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David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

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DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

15 CFR Part 296

[Docket No.: 071106659-8716-02]

RIN 0693-AB59

Technology Innovation Program

AGENCY: National Institute of Standards and Technology, United States Department of Commerce.

ACTION: Final rule.

SUMMARY: The Deputy Director of the National Institute of Standards and Technology (NIST), United States Department of Commerce, issues a final rule to implement the Technology Innovation Program (TIP). This rule prescribes the policies and procedures for the award of financial assistance (grants and/or cooperative agreements) under TIP.

DATES: This rule is effective on June 25, 2008.

FOR FURTHER INFORMATION CONTACT:

Barbara Lambis, National Institute of Standards and Technology, Mail Stop 4700, Gaithersburg, MD 20899-8600, telephone number (301) 975-4447, e-mail barbara.lambis@nist.gov.

Background

The America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science (COMPETES) Act, Public Law 110-69, was enacted on August 9, 2007, to invest in innovation through research and development and to improve the competitiveness of the United States. Section 3012 of the COMPETES Act established TIP for the purpose of assisting United States businesses and institutions of higher education or other organizations, such as national laboratories and nonprofit research institutions, to support, promote, and accelerate innovation in the United States through high-risk, high-reward research in areas of critical national need. High-risk, high-reward research is research that has the potential for

yielding transformational results with far-ranging or wide-ranging implications; addresses areas of critical national need that support, promote, and accelerate innovation in the United States and is within NIST's areas of technical competence; and is too novel or spans too diverse a range of disciplines to fare well in the traditional peer review process. Section 3012(f) of the America COMPETES Act requires the NIST Director to promulgate regulations implementing the TIP.

NIST published a notice of proposed rulemaking with a request for public comments in the **Federal Register** on March 7, 2008 (46 FR 12305) to seek public comment on proposed regulations implementing TIP, which included policies and procedures for the award of financial assistance (grants and/or cooperative agreements) under TIP. The notice specifically sought comment on how NIST should determine if "reasonable and thorough efforts have been made to secure funding from alternative funding sources and no other alternative funding sources are reasonably available." In addition, the **Federal Register** notice informed the public that NIST was revising the heading of Subchapter K of its regulations to accurately reflect the current contents of that subchapter.

The comment period closed on April 21, 2008.

In response to the comment received regarding the ownership of invention rights in the course of a bankruptcy or dissolution, and also to correct the following typographical errors and inconsistencies and clarify terminology found in the proposed rule, NIST makes the following changes from the proposed rule:

In the Table of Contents, the titles of section 296.11 and the title of Subpart C were revised to be consistent with the titles of that section and subpart within the body of the rule. The title of section 296.20 in both the Table of Contents and the body of the rule was changed to be consistent with the capitalization format used in the remainder of the rule.

In paragraphs 296.2(f) and (z), the definitions of *critical national need* and *societal challenge*, respectively, the word "demands" was changed to "justifies" to better characterize the government's role in responding to societal challenges.

In paragraph 296.4(c), the second sentence was corrected to reflect the fact that the referenced Procurement Standards are in part 14 of subtitle A of title 15.

Paragraph 296.11(b)(4) was revised to clarify under what situations that paragraph applies.

In section 296.22, the order of the award criteria found in paragraphs (d) and (e) was revised to be consistent with the order of the evaluation criteria found in section 296.21.

In paragraph 296.21(b)(1), the first sentence was corrected by adding the word "knowledge" after "United States science and technology" to be consistent with newly redesignated paragraph 296.22(e).

Summary of Public Comments Received by NIST in Response to the May 7, 2008, Proposed Regulations, and NIST's Response to Those Comments

NIST received five responses to the request for comments. Two responses were from for-profit companies. One response was from a United States Senator. One response was from an individual. One response was from an industry association. A detailed analysis of the comments follows.

General Comments

Comment: One commenter expressed personal views about NIST.

Response: This comment is outside the scope of this rulemaking.

Comment: One commenter stated that they found it difficult to understand how NIST staff will identify areas that demand government attention. Another commenter highlighted their industry's commitment to high-risk, high-reward research, including a few examples of their work to transform some of the Nation's major societal challenges. The commenter further stated that the examples provided amplify that their specific industry should be considered as an area of critical national need.

Response: As indicated in the March 7, 2008 **Federal Register** notice, in determining which areas of critical national need will be addressed in a competition, TIP may solicit input from within NIST, from the TIP Advisory Board, and from the public. TIP may engage experts in scientific and technology policy to ensure that the areas of critical national need that will be considered are those that entail significant societal challenges that are not already being addressed by others and could be addressed through high-risk, high-reward research. Specific societal challenges within selected areas of critical national need will be the focus of TIP funding.

Comment: One commenter raised a question about a business review indicating that the new legislation appears to remove the impetus and need to commercialize to capture the economic value potentially created.

