

General Terms and Conditions Advanced Technology Program

September 2007

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This document applies to all Recipients of the ATP Cooperative Agreements. ATP Recipient is defined to include all single company Recipients and each individual company or organization that is identified as a Joint Venture Partner in the Special Award Conditions.

General Terms and Conditions Advanced Technology Program

September 2007

1. ORDER OF PRECEDENCE OF AWARD TERMS AND CONDITIONS

Where the terms of the award and proposal differ, the terms of the award shall prevail. The Recipient is obligated to bring to the attention of the Grants Specialist any perceived conflicts in the terms and conditions of the award.

2. AUTHORITY TO MODIFY

The NIST Grants Officer is the **ONLY** authorized agent at NIST with the authority to bind the Federal Government and to take actions to amend, suspend, and terminate the Award. In the case of a joint venture, the NIST Grants Officer may take enforcement action directly with an individual Joint Venture (JV) Partner, as warranted, as well as with the JV as a whole.

3. REQUIREMENTS FOR CONTINUING FINANCIAL ASSISTANCE

A. With respect to any technology arising from assistance provided by NIST under this award, the Recipient shall promote the manufacture of products resulting from that technology within the United States and shall procure parts and materials from competitive United States suppliers to the extent practical.

B. At any time within the life of this award should the Recipient cease to have a majority control or ownership by individuals who are citizens of the United States, the ***Recipient shall notify the NIST Grants Officer of that fact, in writing, within THIRTY (30) calendar days of such change in control or ownership.***

4. NIST PROJECT MANAGEMENT TEAM

The NIST Project Management Team (PMT) includes an ATP Project Manager, a NIST Grants Specialist, and one or more ATP technical and business specialists. The ATP Project Manager is responsible for:

A. General oversight and project management functions associated with the Award.

B. Arranging kickoff, annual review, and final closeout meetings.

C. Monitoring the project to ensure that it is executed in accordance with the proposal and this award; this includes analyzing the quarterly, annual, and final reports, and consulting with other members of the PMT to assess progress.

D. Recommending appropriate action to the NIST Grants Officer if the project is failing to meet its objectives.

5. SUBSTANTIAL INVOLVEMENT

NIST has selected a cooperative agreement as the funding instrument for this project. Consistent with Final Office of Management and Budget Guidance Implementing the Federal Grants and Cooperative Agreement Act, 43 Fed. Reg. 36860 (August 18, 1978), NIST will be substantially involved in the following areas:

A. Approval of go/no go decision points at various project stages before subsequent stages of a project may continue, if specified in the Special Award Conditions;

B. Concurrence with sole source procurements in excess of \$100,000;

C. Approval of key personnel specified in the proposal (including such positions as, Principal Investigator); and

D. Approval of changes in Joint Venture membership.

6. TECHNICAL PERFORMANCE, BUSINESS, AND FINANCIAL REPORTS

The Recipient shall provide access to information that is required to assess the project's progress throughout the project life cycle. In addition to monitoring the technical work, NIST requires business information pertaining to the project during the life of the project and for six years after its end to assess progress towards commercialization, the degree of adoption of the technology, and the impact of the project on the economy.

A. Technical Reporting:

The Recipient shall submit technical performance reports in triplicate (one original and two copies). Two copies shall be submitted to the ATP Project Manager and the original report to the NIST Grants Officer in the same frequency as the SF-269 (Financial Status Report). Technical performance reports shall contain information as prescribed in 15 C.F.R §14.51. (See Attachment A for Optional Guidelines for Quarterly Technical Performance Reports.)

B. Business Reports:

The Recipient shall submit business reports in accordance with the "*Guidelines for Reporting on Business Progress and Economic Impacts*" (see Attachment B).

C. Financial Reports:

For submission of financial reports for ATP Recipients, Article A.01 of the *Department of Commerce (DoC) Financial Assistance Standard Terms and Conditions* dated May 2007 is revised as follows:

- (1) The Recipient shall submit a SF-269 on a calendar quarter basis for the periods ending March 31, June 30, September 30, and December 31, or any portion thereof, unless otherwise specified in a Special Award Condition. Reports are due no later than Thirty (30) calendar days following the end of each reporting period. A final SF-269 shall be submitted within Ninety (90) calendar days after the expiration date of the award.
- (2) All financial reports shall be submitted in triplicate (one original and two copies) to the Grants Specialist.
- (3) By signing this award the Recipient agrees to ensure that only actual costs incurred will be charged to the award and that all costs will be reasonable, allocable, and allowable in accordance with the applicable Federal Cost Principles (see 15 C.F.R. §14.27). The Recipient shall also ensure that all salaries/wages (technical and administrative), fringe benefits, travel, materials and supplies, equipment, subcontracts, other costs, and indirect costs proposed and to be incurred under this award are consistent with costs incurred for like or similar items on all other Federal and non-Federal projects or cost centers (exclusive of any profits or fees) of the Recipient, including each JV Partner. All costs charged to the project are subject to audits.
- (4) Where a Recipient's, including each JV Partner's normal accounting practice makes use of blended or average labor rates in lieu of actual salaries, the Recipient must provide the NIST Grants Officer with a copy of its current, Federally audited and approved pricing or rate agreement. The Recipient must, throughout the project period of the award, maintain contemporaneous records of the actual labor hours expended on the project, and ensure that the appropriate labor schedule and

category are used. Only actual incurred costs are allowed to be charged to the project and are subject to audits.

