) If, in the Secretary's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or

(C) When the electronic payment mechanisms provide adequate data.

(b) When the Secretary needs additional information or more frequent reports, the following shall be observed:

(1) When additional information is needed to comply with legislative requirements, the Secretary shall issue instructions to require recipients to submit information under the "Remarks" section of the reports.

(2) When the Secretary determines that a recipient's accounting system does not meet the standards in § 74.21, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until the system is brought up to standard. The Secretary, in obtaining this information, complies with the report clearance requirements of 5 CFR part 1320.

(3) The Secretary may shade out any line item on any report if not necessary.

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(4) The Secretary may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) The Secretary may provide computer or electronic outputs to recipients when these outputs expedite or contribute to the accuracy of reporting.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

### § 74.53 Retention and access requirements for records.

(a) This section establishes requirements for record retention and access to records for awards to recipients. The Secretary does 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 or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by the Secretary. 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 Secretary, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc. as specified in § 74.53(g).

(c) Copies of original records may be substituted for the original records if authorized by the Secretary.

(d) The Secretary requests transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, the Secretary may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) The Secretary, 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 documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to these 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, the Secretary does not place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the Secretary can demonstrate that the records must 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 ED.

(g) The starting date for retention of the following types of documents (including supporting records) is specified in paragraphs (g)(1) and (2) of this section: 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 to the Secretary or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of submission.

(2) *If not submitted for negotiation.* If the recipient is not required to submit

to the Secretary 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.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3 and 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995; 60 FR 46493, Sept. 6, 1995]

#### TERMINATION AND ENFORCEMENT

#### § 74.60 Purpose of termination and enforcement.

Sections 74.61 and 74.62 establish uniform suspension, termination, and enforcement procedures.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.61 Termination.

(a) Awards may be terminated in whole or in part only—

(1) By the Secretary, if a recipient materially fails to comply with the terms and conditions of an award;

(2) By the Secretary 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 Secretary written notification containing the reasons for the termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Secretary determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety under either paragraph (a)(1) or (2) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 74.71(a), including those for property management as

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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.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

### § 74.62 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 Secretary may, in addition to imposing any of the special conditions outlined in § 74.14, 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 Secretary.

(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 Secretary provides 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.

(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 Secretary 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—

(1) The costs 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

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(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 ED from initiating a debarment or suspension action against a recipient under 34 CFR part 85 (see § 74.13).

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

### Subpart D—After-the-Award Requirements

#### § 74.70 Purpose.

Sections 74.71 through 74.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

#### § 74.71 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. The Secretary may approve extensions when requested by the recipient.

(b) Unless the Secretary 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 ED implementing instructions.

(c) The Secretary makes prompt 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 Secretary has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A-129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, the Secretary

makes 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 §§ 74.31 through 74.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, the Secretary shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

**§ 74.72 Subsequent adjustments and continuing responsibilities.**

(a) The closeout of an award does not affect any of the following:

(1) The right of the Secretary 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 § 74.26.

(4) Property management requirements in §§ 74.31 through 74.37.

(5) Records retention as required in § 74.53.

(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 Secretary and the recipient, provided the responsibilities of the recipient referred to in § 74.73(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

**§ 74.73 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. If not paid within a reasonable period after the demand for payment, the Secretary may reduce the debt by—

(1) Making an administrative offset against other requests for reimbursements;

(2) Withholding advance payments otherwise due to the recipient; or

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, the Secretary charges interest on an overdue debt in accordance with 4 CFR Chapter II—Federal Claims Collection Standards.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

**APPENDIX A TO PART 74—CONTRACT PROVISIONS**

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts must contain a provision requiring compliance with E.O. 11246—Equal Employment Opportunity, as amended by E.O. 11375—Amending Executive Order 11246 Relating to Equal Employment Opportunity, and as supplemented by regulations at 41 CFR Part 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 subgrants in excess of \$2,000 for construction or repair awarded by recipients and subrecipients must 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 Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)*—When required by Federal program legislation, 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 \$2,000 for construction contracts and in excess of \$2500 for other contracts that involve the employment of mechanics or laborers must 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 or Agreement*—Contracts or agreements for the performance of experimental, developmental, or research work must 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, and any implementing regulations issued by the awarding agency.

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 subgrants 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 ED 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. The disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O. 12549 and E.O. 12689)*—No contract may be made to parties listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with E.O. 12549 and E.O. 12689—Debarment and Suspension. This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549.

Contractors with awards that exceed the small purchase threshold must provide the required certification regarding its exclusion status and that of its principal employees.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

## PART 75—DIRECT GRANT PROGRAMS

### Subpart A—General

#### REGULATIONS THAT APPLY TO DIRECT GRANT PROGRAMS

Sec.

- 75.1 Programs to which part 75 applies.
- 75.2 Exceptions in program regulations to part 75.
- 75.4 Department contracts.