Response: The TIP legislation does not include a commercialization

element; therefore, business review is not required.

Comment: One commenter stated that a representative of their industry should be on the TIP Advisory Board.

Response: This comment is outside the scope of this rulemaking.

Comment: One commenter recommended that NIST clarify the ownership of invention rights in the course of a bankruptcy or dissolution. Specifically, the commenter suggested that in the course of a bankruptcy or dissolution of a joint venture, the last participant in a joint venture would determine whether to retain ownership or transfer a patent for an invention developed with TIP funds. The commenter provided an example where a company in bankruptcy could continue to exist and run its day-to-day operations and therefore, should be able to opt to retain or transfer such a patent for a TIP funded invention.

Response: The TIP statute requires that intellectual property developed by a joint venture from assistance provided by TIP "shall not be transferred or passed, except to a participant in the joint venture, until the expiration of the first patent obtained in connection with such intellectual property." (15 U.S.C. 278n(e)(1)). Section 296.11(b)(4) of the TIP rule contemplates the situation where all members of a joint venture cease to exist prior to the expiration of the first such patent. NIST has revised section 296.11(b)(4) of the rule to clarify that whenever the last existing participant in a joint venture ceases to exist prior to the expiration of the first patent obtained in connection with intellectual property developed by a joint venture from assistance under the TIP, title to any such patent must be transferred or passed to a United States entity that can commercialize the technology in a timely fashion.

Comment: One commenter recommended that NIST clarify that contractors and subcontractors who have contributed to an invention should have ownership rights to the invention if contractually agreed upon by the participants in the joint venture.

Response: The TIP statute specifies: "Title to any intellectual property developed by a joint venture from assistance provided under this section may vest in any participant in the joint venture, as agreed by the members of the joint venture, notwithstanding section 202(a) and (b) of title 35, United States Code." (15 U.S.C. 278n(e)(1)). This section of the TIP statute clearly means that the members of the joint venture must decide and set forth in their joint venture agreement how title to all intellectual property that arises

from the project, including intellectual property developed by the members themselves and intellectual property created by contractors, will be owned. The decisions of the joint venture will be implemented through the contracts.

Comments on the Selection Process

Comment: Two commenters recommended that the reviewers demonstrate proven technical and industry sector expertise in the research proposed in order to effectively award scarce funds to appropriate and deserving applicants.

Response: NIST intends to use qualified reviewers with requisite in-depth knowledge to evaluate proposals.

Comment: One commenter recommended that their specific industry be represented on the TIP Evaluation Panel and that the Evaluation Panel members have in-depth knowledge of their specific private industry sector.

Response: The composition and requisite expertise of the TIP Evaluation Panel will depend on the area(s) of critical national need selected for each competition. NIST intends to use qualified individuals to serve on the Evaluation Panel with requisite in-depth knowledge to evaluate proposals.

Comment: One commenter asked what makes one eligible to participate in the Evaluation Panel and what is the overall make-up.

Response: Since the Evaluation Panel(s) will be providing funding recommendations to the Selecting Official, to ensure compliance with the Federal Advisory Committee Act (5 U.S.C. App.), all members of the Evaluation Panel(s) will be federal employees. The Evaluation Panel may request individual technical reviews of proposals. The technical reviews will generally be conducted by federal employees. As stated in the response to the previous comment, the composition and requisite expertise of the TIP Evaluation Panel will depend on the area(s) of critical national need selected for each competition. NIST intends to use qualified individuals to serve on the Evaluation Panel with requisite in-depth knowledge to evaluate proposals. The make-up of the Evaluation Panel will be discussed in the notice announcing a competition and request for proposals.

Comments on the Evaluation Criteria

Comment: One commenter questioned, how is a proposing entity to provide a 50% matching, when a major premise of the process is that no alternative funding is available to support these developments? The commenter further stated that while a

number of states might respond to this by creating specific matching funds for their companies, it could create an unnecessary burden on numerous underserved regions and benefit those that already have significant technology-based business infrastructures.

Response: The 50% cost sharing requirement is statutorily mandated and cannot be changed in the rule.

Comment: One commenter indicated that meeting "the second 50% of the evaluation criteria relating to demonstrating the potential magnitude of transformational results upon the Nation's capabilities in an area, the mechanism and timing for the translational effects to be useful to the Nation, and demonstrating the capacity and commitment of each award participant to enable or advance the transformation seems somewhat improbable and potentially impossible."

Response: TIP was established to fund research and development projects that will address areas of critical national need that demand government attention because the magnitude of the problem is large and the societal challenges that need to be overcome are not being addressed, but could be addressed through high-risk, high-reward research. NIST developed the evaluation criteria contained in the rule to ensure that projects funded by TIP meet the requirements sets forth in the authorizing legislation. The TIP Proposal Preparation Kit will provide guidance to potential proposers on how to address the TIP evaluation criteria.