7. COST SHARE

- A. Cost share commitments must be met and the non-Federal share, whether in cash or in-kind, is expected to be paid out at the same general rate as the Federal share, throughout the Award in accordance with the approved budget. Any cost sharing must be in accordance with the “cost sharing or matching” provisions of 15 C.F.R. Part 14. Costs included as cost share must be allocable to the project and allowable under the applicable federal cost principles. Costs incurred as non-Federal cost share are subject to the same allowability requirements as Federally-funded costs and are subject to audits.
- B. For JVs, the JV Administrator is responsible for conducting a review of the SF-269s for each JV Partner prior to submission of a consolidated financial status report for the entire JV. This review must ensure that the financial information is consistent with each JV Partner’s approved budget including each JV Partner’s required cost sharing. The JV Administrator must resolve any discrepancies in the financial information prior to submitting the consolidated financial status report to NIST, and prior to making any withdrawal of funds. At the time of submission of the financial status report by the JV Administrator to NIST, the financial status report must reflect that the overall cost share is being met at the same rate that the Federal share is being spent.
- C. Each JV Partner is responsible for meeting its cost-share commitment throughout the Award, at the same rate that the Federal share is being spent, in accordance with its approved budget. No JV Partner is responsible for the cost-share commitment of any other JV Partner. However, with the agreement

of the JV Partners, along with notification to the NIST Grants Officer, a JV Partner that has exceeded its cost share commitment may allow its excess cost share to be used to make up for the cost share deficit of another JV Partner, so that the overall annual JV cost share is met.

- D. The disallowance of any costs as a result of an audit could result in a Recipient’s failure to provide its required cost share commitment. Whether it is a single or a JV Partner, if audit disallowances result in a Recipient’s failure to meet its annual cost share, the Recipient shall reimburse the Federal Government for any account receivable resulting from such disallowance, regardless of the Federal funding amount, if any, that the Recipient may have received under the award.

8. KICK-OFF, ANNUAL REVIEW, AND CLOSEOUT MEETINGS, AND SPECIAL STUDIES

The Recipient, including each JV Partner, if applicable, shall participate in kick-off, annual review, and closeout meetings. The ATP Project Manager will provide the Recipient with meeting instructions in advance of these meetings.

Consistent with the requirements of the Government Performance and Results Act of 1993, Recipients may be asked from time to time to participate in special economic or case studies. All requests for participation in such studies will be in accordance with the Paperwork Reduction Act (PRA) requirements as implemented by 5 C.F.R. §1320, and will display a PRA approval number.

9. NOTIFICATION AND PRIOR APPROVAL REQUIREMENTS

- A. The prior approval requirements in 15 C.F.R. §14.25, paragraph (e) MAY NOT be waived automatically by the Recipient and require written approval from the NIST Grants Officer.

In addition to the requirements specified in 15 C.F.R. §14.25, Recipients must obtain prior written approval from the NIST Grants Officer for the following changes:

(1) Any use of human subjects, such as interactions with live human beings or the use of data, images, tissue, and/or cells/cell lines from human subjects.

(2) Any use of vertebrate animals.

B. Joint Ventures

(1) Prior written approval of the NIST Grants Officer is required for any substitution and/or addition of JV Partners, change in JV Administrator, or revision to JV Agreement. However, any deletion of a JV Partner requires immediate notification to the NIST Grants Officer and ATP project manager.

(2) Proposed new JV Partners may not enter into any obligation, incur any expenditure, or engage in any activity that involves a commitment of Federal funds under this Award until the NIST Grants Officer has provided formal acceptance of the new JV Partner and revised JV Agreement.

(3) **Withdrawal of any JV Partner.** The notification must include the following information:

- a. Date of the JV Partner's withdrawal.
- b. Circumstances of the departure.
- c. Plans, if any, for replacing the departing JV Partner.
- d. An explanation of how this change will affect the project.

(4) When only two for-profit companies comprise a JV and one of them ceases participation, the project must be suspended until the NIST Grants Officer has provided formal approval of the revised JV Agreement. During the suspension period, the Recipient may not continue to enter into obligations, incur expenditures, and/or engage in any activity that involves a commitment of Federal funds under this Award.

C. Recipients must provide written notification to the NIST Grants Officer, with a copy to the ATP Project Manager, within THIRTY (30) calendar days of the occurrence of any of the following changes:

Ownership and/or dissolution of a Recipient company (including a JV Partner, if a JV). Revisions to ownership include, but are not limited to, mergers, acquisitions, change resulting in majority ownership by non-U.S. citizen(s), etc. In each instance, the notification must include the following information:

- a. Date of final acquisition, merger, or change resulting in majority ownership by non-U.S. citizen(s), etc.
- b. Name and address of any new foreign parent(s) and for each foreign parent(s), the percentage of ownership for each parent.
- c. If the change results in majority ownership or control by non-U.S. citizen(s), the owner(s) and percentage of ownership for each.
- d. Confirmation that the Recipient intends to complete its assigned tasks with the same commitment and at the same location.
- e. Description of how this change in ownership will affect the project's projected benefits to the United States.

D. Recipients must provide written notification to the NIST Grants Officer and the ATP Project Manager within Fifteen (15) calendar days of any budget changes involving the transfer of funds among direct cost categories or between Joint Venture members if the amount of the transfer exceeds 10% of the approved total annual budget for any single Recipient or Joint Venture participant for an approved project year.

10. UNALLOWABLE PROJECT COSTS

In addition to unallowable costs in the applicable Federal Cost Principles, costs designated unallowable in Chapter 1, Section D.2 of the April 2007 [ATP Proposal](#)

Preparation Kit will be unallowable under this award.

11. PROGRAM INCOME

A. Program income earned during the project period shall be retained by the Recipient and shall be used to finance any non-Federal share of the project.

B. Recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

C. Costs incidental to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award

D. Proceeds from the sale of property shall be handled in accordance with the requirements of Property Standards in 15 C.F.R. §§14.30 through 14.37.

E. Recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under this award.

12. EQUIPMENT

Upon expiration of the project period, the Recipient shall submit to the NIST Grants Officer an inventory of equipment acquired with Federal funds, as prescribed in 15 C.F.R. §14.34, along with an "Equipment Disposition Certification." The certification provides the Recipient an opportunity to request authorization to continue to utilize the equipment for the purposes of the commercialization initiative. If approved by the NIST Grants Officer, the Recipient shall report to NIST every two years the condition of the equipment as long as the current market value is more than \$5,000.

For Joint Venture awards, title to any equipment purchased under the award, including intangible property that meets the definition of equipment in 15 C.F.R.

paragraph 14.2(n), that may be in the name of a departing JV Partner, and that is vital to the project, shall be transferred to another JV Partner as instructed by the JV Administrator for continued use on the project. The JV shall make compensation to the departing JV Partner for its contribution to the purchase of the equipment by applying its percentage of the cost of the equipment to the current fair market value of the equipment. Should the equipment no longer be needed on the project, the departing JV Partner shall request disposition instructions in accordance with 15 C.F.R. §14.34.

13. NON-COMPLIANCE WITH STATUTORY PURPOSE

If NIST determines that the statutory purposes of research and development under 15 U.S.C. §278n can no longer be served (e.g., the project is no longer high-risk), the Recipient shall be deemed in material non-compliance with award requirements. As a result, NIST may terminate the award pursuant to 15 C.F.R. §14.61.

14. INSTRUCTIONS FOR INTEREST PAYMENT

This award is subject to 15 C.F.R. §14.22 requiring recipients of Federal financial assistance to maintain advances of Federal funds in interest bearing accounts. Interest earned on Federal advances deposited in such accounts (with the exception of \$250 per year, which may be retained for administrative expenses) shall be remitted promptly.

In keeping with Electronic Funds Transfer rules (31 C.F.R. §206), interest should be remitted to the HHS Payment Management System through an electronic medium such as the FEDWIR Deposit System. Electronic remittances should be in the format and should include any data that are specified by the HHS as being necessary to facilitate direct deposit in HHS' account at the Department of Treasury. The following website provides further instructions: http://www.dpm.psc.gov/grant_recipient/funding_requests/returning_funds.aspx?

It is the Recipient's responsibility to calculate accrued Interest on the excess Federal funds on hand from the date of the last payment made on this award. The minimum annual interest rate to be assessed is the Department of Treasury's Current Value of Funds Rate found at <http://www.fms.treas.gov/cvfr/index.html>.

15. AUDITS

Project audits (of Federal and non-Federal funds) are required for all ATP Recipients except when those Recipients are required to comply with the Single Audit Act of 1996 and the audit requirements of Office of Management and Budget (OMB) Circular A-133, "Audits of States, Local Governments and Non-Profit Organizations." Recipients and Subawardees, including universities who expend \$500,000 or more in a year in Federal awards, are also subject to the audit requirements. A subawardee is defined as an organization which receives a portion of the financial assistance from the Recipient and assists the ATP Recipient in meeting the project goals, but does not include the procurement of goods and services.

A. ALL ATP Recipients, including each JV Partner (if a JV project), are required to provide sufficient funds as direct costs (unless included as indirect) in the project's multi-year budget to have project audits performed according to the Schedule shown in B. Below:

B. All Recipients shall schedule audits as follows:

- (1) For awards less than 24 months, an audit is required within 90 days from the project expiration date.
- (2) For 2-, 3-, or 4-year awards, an audit is required within 90 days after the end of the first year and within 90 days from the project expiration date.
- (3) For 5-year awards, an audit is required within 90 days after the end of the first year and third year, and within 90 days from the project expiration date.

C. Audits of all Recipients (i.e., Single companies and JV Partners) shall be conducted in accordance with *Government Auditing Standards (GAS)*, issued by the Comptroller General of the United States (the Yellow Book).

If an ATP Recipient is required to have an audit performed in accordance with OMB Circular A-133, "Audits of States, Local Government, and Non-Profit Organizations," the annual OMB Circular A-133 audit is deemed to meet the ATP audit requirement.

If an ATP Recipient does not have an annual OMB Circular A-133 audit performed, the Recipient should follow the following project audit requirements:

- (1) Audits for single company Recipients shall be conducted using the *September 1999 NIST Program-Specific Audit Guidelines for Advanced Technology Program (ATP) Cooperative Agreements with Single Companies* to the extent these guidelines do not conflict with the current award. Recipients will be provided updated guidelines when they become available. The guidelines can be found at <http://www.atp.nist.gov/atp/psag-co.htm>.
- (2) Audits for joint venture Recipients shall be conducted using the *September 1999 NIST Program-Specific Audit Guidelines for Advanced Technology Program (ATP) Cooperative Agreements with Joint Ventures* to the extent these guidelines do not conflict with the current award. Recipients will be provided updated guidelines when they become available. The guidelines can be found at <http://www.atp.nist.gov/atp/psag-jv.htm>.