Comments on How NIST Should Determine if "Reasonable and Thorough Efforts Have Been Made To Secure Funding From Alternative Funding Sources and No Other Alternative Funding Sources Are Reasonably Available"

Comment: One commenter suggested that any criteria set forth regarding the demonstration that reasonable and thorough efforts have been made to secure external funding "does not require exchange of detailed information that would be deemed to be confidential by the alternative funding sources." The commenter indicated that in some cases, funding sources may deem that even the acknowledgement of consideration of funding is confidential and offerors may not be able to disclose details about the funding source and would therefore not meet award criteria. The commenter requested that the government consider the level of information that can be reasonably provided by the offeror depending upon the funding source as acceptable.

Response: To the extent permitted by law, including the Freedom of Information Act (5 U.S.C. 552), NIST will protect confidential/proprietary information about business operations possessed by any organization and provided to NIST. Proposals are likely to be less competitive if significant details are omitted due to an organization's reluctance to reveal confidential/proprietary information.

Comment: One commenter suggested that the regulations require applicants to provide evidence that their application has been rejected by at least two funding sources, including one private source, before they can be considered for federal funding, and that the application submitted to NIST must be identical to the application rejected twice previously. The commenter further suggests that applicants must demonstrate that they do not have the necessary financial resources to conduct the research themselves.

Response: Due to the variety of types of organizations that may apply to TIP and the various types of funds available to different types of organizations and in different sectors, setting a minimum number of unsuccessful attempts to obtain funding seems to be inappropriate. Rather, NIST will require that each proposer, including each member of a joint venture, submit evidence documenting all of their unsuccessful attempts to obtain funding for the work described in the proposal, including internal funding, funding from external private sources, and other funding from government sources (federal, state and local). Based on all relevant factors, NIST will determine whether the unsuccessful attempts to obtain funding documented in each proposal are reasonable and thorough.

Comment: One commenter recommended that NIST consider an applicant's previous efforts to raise funds, such as through public and private financing, to demonstrate "reasonable and thorough" efforts to secure alternative funds and to show that no other alternative sources are available. The commenter further recommended that NIST should examine the rationale behind a non-lead product failing to receive funding, which would allow companies to satisfy the requirement that no other alternative sources are reasonably available. The commenter provided the example that a company could submit as part of their proposal an attestation by the company's board, which would usually include key investors. Such attestation would state that the funds raised are for the more advanced lead products and

that there was no alternative in the budget for the proposed project.

Response: NIST will consider information provided in each proposal received to address the award criteria on a case by case basis. It would be premature to speculate on what documentation an applicant will submit to address the applicant's efforts to secure alternative funding and whether such documentation will be acceptable. The example provided by the commenter could be considered along with the documentary evidence of any efforts to secure alternative funding.

Additional Information

Executive Order 12866

This rulemaking is a significant regulatory action under sections 3(f)(3) and 3(f)(4) of Executive Order 12866, as it materially alters the budgetary impact of a grant program and raises novel policy issues. This rulemaking, however, is not an "economically significant" regulatory action under section 3(f)(1) of the Executive Order, as it does not have an effect on the economy of \$100 million or more in any one year, and it does not have a material adverse effect on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

Executive Order 13132

This rule does not contain policies with Federalism implications as defined in Executive Order 13132.

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(a)(2), all matters related to agency management or personnel or to public property, loans, grants, benefits, or contracts are exempt from the rulemaking requirements of 5 U.S.C. 553, including the 30-day delay in effectiveness. This rule prescribes the policies and procedures for the award of financial assistance (grants and/or cooperative agreements) under the Technology Innovation Program. Because this rule concerns a grant program, this rule is not subject to the 30-day delay in effectiveness. Therefore, this final rule is made effective immediately upon publication.

Regulatory Flexibility Act

Because notice and comment are not required under 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. As such, a regulatory flexibility analysis is not required, and none has been prepared.

Paperwork Reduction Act

Notwithstanding any other provision of the law, no person is required to, nor shall any person be subject to penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

This rule does not contain collection of information requirements subject to review and approval by OMB under the Paperwork Reduction Act (PRA). The TIP Proposal Preparation Kit, which contains all necessary forms and information requirements, was submitted to OMB and approved. The OMB Control Number for the information collection requirements is 0693-0050 and will be published in all **Federal Register** notices soliciting proposals under the Program.

National Environmental Policy Act

This rule will not significantly affect the quality of the human environment. Therefore, an environmental assessment or Environmental Impact Statement is not required to be prepared under the National Environmental Policy Act of 1969.

List of Subjects in 15 CFR Part 296

Business and industry; Grant programs—science and technology; Inventions and patents; Reporting and recordkeeping requirements; Research; Science and technology.

Dated: June 16, 2008.

James M. Turner,
Deputy Director.