The program specific guidelines may be useful in identifying the allowability of specific cost elements and other programmatic compliance requirements for those recipients required to have an OMB Circular A-133 audit.

D. The Recipient shall submit **two (2) copies** of each audit report, one to the address shown in Article D.01.b. of the DoC

Financial Assistance Standard Terms and Conditions dated May 2007, and one copy to the NIST Grants Officer.

16. AWARD CLOSEOUT

A. In accordance with the guidelines established in 15 C.F.R. §14.71 and Term A.06 of the *DoC Financial Assistance Standard Terms and Conditions* dated May 2007, the NIST Grants Officer will allow only those costs that are strictly associated with closeout activities during the ninety (90) day period following the award expiration date. Closeout activities are normally limited to preparation of the final reports (technical, business, financial, patent/invention, equipment inventory) and closeout audit.

B. The final closeout meeting with NIST ATP is generally not considered a closeout-related activity. This closeout meeting should be conducted prior to the expiration date of the award. The Recipient must provide adequate funds in the project budget to ensure participation by all appropriate individuals in the closeout meeting. Costs associated with any closeout meeting held after the expiration date of the award may not be charged to the project unless specific, prior written approval is obtained from the NIST Grants Officer.

17. USE OF NAME OR ENDORSEMENTS

A. The Recipient and/or its Subrecipients or subcontractors shall not, without the prior written approval from NIST, use the name of NIST or the Department of Commerce on any product or service which is directly or indirectly related to either this award or any patent license or assignment agreement which relates to this award.

B. By entering into this award, NIST does not directly or indirectly endorse any product or service provided or to be provided by the Recipient, its successors, assignees, or licensees. The Recipient and its Subrecipients and subcontractors, shall not in any way imply that this award is an endorsement of any such product or service.

18. PUBLICATIONS

In any publications, the Recipient shall acknowledge support of the technology development by NIST. Normally this is done by a footnote reading, "This work was performed under the support of the U.S. Department of Commerce, National Institute of Standards and Technology, Advanced Technology Program, Cooperative Agreement Number 70NANBXHXXXX," or words to that effect.

19. PROTECTION OF HUMAN SUBJECTS

Research involving human subjects is not permitted under an ATP award unless expressly authorized by a Special Award Condition or otherwise in writing by the NIST Grants Officer.

As referenced in *the DoC Financial Assistance Standard Terms Conditions*, M.06, the Federal Policy for the Protection of Human Subjects (The Common Rule), codified by the Department of Commerce at 15 C.F.R. Part 27, requires Recipients to maintain appropriate policies and procedures for the protection of human subjects in research. The Common Rule defines a "human subject" as a living individual about whom an investigator conducting research obtains 1) data through intervention or interaction with the individual, or 2) identifiable private information. The term "research" means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. The Common Rule also sets forth the categories of research that may be considered exempt from this policy.

In the event it becomes evident that a human subject may be involved in this project, the Recipient shall submit appropriate documentation to the ATP Project Manager for NIST institutional review and approval. Additional information and documentation requirements are set forth in the April 2007 booklet entitled, "*Guidelines and Documentation Requirements for Research Involving Human and Animal Subjects*," available on the ATP website at

<http://www.atp.nist.gov/atp/2007has.pdf>.

This documentation may include:

- A. Documentation establishing review and approval of the project by a qualified Institutional Review Board (IRB). [NOTE: Recipients must provide documentation of continuing IRB approval by the cognizant IRB at appropriate intervals as designated by the IRB, but not less than annually];
- B. Documentation to support an exemption for the project from The Common Rule;
- C. Documentation to support a request for a deferral of review for research involving human subjects beginning after award of the project, but sufficiently in advance of the activity for NIST institutional review and approval.
- D. Documentation of IRB approval of any modification to an IRB-approved existing protocol or informed consent form must be submitted to the ATP Project Manager for NIST Institutional review and approval.

No work involving human subjects may be undertaken, conducted, or costs incurred and/or charged to the project for this work, until the NIST Grants Officer approves the required appropriate documentation in writing.

20. CARE AND USE OF VERTEBRATE ANIMALS

Research involving live vertebrate animals is not permitted under an ATP award unless expressly authorized by a Special Award Condition or otherwise in writing by the NIST Grants Officer.

The DoC Financial Assistance Standard Terms Conditions, M.12, requires Recipients of financial assistance awards to comply with the Laboratory Animal Welfare Act (Public Law 89-544); as amended (7 U.S.C. §§2131 et seq.), and implementing regulations found at 9 C.F.R. Parts 1, 2, and 3; and other applicable statutes pertaining to the care, handling, or other activities supported by Federal financial assistance.

In the event it becomes evident that live vertebrate animals may be involved in this project, the Recipient shall submit appropriate documentation to the ATP Project Manager for NIST institutional review and approval. Additional information and requirements are set forth in the April 2007 booklet entitled, *“Guidelines and Documentation Requirements for Research Involving Human and Animal Subjects,”* available on the ATP website at <http://www.atp.nist.gov/atp/2007has.pdf>

ATP accepts documentation identifying the institution’s required credentials for performing animal studies (e.g. OLAW animal welfare assurance number, USDA certificate number, or AAALAC accreditation) in lieu of an actual copy of applicable institutional credentials ((e.g., OLAW animal welfare assurance, USDA certificate, or AAALAC letter of accreditation). Since verification that assurances are valid and current can be made through official websites, generally only documentation of the applicable credential’s identifier linked to the institution performing the animal studies is needed. NIST reserves the right to request a copy of the applicable institutional credentials (e.g., OLAW animal welfare assurance designation, USDA certificate, or AAALAC letter of accreditation), as warranted.

No work involving live vertebrate animals may be undertaken, conducted, and/or costs incurred and/or charged to the project for this work, until the NIST Grants Officer approves the required appropriate documentation in writing.

21. BUREAU OF INDUSTRY AND SECURITY (BIS) CLEARANCE

A. The Recipient agrees to adhere to U.S. export laws, as administered by U.S. BIS, and shall not export or re-export, directly or indirectly, any technical data created with Federal Government funding under this award to any country for which the United States Government or any agency thereof, at the time of such export or re-export, requires an export license or other Federal Governmental approval without first

obtaining such licenses or approval and the written clearance of the NIST Grants Officer.

B. The BIS shall conduct an annual review for any relevant information about the Recipient's compliance with U.S. export laws. NIST reserves the right to take appropriate action in accordance with 15 C.F.R. Part 14.62 and Term M.01 of *the Department of Commerce Financial Assistance Standard Terms and Conditions* (May 2007), if the BIS reports significant adverse information about the Recipient to the NIST Grants Officer.

22. LIABILITY

A. Property

The Federal Government shall not be responsible for damage to or resulting from any property provided to the Recipient, and/or its Subrecipients and/or subcontractors, and/or acquired by the Recipient, and/or its Subrecipients and/or subcontractors, pursuant to this award.

B. No Warranty

NIST makes no express or implied warranty as to any matter whatsoever, including the conditions of the research or any invention or product, whether tangible or intangible, made, or developed under this award, or the ownership, merchantability, or fitness for a particular purpose of the research or any invention or product made or developed under this award.

C. Disclaimer

(1) The United States expressly disclaims any and all responsibility to the Recipients or third persons for the actions of the Recipient or third persons resulting in death, bodily injury, property damage, or any other losses resulting in any way from the performance of this award or any subaward or subcontract under this award.

(2) The acceptance of this award by the Recipient does not in any way constitute an agency relationship between the United States and the Recipient.

D. Indemnification

(1) The Recipient, and/or its Subrecipients and/or subcontractors, agree to indemnify and hold harmless the U.S. Government for all liabilities, demands, damages, expenses and losses arising out of the use by the Recipient, its Subrecipients, subcontractors, and/or any party acting on their behalf or under their authorization, of products made by the use of technical developments arising under this agreement. This provision shall survive termination of this award.

(2) The Recipient, and/or its Subrecipients and/or subcontractors, agree to indemnify and hold harmless the U.S. Government for any loss, claim, damage, or liability of any kind involving the Recipient's, Subrecipient's, and/or subcontractor's employees arising in connection with this award.

E. Force Majeure

Neither party shall be liable for any unforeseeable event beyond its reasonable control not caused by the fault or negligence of such party, which causes such party to be unable to perform its obligations under this award (and which it has been unable to overcome by the exercise of due diligence), including, but not limited to: flood, drought, earthquake, storm, fire, pestilence, lightning and other natural catastrophes, epidemic, war, riot, civil disturbance or disobedience, strikes, labor dispute, or failure, threat of failure, or sabotage of the Recipient or subcontractor facilities, or any order or injunction made by a court or public agency. In the event of the occurrence of such a *force majeure* event, any party unable to perform shall promptly notify the other party(ies). It shall further use its best efforts to resume performance as quickly as possible and shall suspend performance only for such period of time as is necessary as a result of the *force majeure* event.

23. INFORMAL COLLABORATORS

All informal collaborators in ATP awards are subject to ATP intellectual property regulations as specified in 15 C.F.R §295.8.

Informal collaborator means any individual or organization which consults, cooperates with, or participates in the performance of this award, and is not included in the approved award budget.

24. INTELLECTUAL PROPERTY

A. Patent Notification Procedures

This General Term implements *Department of Commerce Financial Assistance Standard Term and Condition M.04.b.*, which states that, pursuant to Executive Order 12889, the DoC is required to notify the owner of any valid patent covering technology whenever the DoC or its financial assistance Recipient, without making a patent search, knows (or has demonstrable reasonable grounds to know) that technology covered by a valid United States patent has been or will be used without a license from the owner. To ensure proper notification, if the Recipient uses or has used patented technology under this award without a license or permission from the owner, the Recipient must notify the NIST Grants Officer:

National Institute of Standards and
Technology
Grants and Agreements Management
Division
100 Bureau Drive, Mail Stop 1650
Gaithersburg, MD 20899-1650

The notification shall include the following information:

- A. The award number
- B. The name of the DoC awarding agency
- C. A copy of the patent
- D. A description of how the patented technology was used
- E. The name of the Recipient contact, including an address and telephone number

B. Rights in Data

- (1) The Federal Government shall have certain rights to use data first produced in the performance of the award, whether or not the data are

copyrighted. The Recipient may establish claim to copyright subsisting in any data first produced in the performance of the award. When claim is made to copyright, the Recipient shall affix the applicable copyright notice of 17 U.S.C. §401 or 402 and acknowledgment of Federal Government sponsorship to the data when and if the data are delivered to the Federal Government, are published, or are deposited for registration as a published work in the U.S. Copyright Office. The Recipient shall grant to the Federal Government, and others acting on its behalf, a paid up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, perform and display publicly, and for data other than computer software to distribute to the public by or on behalf of the Federal Government.