■ For the reasons set forth in the preamble, Title 15 of the Code of Federal Regulations is amended as follows:

Subchapter K—NIST Extramural Programs

- 1. The heading of chapter II, subchapter K is revised to read as set forth above.
- 2. In 15 CFR chapter II, subchapter K, add a new part 296 as follows:

PART 296—TECHNOLOGY INNOVATION PROGRAM

Subpart A—General

- Sec.
- 296.1 Purpose.
 - 296.2 Definitions.
 - 296.3 Types of assistance available.
 - 296.4 Limitations on assistance.
 - 296.5 Eligibility requirements for companies and joint ventures.
 - 296.6 Valuation of transfers.
 - 296.7 Joint venture registration.
 - 296.8 Joint venture agreement.

- 296.9 Activities not permitted for joint ventures.
- 296.10 Third party in-kind contribution of research services.
- 296.11 Intellectual property rights and procedures.
- 296.12 Reporting and auditing requirements.

Subpart B—The Competition Process

- 296.20 The selection process.
- 296.21 Evaluation criteria.
- 296.22 Award criteria.

Subpart C—Dissemination of Program Results

- 296.30 Monitoring and evaluation.
- 296.31 Dissemination of results.
- 296.32 Technical and educational services.
- 296.33 Annual report.

Authority: 15 U.S.C. 278n (Pub. L. 110–69 section 3012)

Subpart A—General

§ 296.1 Purpose.

(a) The purpose of the Technology Innovation Program (TIP) is to assist United States businesses and institutions of higher education or other organizations, such as national laboratories and nonprofit research institutes, to support, promote, and accelerate innovation in the United States through high-risk, high-reward research in areas of critical national need within NIST's areas of technical competence.

(b) The rules in this part prescribe policies and procedures for the award and administration of financial assistance (grants and/or cooperative agreements) under the TIP. While the TIP is authorized to enter into grants, cooperative agreements, and contracts to carry out the TIP mission, the rules in this part address only the award of grants and/or cooperative agreements.

§ 296.2 Definitions.

Award means Federal financial assistance made under a grant or cooperative agreement.

Business or company means a for-profit organization, including sole proprietors, partnerships, limited liability companies (LLCs), and corporations.

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

Contractor means the legal entity to which a contract is made and which is accountable to the recipient, subrecipient, or contractor making the contract for the use of the funds provided.

Cooperative agreement refers to a Federal assistance instrument used whenever the principal purpose of the

relationship between the Federal government and the recipient is to transfer something of value, such as money, property, or services to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the Federal government; and substantial involvement is anticipated between the Federal government and the recipient during performance of the contemplated activity.

Critical national need means an area that justifies government attention because the magnitude of the problem is large and the societal challenges that need to be overcome are not being addressed, but could be addressed through high-risk, high-reward research.

Direct costs means costs that can be identified readily with activities carried out in support of a particular final objective. A cost may not be allocated to an award as a direct cost if any other cost incurred for the same purpose in like circumstances has been assigned to an award as an indirect cost. Because of the diverse characteristics and accounting practices of different organizations, it is not possible to specify the types of costs which may be classified as direct costs in all situations. However, typical direct costs could include salaries of personnel working on the TIP project, travel, equipment, materials and supplies, subcontracts, and other costs not categorized in the preceding examples. NIST shall determine the allowability of direct costs in accordance with applicable Federal cost principles.

Director means the Director of the National Institute of Standards and Technology (NIST).

Eligible company means a small-sized or medium-sized business or company that satisfies the ownership and other requirements stated in this part.

Grant means a Federal assistance instrument used whenever the principal purpose of the relationship between the Federal government and the recipient is to transfer something of value, such as money, property, or services to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the Federal government; and no substantial involvement is anticipated between the Federal government and the recipient during performance of the contemplated activity.

High-risk, high-reward research means research that:

(1) Has the potential for yielding transformational results with far-ranging or wide-ranging implications;

(2) Addresses areas of critical national need that support, promote, and accelerate innovation in the United States and is within NIST's areas of technical competence; and

(3) Is too novel or spans too diverse a range of disciplines to fare well in the traditional peer-review process.

Indirect costs means those costs incurred for common or joint objectives that cannot be readily identified with activities carried out in support of a particular final objective. A cost may not be allocated to an award as an indirect cost if any other cost incurred for the same purpose in like circumstances has been assigned to an award as a direct cost. Because of diverse characteristics and accounting practices it is not possible to specify the types of costs which may be classified as indirect costs in all situations. However, typical examples of indirect costs include general administration expenses, such as the salaries and expenses of executive officers, personnel administration, maintenance, library expenses, and accounting. NIST shall determine the allowability of indirect costs in accordance with applicable Federal cost principles.