- (2) The licenses granted to the Federal Government under this Term shall not be considered as a waiver of the nondisclosure requirements of 15 U.S.C. §278n(d)6: "Intellectual property owned or developed by any business receiving funding may not be disclosed by any officer or employee of the Federal Government except in accordance with a written agreement between the owner or developer and the Program."

C. Patent Rights

(1) Definitions

- (a) "Company" means a for-profit organization, including sole proprietors, partnerships or corporations.
- (b) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.
- (c) "Made" means, when used in relation to any Invention, the conception or first actual reduction to practice of such invention.

(d) "Practical Application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Federal Government regulations, available to the public on reasonable terms.

(e) "Subject Invention" means any invention of the Recipient conceived or first actually reduced to practice in the performance of work under this award.

(2) Ownership of Inventions

Pursuant to the statute that establishes the ATP (15 U.S.C. §278n(d)(11)), this paragraph takes precedence over 15 C.F.R. §14.36 and DoC Financial Assistance Standard Terms and Conditions, dated May 2007, article M.04. The Recipient or, if appropriate, its Subrecipients, contractor(s) and/or subcontractor(s), shall have the entire right, title, and interest throughout the world to each Subject Invention according to the provisions of this clause, provided that this party is a company or companies organized in the United States. Joint ventures shall provide to NIST a copy of their written agreement, which defines the disposition of ownership rights among the members of the joint venture, and their contractor and/or subcontractors as appropriate, in accordance with the second sentence of this paragraph. However, the United States hereby reserves a nonexclusive, nontransferable, irrevocable paid-up license, to have practiced for or on behalf of the United States, any such invention. Title to any such invention shall not be transferred or passed, except to a company organized in the United States, until the expiration of the first patent obtained in connection with such invention.

(3) Invention Disclosure, United States License and Filing of Patent Application by Recipient

(a) The Recipient shall disclose each subject invention to NIST within **two months after the inventor discloses it** in

writing to Recipient personnel responsible for patent matters. The disclosure to NIST shall be in the form of Recipient's electronic disclosure submission through the Interagency Edison extramural invention reporting system (iEdison) at www.iEdison.gov and the disclosure shall identify the award under which the invention was made and the inventor(s) and at a minimum, also contain the following information:

- i. the title of the invention;
- ii. the names of all inventors;
- iii. the name and address of the assignee (if any);
- iv. an acknowledgement that the United States has rights in the subject invention (i.e., the Governmental Use License);
- v. the filing date of the present invention;
- vi. an abstract of the disclosure;
- vii. a description or summary of the present invention;
- viii. the background of the present invention or the prior art;
- ix. a description of the preferred embodiments
- x. what matter is claimed

To the extent not inconsistent with any ATP requirements, Recipient shall comply with all disclosure, election, and/or other reporting requirements of iEdison, and shall update all such information as necessary.

Each report shall also include the use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to NIST via iEdison, the Recipient will promptly notify NIST via iEdison of acceptance of any manuscript describing the invention for publication or of any sale or public use planned by the Recipient by specifying the date of such publication, or sale, or public use of the invention in the proper iEdison field(s).

(b) The Recipient shall notify NIST via iEdison **within two years** of the date the invention required to be disclosed to NIST

via iEdison whether or not the Recipient intends to file a patent application on any subject invention.

If a patent is issued, or applied for, the Recipient(s) must submit the following information to NIST via iEdison:

1. The award number under which the invention was made;
2. The serial number of the patent issued or applied for;
3. The date of issuance or application;
4. A copy of the disclosure as issued (including the drawings) and;
5. The name(s), address, and telephone number(s) of an assignee.

In a JV award, the JV Administrator must submit the patent information to NIST via iEdison for all JV Partners. In order to prevent disclosure of information to the general public under the Freedom of Information Act (FOIA) or any other statute, each page of each patent report should be marked, "CONFIDENTIAL/PROPRIETARY."

(c) Requests for extension of the time for disclosure, election, and filing under paragraphs 24.C.(3)(a) and (b) of this Term may be permitted at the discretion of NIST.

(4) Recipient Action to Protect the Government's Interest

(a) The Recipient will, via iEdison, execute, or have executed, all instruments necessary to establish or confirm the rights the United States Government has throughout the world in those subject inventions to which the Recipient has filed a patent application in which the United States has reserved a non-exclusive license.

(b) The Recipient shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Recipient, each subject invention made under the award in order that the Recipient can comply with the

disclosure provisions of paragraph C.(3) of this Term, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by C.(3)(a) of this Term. The Recipient shall instruct such employees through employee agreements or other suitable education programs on the importance and requirements of reporting inventions in sufficient time to permit the filing of patent applications prior to United States or foreign statutory bars.

(c) The Recipient shall promptly notify NIST via iEdison of any decisions not to continue the prosecution of a patent application, the payment of maintenance fees, or the defense in a reexamination or opposition proceeding on a patent in any country.

(d) The Recipient agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statements:

This invention was made with United States Government support under (identify the cooperative agreement number) awarded by the National Institute of Standards and Technology (NIST).

The United States Government has certain rights in the invention.