Institution of higher education means an educational institution in any State that—(1) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(2) Is legally authorized within such State to provide a program of education beyond secondary education;

(3) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;

(4) Is a public or other nonprofit institution; and

(5) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary of Education for the granting of preaccreditation status, and the Secretary of Education has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time (20 U.S.C. 1001). For the purpose of this paragraph (1) only,

the term *State* includes, in addition to the several States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Freely Associated States. The term *Freely Associated States* means the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

Intellectual property means an invention patentable under title 35, United States Code, or any patent on such an invention, or any work for which copyright protection is available under title 17, United States Code.

Joint venture means a business arrangement that:

(1) Includes either:

(i) At least two separately owned companies that are both substantially involved in the project and both of which are contributing to the cost-sharing required under the TIP statute, with the lead company of the joint venture being an eligible company; or

(ii) At least one eligible company and one institution of higher education or other organization, such as a national laboratory, governmental laboratory (not including NIST), or nonprofit research institute, that are both substantially involved in the project and both of which are contributing to the cost-sharing required under the TIP statute, with the lead entity of the joint venture being either the eligible company or the institution of higher education; and

(2) May include additional for-profit companies, institutions of higher education, and other organizations, such as national laboratories and nonprofit research institutes, that may or may not contribute non-Federal funds to the project.

Large-sized business means any business, including any parent company plus related subsidiaries, having annual revenues in excess of the amount published by the Program in the relevant **Federal Register** notice of availability of funds in accordance with § 296.20. In establishing this amount, the Program may consider the dollar value of the total revenues of the 1000th company in Fortune magazine's Fortune 1000 listing.

Matching funds or *cost sharing* means that portion of project costs not borne by the Federal government. Sources of revenue to satisfy the required cost share include cash and third party in-kind contributions. Cash may be contributed by any non-Federal source, including but not limited to recipients, state and local governments, companies, and nonprofits (except contractors

working on a TIP project). Third party in-kind contributions include but are not limited to equipment, research tools, software, supplies, and/or services. The value of in-kind contributions shall be determined in accordance with § 14.23 of this title and will be prorated according to the share of total use dedicated to the TIP project. NIST shall determine the allowability of matching share costs in accordance with applicable Federal cost principles.

Medium-sized business means any business that does not qualify as a *small-sized business* or a *large-sized business* under the definitions in this section.

Member means any entity that is identified as a joint venture member in the award and is a signatory on the joint venture agreement required by § 296.8.

Nonprofit research institute means a nonprofit research and development entity or association organized under the laws of any state for the purpose of carrying out research and development.

Participant means any entity that is identified as a recipient, subrecipient, or contractor on an award to a joint venture under the Program.

Person will be deemed to include corporations and associations existing under or authorized by the laws of the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Program or *TIP* means the Technology Innovation Program.

Recipient means an organization receiving an award directly from NIST under the Program.

Small-sized business means a business that is independently owned and operated, is organized for profit, has fewer than 500 employees, and meets the other requirements found in 13 CFR part 121.

Societal challenge means a problem or issue confronted by society that when not addressed could negatively affect the overall function and quality of life of the Nation, and as such justifies government attention.

State, except for the limited purpose described in paragraph (l) of this section, means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under the United States Housing Act of 1937.

Subaward means an award of financial assistance 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 legal agreement is called a contract, but does not include procurement of goods and services.

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.

Transformational results means potential project outcomes that enable disruptive changes over and above current methods and strategies. Transformational results have the potential to radically improve our understanding of systems and technologies, challenging the status quo of research approaches and applications.

United States owned company means a for-profit organization, including sole proprietors, partnerships, limited liability companies (LLCs), and corporations, that has a majority ownership by individuals who are citizens of the United States.

§ 296.3 Types of assistance available.

Subject to the limitations of this section and § 296.4, assistance under this part is available to eligible companies or joint ventures that request either of the following:

(a) Single Company Awards: No award given to a single company shall exceed a total of \$3,000,000 over a total of 3 years.

(b) Joint Venture Awards: No award given to a joint venture shall exceed a total of \$9,000,000 over a total of 5 years.

§ 296.4 Limitations on assistance.

(a) The Federal share of a project funded under the Program shall not be more than 50 percent of total project costs.

(b) Federal funds awarded under this Program may be used only for direct costs and not for indirect costs, profits, or management fees.

(c) No large-sized business may receive funding as a recipient or subrecipient of an award under the Program. When procured in accordance with procedures established under the Procurement Standards required by part 14 of Subtitle A of this title, recipients may procure supplies and other expendable property, equipment, real property and other services from any party, including large-sized businesses.

(d) If a project ends before the completion of the period for which an award has been made, after all allowable costs have been paid and appropriate audits conducted, the unspent balance

of the Federal funds shall be returned by the recipient to the Program.

§ 296.5 Eligibility requirements for companies and joint ventures.

Companies and joint ventures must be eligible in order to receive funding under the Program and must remain eligible throughout the life of their awards.

(A) A company shall be eligible to receive an award from the Program only if:

(1) The company is a small-sized or medium-sized business that is incorporated in the United States and does a majority of its business in the United States; and

(2) Either

(i) The company is a United States owned company; or

(ii) The company is owned by a parent company incorporated in another country and the Program finds that:

(A) The company's participation in TIP would be in the economic interest of the United States, as evidenced by investments in the United States in research, development, and manufacturing (including, for example, the manufacture of major components or subassemblies in the United States); significant contributions to employment in the United States; and agreement with respect to any technology arising from assistance provided by the Program to promote the manufacture within the United States of products resulting from that technology, and to procure parts and materials from competitive United States suppliers; and

(B) That the parent company is incorporated in a country which affords to United States-owned companies opportunities, comparable to those afforded to any other company, to participate in any joint venture similar to those authorized to receive funding under the Program; affords to United States-owned companies local investment opportunities comparable to those afforded to any other company; and affords adequate and effective protection for the intellectual property rights of United States-owned companies.

(b) NIST may suspend a company or joint venture from continued assistance if it determines that the company, the country of incorporation of the company or a parent company, or any member of the joint venture has failed to satisfy any of the criteria contained in paragraph (a) of this section, and that it is in the national interest of the United States to do so.

(c) Members of joint ventures that are companies must be incorporated in the

United States and do a majority of their business in the United States and must comply with the requirements of paragraph (a)(2) of this section. For a joint venture to be eligible for assistance, it must be comprised as defined in § 296.2.

§ 296.6 Valuation of transfers.

(a) This section applies to transfers of goods, including computer software, and services provided by the transferor related to the maintenance of those goods, when those goods or services are transferred from one joint venture member to another separately-owned joint venture member.

(b) The greater amount of the actual cost of the transferred goods and services as determined in accordance with applicable Federal cost principles, or 75 percent of the best customer price of the transferred goods and services, shall be deemed to be allowable costs. Best customer price means the GSA schedule price, or if such price is unavailable, the lowest price at which a sale was made during the last twelve months prior to the transfer of the particular good or service.

§ 296.7 Joint venture registration.

Joint ventures selected for assistance under the Program must notify the Department of Justice and the Federal Trade Commission under section 6 of the National Cooperative Research Act of 1984, as amended (15 U.S.C. 4305). No funds will be released prior to receipt by the Program of copies of such notification.

§ 296.8 Joint venture agreement.

NIST shall not issue a TIP award to a joint venture and no costs shall be incurred under a TIP project by the joint venture members until such time as a joint venture agreement has been executed by all of the joint venture members and approved by NIST.

§ 296.9 Activities not permitted for joint ventures.

The following activities are not permissible for TIP-funded joint ventures:

(a) Exchanging information among competitors relating to costs, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required to conduct the research and development that is the purpose of such venture;

(b) Entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the marketing, distribution, or provision by any person who is a party to such joint venture of any product, process, or service, other than the

distribution among the parties to such venture, in accordance with such venture, of a product, process, or service produced by such venture, the marketing of proprietary information, such as patents and trade secrets, developed through such venture, or the licensing, conveying, or transferring of intellectual property, such as patents and trade secrets, developed through such venture; and

(c) Entering into any agreement or engaging in any other conduct:

(1) To restrict or require the sale, licensing, or sharing of inventions or developments not developed through such venture; or

(2) To restrict or require participation by such party in other research and development activities, that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture.

§ 296.10 Third party in-kind contribution of research services.

NIST shall not issue a TIP award to a single recipient or joint venture whose proposed budget includes the use of third party in-kind contribution of research as cost share, and no costs shall be incurred under such a TIP project, until such time as an agreement between the recipient and the third party contributor of in-kind research has been executed by both parties and approved by NIST.

§ 296.11 Intellectual property rights and procedures.

(a) *Rights in Data.* Except as otherwise specifically provided for in an award, authors may copyright any work that is subject to copyright and was developed under an award. When claim is made to copyright, the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Federal government sponsorship shall be affixed to the work when and if the work is delivered to the Federal government, is published, or is deposited for registration as a published work in the U.S. Copyright Office. The copyright owner shall grant to the Federal government, and others acting on its behalf, a paid up, nonexclusive, irrevocable, worldwide license for all such works to reproduce, publish, or otherwise use the work for Federal purposes.

(b) *Invention Rights.*

(1) Ownership of inventions developed from assistance provided by the Program under § 296.3(a) shall be governed by the requirements of chapter 18 of title 35 of the United States Code.

(2) Ownership of inventions developed from assistance provided by

the Program under § 296.3(b) may vest in any participant in the joint venture, as agreed by the members of the joint venture, notwithstanding section 202(a) and (b) of title 35, United States Code. Title to any such invention shall not be transferred or passed, except to a participant in the joint venture, until the expiration of the first patent obtained in connection with such invention. In accordance with § 296.8, joint ventures will provide to NIST a copy of their written agreement that defines the disposition of ownership rights among the participants of the joint venture, including the principles governing the disposition of intellectual property developed by contractors and subcontractors, as appropriate, and that complies with these regulations.