(5) Subawards and Subcontracts

The Recipient shall include in all subawards and subcontracts, **regardless of tier**, for experimental, developmental, or research work, a patent rights clause, as appropriately modified, comparable to this term. However, pursuant to the statute establishing the ATP (15 U.S.C. 278n(d)(11)), the patent rights clause shall also provide that title to each subject invention made by the Subrecipient or subcontractor shall vest with a company or

companies incorporated in the United States.

(6) Reporting on Utilization of Subject Inventions

The Recipient agrees to submit on request, no more frequently than annually, periodic reports on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Recipient or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Recipient, and such other data and information as NIST may reasonably specify. The Recipient also agrees to provide additional reports as may be requested by NIST in connection with any march-in proceeding undertaken by NIST in accordance with paragraph C.(8) of this Term. Such information shall be treated by NIST as commercial and financial information and thus as privileged and confidential and not subject to disclosure under §552 of Title 5 of the United States Code.

(7) Preference for United States Industry

Notwithstanding any other provision of this Term, the Recipient agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject inventions in the United States unless such person agrees that any products embodying the inventions will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by NIST upon a showing by the Recipient or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that, under the circumstances, domestic manufacture is not commercially feasible.

(8) March-in Rights

The Recipient agrees that, with respect to any subject invention in which it has

acquired title, NIST has the right, in accordance with procedures in 37 C.F.R. §401.6 and any supplemental regulations of NIST, to require the Recipient, an assignee, or an exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances. If the Recipient, assignee, or exclusive licensee refuses such a request, NIST has the right to grant such a license itself if NIST determines that:

- (a) Such action is necessary because the Recipient or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;
- (b) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Recipient, assignee, or licensees;
- (c) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Recipient, assignee, or licensees; or
- (d) Such action is necessary because the agreement required by paragraph C.(7) of this Term has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of the agreement required by paragraph C.(7) of this Term.

(9) Conflicts Between ATP Intellectual Property Provisions and Non-U.S. Country Intellectual Property Provisions

The intellectual property provisions in the ATP statute, rule, and General Terms and Conditions require that any intellectual property arising from an ATP-funded project shall vest with a for-profit company organized in the United States. If the

Recipient's proposal includes work approved by the Grants Officer to be performed in a non-U.S. country, by accepting this award, the Recipient certifies that no legal requirement exists in that country those conflicts with the ATP intellectual property requirements, including the U.S. Government license provisions.

25. STATUTORY REFERENCE

All references to the ATP statute (15 U.S.C. §278n) contained in this award, including the September 2007 ATP Special Award Conditions and these ATP General Terms and Conditions, mean the ATP statute as it existed prior to the enactment of the America COMPETES Act (Pub. L. 110-69) on August 9, 2007.

ATTACHMENT A

SEPTEMBER 2007

ADVANCED TECHNOLOGY PROGRAM OPTIONAL GUIDELINES FOR QUARTERLY TECHNICAL PERFORMANCE REPORTS

OVERVIEW

The National Institute of Standards and Technology (NIST) Advanced Technology Program (ATP) General Terms and Conditions incorporated into the Cooperative Agreement between your organization(s) and NIST calls for quarterly technical performance reports that are the main source of information provided to the ATP. The content of these reports, as requested by ATP, is consistent with 15 C.F.R. §14.51. A suggested structure is outlined below and is designed to not be overly burdensome to your organization. This specific structure or format is optional, but the content is required. If your organization has its own format for such reports and all the requested information is provided, ATP will accept your format.

ATP relies on these quarterly technical performance reports to monitor technical developments in projects. In addition, these reports are used in preparing quick-response derivative reports to Congress and Executive Agencies of the Government that oversee ATP. ATP policy prohibits release of proprietary information contained in these reports and limits internal distribution to those directly involved in management and administration of the specific cooperative agreement. ATP will clear information abstracted from the reports by ATP through your organization in advance of release. The report format outlined here provides for a systematic and logical structuring of key progress elements, and promotes tracking of developments. For each performance year, a core report is initially established, and subsequent reports simply update this core. Besides keeping the ATP Project Manager up to date on progress, these reports will provide a history of the project over its life.

CONTENT

The quarterly technical performance report should:

- a) Identify project objectives, the initial "baseline" for tracking project developments, and milestones through the end of the current performance year;
- b) Provide evidence that projects are attaining technical milestones necessary to meet the objectives of the original proposal;
- c) Identify and explain changes in the composition, direction, or key personnel associated with the project;

d) Identify problems or special opportunities that are critical to the progress of the research, and areas which may benefit from consultation with specialists at NIST.

Two copies of each quarterly R&D performance report shall be submitted to the ATP Project Manager, and the original report to the Grants Officer. If there are technical graphics that do not copy well, please include originals in the copies of the report. Please refer to Special Award Conditions for mailing addresses.

In the following sections, each element of the quarterly technical performance report is discussed. If you wish to submit a more extensive report of technical progress for a given quarter, you may append it to the formal report. If there is no additional progress to report under a given heading, a statement to that effect should be included for the performance period. Please date all additions and mark each page of the report "Proprietary."

PROJECT OBJECTIVES

The first section of the first quarterly technical performance report should state the overall technical goal of the project and list specific objectives. These should be drawn from the proposal with amplification as required to provide quantitative bases for success, or additional detail. The objectives should remain unchanged throughout the project unless results dictate a shift or major technical problems require re-planning a portion of the work. Changes should be addressed in the section entitled "Summary of Project Changes." If the project objectives are unchanged, they may be put in an appendix to the report.