(3) The United States reserves a nonexclusive, nontransferable, irrevocable paid-up license, to practice or have practiced for or on behalf of the United States any inventions developed using assistance under this section, but shall not in the exercise of such license publicly disclose proprietary information related to the license. Nothing in this subsection shall be construed to prohibit the licensing to any company of intellectual property rights arising from assistance provided under this section.

(4) Should the last existing participant in a joint venture cease to exist prior to the expiration of the first patent obtained in connection with any invention developed from assistance provided under the Program, title to such patent must be transferred or passed to a United States entity that can commercialize the technology in a timely fashion.

(c) *Patent Procedures.* Each award by the Program will include provisions assuring the retention of a governmental use license in each disclosed invention, and the government's retention of march-in rights. In addition, each award by the Program will contain procedures regarding reporting of subject inventions by the recipient through the Interagency Edison extramural invention reporting system (iEdison), including the subject inventions of recipients, including members of the joint venture (if applicable), subrecipients, and contractors of the recipient or joint venture members.

§ 296.12 Reporting and auditing requirements.

Each award by the Program shall contain procedures regarding technical, business, and financial reporting and auditing requirements to ensure that awards are being used in accordance with the Program's objectives and

applicable Federal cost principles. The purpose of the technical reporting is to monitor "best effort" progress toward overall project goals. The purpose of the business reporting is to monitor project performance against the Program's mission as required by the Government Performance and Results Act (GPRA) mandate for program evaluation. The purpose of the financial reporting is to monitor the status of project funds. The audit standards to be applied to TIP awards are the "Government Auditing Standards" (GAS) issued by the Comptroller General of the United States and any Program-specific audit guidelines or requirements prescribed in the award terms and conditions. To implement paragraph (f) of § 14.25 of this title, audit standards and award terms may stipulate that "total Federal and non-Federal funds authorized by the Grants Officer" means the total Federal and non-Federal funds authorized by the Grants Officer annually.

Subpart B—The Competition Process

§ 296.20 The selection process.

(a) To begin a competition, the Program will solicit proposals through an announcement in the **Federal Register**, which will contain information regarding that competition, including the areas of critical national need that proposals must address. An Evaluation Panel(s) will be established to evaluate proposals and ensure that all proposals receive careful consideration.

(b) (1) A preliminary review will be conducted to determine whether the proposal:

- (i) Is in accordance with § 296.3;
- (ii) Complies with either paragraph (a) or paragraph (c) of § 296.5;
- (iii) Addresses the award criteria of paragraphs (a) through (c) of § 296.22;
- (iv) Was submitted to a previous TIP competition and if so, has been substantially revised; and
- (v) Is complete.

(2) Complete proposals that meet the preliminary review requirements described in paragraphs (b)(1)(i) through (v) of this section will be considered further. Proposals that are incomplete or do not meet any one of these preliminary review requirements will normally be eliminated.

(c) The Evaluation Panel(s) will then conduct a multi-disciplinary peer review of the remaining proposals based on the evaluation criteria listed in § 296.21 and the award criteria listed in § 296.22. In some cases NIST may conduct oral reviews and/or site visits. The Evaluation Panel(s) will present funding recommendations to the

Selecting Official in rank order for further consideration. The Evaluation Panel(s) will not recommend for further consideration any proposal determined not to meet all of the eligibility and award requirements of this part and the **Federal Register** notice announcing the availability of funds.

(d) In making final selections, the Selecting Official will select funding recipients based upon the Evaluation Panel's rank order of the proposals and the following selection factors: assuring an appropriate distribution of funds among technologies and their applications, availability of funds, and/or Program priorities. The selection of proposals by the Selecting Official is final.

(e) NIST reserves the right to negotiate the cost and scope of the proposed work with the proposers that have been selected to receive awards. This may include requesting that the proposer delete from the scope of work a particular task that is deemed by NIST to be inappropriate for support against the evaluation criteria. NIST also reserves the right to reject a proposal where information is uncovered that raises a reasonable doubt as to the responsibility of the proposer. The final approval of selected proposals and award of assistance will be made by the NIST Grants Officer as described in the **Federal Register** notice announcing the competition. The award decision of the NIST Grants Officer is final.

§ 296.21 Evaluation criteria.

A proposal must be determined to be competitive against the Evaluation Criteria set forth in this section to receive funding under the Program. Additionally, no proposal will be funded unless the Program determines that it has scientific and technical merit and that the proposed research has strong potential for meeting identified areas of critical national need.

(a)(1) The proposer(s) adequately addresses the scientific and technical merit and how the research may result in intellectual property vesting in a United States entity including evidence that:

- (i) The proposed research is novel;
- (ii) The proposed research is high-risk, high-reward;

(iii) The proposer(s) demonstrates a high level of relevant scientific/technical expertise for key personnel, including contractors and/or informal collaborators, and have access to the necessary resources, for example research facilities, equipment, materials, and data, to conduct the research as proposed;

(iv) The research result(s) has the potential to address the technical needs associated with a major societal challenge not currently being addressed; and

(v) The proposed research plan is scientifically sound with tasks, milestones, timeline, decision points and alternate strategies.

(2) Total weight of (a)(1)(i) through (v) is 50%.

(b)(1) The proposer(s) adequately establishes that the proposed research has strong potential for advancing the state-of-the-art and contributing significantly to the United States science and technology knowledge base and to address areas of critical national need through transforming the Nation's capacity to deal with a major societal challenge(s) that is not currently being addressed, and generate substantial benefits to the Nation that extend significantly beyond the direct return to the proposer including an explanation in the proposal:

(i) Of the potential magnitude of transformational results upon the Nation's capabilities in an area;

(ii) Of how and when the ensuing transformational results will be useful to the Nation; and

(iii) Of the capacity and commitment of each award participant to enable or advance the transformation to the proposed research results (technology).

(2) Total weight of (b)(1)(i) through (iii) is 50%.

§ 296.22 Award criteria.

NIST must determine that a proposal successfully meets all of the Award Criteria set forth in this section for the proposal to receive funding under the Program. The Award Criteria are:

(a) The proposal explains why TIP support is necessary, including evidence that the research will not be conducted within a reasonable time period in the absence of financial assistance from TIP;

(b) The proposal demonstrates that reasonable and thorough efforts have been made to secure funding from alternative funding sources and no other alternative funding sources are reasonably available to support the proposal;

(c) The proposal explains the novelty of the research (technology) and demonstrates that other entities have not already developed, commercialized, marketed, distributed, or sold similar research results (technologies);

(d) The proposal has scientific and technical merit and may result in intellectual property vesting in a United States entity that can commercialize the technology in a timely manner;

(e) The proposal establishes that the research has strong potential for advancing the state-of-the-art and contributing significantly to the United States science and technology knowledge base; and

(f) The proposal establishes that the proposed transformational research (technology) has strong potential to address areas of critical national need through transforming the Nation's capacity to deal with major societal challenges that are not currently being addressed, and generate substantial benefits to the Nation that extend significantly beyond the direct return to the proposer.

Subpart C—Dissemination of Program Results

§ 296.30 Monitoring and evaluation.

The Program will provide monitoring and evaluation of areas of critical national need and its investments through periodic analyses. It will develop methods and metrics for assessing impact at all stages. These analyses will contribute to the establishment and adoption of best practices.

§ 296.31 Dissemination of results.

Results stemming from the analyses required by § 296.30 will be disseminated in periodic working papers, fact sheets, and meetings, which will address the progress that the Program has made from both a project and a portfolio perspective. Such disseminated results will serve to educate both external constituencies as well as internal audiences on research results, best practices, and recommended changes to existing operations based on solid analysis.

§ 296.32 Technical and educational services.

(a) Under the Federal Technology Transfer Act of 1986, NIST has the authority to enter into cooperative research and development agreements with non-Federal parties to provide personnel, services, facilities, equipment, or other resources except funds toward the conduct of specified research or development efforts which are consistent with the missions of the laboratory. In turn, NIST has the authority to accept funds, personnel, services, facilities, equipment and other resources from the non-Federal party or parties for the joint research effort. Cooperative research and development agreements do not include procurement contracts or cooperative agreements as those terms are used in sections 6303, 6304, and 6305 of title 31, United States Code.

(b) In no event will NIST enter into a cooperative research and development agreement with a recipient of an award under the Program which provides for the payment of Program funds from the award recipient to NIST.

(c) From time to time, TIP may conduct public workshops and undertake other educational activities to foster the collaboration of funding Recipients with other funding resources for purposes of further development and diffusion of TIP-related technologies. In no event will TIP provide recommendations, endorsements, or approvals of any TIP funding Recipients to any outside party.

§ 296.33 Annual report.

The Director shall submit annually to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Science and Technology of the House of Representatives a report describing the Technology Innovation Program's activities, including a description of the metrics upon which award funding decisions were made in the previous fiscal year, any proposed changes to those metrics, metrics for evaluating the success of ongoing and completed awards, and an evaluation of ongoing and completed awards. The first annual report shall include best practices for management of programs to stimulate high-risk, high-reward research.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 242

[Docket No. FR-4927-F-03]

RIN 2502-A122

Revisions to the Hospital Mortgage Insurance Program: Technical and Clarifying Amendments

AGENCY: Office of Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: On November 28, 2007, HUD published a final rule revising HUD's regulations on mortgage insurance for hospitals. This publication corrects certain non-substantive errors and omissions that occurred in the final rule, as well as makes certain additional amendments designed to enhance clarity of certain of the rule's provisions.

DATES: *Effective Date:* July 25, 2008.