PROJECT BASELINE

In order to contrast the state of the art before and after completion of each ATP project, establish a baseline to describe the status of key elements of the technology at the project outset. Define the baseline in the context of specific targets that are expected to constitute success, and are consistent with project objectives. These may include initial per-unit-costs, physical performance characteristics, or specific technical capabilities. If quantitative measures are not applicable, provide qualitative statements describing the state of the art at the time of project initiation. Identify any changes since the proposal was prepared. The ATP Project Manager will assist you in identifying appropriate baseline characterization as part of the project kickoff. Once established, the project baseline may be moved to an appendix to the report.

TECHNICAL MILESTONES

The quarterly reports should present appropriate milestones through the current performance year and relate the contribution of current year milestones to the overall project milestones. Current year milestones are generally presented and/or modified during the kickoff meeting, and subsequently extended as part of each annual review. The level of detail will depend on the nature of each project, and the concurrence of the

principal investigator and the ATP Project Manager. A time line chart of the current year and the overall project milestones may be included in this section with clear identification of major decision points. Once established, this list of milestones with appropriate due dates should not be changed unless technical results or new opportunities dictate. Such changes should be addressed in the section entitled "Summary of Project Changes."

TECHNICAL PROGRESS AND IMPACT

This is the heart of the quarterly technical performance report, and will occupy the majority of the text. This section includes a discussion of technical progress for the specific performance quarter against the current performance year milestones identified in the preceding section. Sufficient discussion should be provided to allow an accurate assessment of progress, and identification of both successes and technical difficulties against the milestones. Discussion of progress (and technical setbacks) should include implications for the overall objectives of the project. At the end of this section please identify the most significant technical advance to date in the project, and include a short discussion of its significance. Please list any patent applications as well as major equipment purchases.

SUMMARY OF PROJECT CHANGES

In this section, succinctly summarize substantive changes in project planning, personnel, or execution that have occurred over the reporting quarter. These should be derived from the main elements of the report as this section is intended only as a summary. If approval of a change is being requested, please note that specifically. All substantive changes to the technical scope of work or budget changes must be discussed in advance with the ATP Project Manager, who must recommend an amendment to the award by the NIST Grants Officer. The criteria for obtaining 'Prior Approval' are specified in 15 C.F.R §14 and the ATP General Terms and Conditions in the award document. Major changes can be discussed with the ATP Project Manager at ANY time; you do not have to wait to request them in a quarterly report.

PROBLEMS AND OPPORTUNITIES

This section should provide a synopsis of technical problems that must be resolved,

BUSINESS ISSUES

This section is for any business development, commercialization, or market issues that have arisen since your last Business Report.

UPCOMING MEETINGS

If you wish to set up a meeting at NIST, or to request the attendance of either or both of the ATP Technical or Business Project Managers at any meeting, you may use this section to make the request and to provide an overview of the meeting. It is often helpful

to present a proposed project coordination meeting schedule for the year in this section, to note when subcontractors' progress will be reviewed, when input from commercialization units may occur, etc. The meeting calendar may include formal or informal meetings of the project principals or formal technical meetings where work, which is related to the project, is addressed. It should include a planned general time frame and expected location for the annual project review, which is to be scheduled during the last quarter of the project year (not the calendar year).

FINAL TECHNICAL REPORT FOR THE TOTAL PROJECT PERIOD

Provides an executive summary that could be read and understood by someone not skilled in the particular technology. The final technical report is proprietary, just like past technical quarterly reports and the original proposal.

The summary should provide an overview of the technology that was developed and the problems that were solved and unsolved in its development.

The summary should identify the key performance parameters and describe how end-of-project performance compared with beginning-of-project performance.

The summary should also discuss the significance of the project accomplishments in terms of potential economic or commercial impact.

Important remaining technical and non-technical barriers to commercialization should be identified.

A separate non-proprietary project overview of R&D accomplishments and potential benefits that may be used in a project closeout ATP press release should be clearly identified as part of the final technical report. The final ATP press or other publication use will be reviewed with the company prior to release.

SAMPLE

ATP Quarterly Technical Performance Report Date of Summary: mm/dd/yyyy

Cooperative Agreement Number:
Project Title:
Performing Organization(s):
Address(es):
Subcontractor(s):
Address(es):
Project Manager:
Title:
Telephone Number:
Facsimile Number:
Electronic Mail Address: Administrative Contact:
Title:
Telephone Number:
Facsimile Number:
Electronic Mail Address:
Type of Project:
 Single Business Joint Venture
Date Initiated: mm/yy Duration: months
Total ATP Funding Requested: (\$M) Total Industry Funding Committed: (\$M)
Current Performance Year: mm/yy-mm/yy Quarterly Report Period: mm/yy-mm/yy
ATP Project Manager:
Project Objectives:
Project Baseline:
Technical Milestones:
Technical Progress and Impact:
(including Most Significant Technical Advance to Date)
Summary of Project Changes:
Problems and Opportunities:
Business Issues:
(not covered on business diskette)
Upcoming Meetings:

ATTACHMENT B

SEPTEMBER 2007

**GUIDELINES FOR REPORTING ON BUSINESS PROGRESS AND
ECONOMIC IMPACTS**

The following reports should be prepared by the persons with primary responsibility for developing and executing business strategies leading to commercialization of the technologies resulting from the ATP-funded project. A questionnaire format is used to facilitate efficient reporting and analysis. Because members of a joint venture have different business goals and different roles in commercialization and diffusion of the ATP-funded technology, each member of a joint venture, as well as each single applicant, has a business reporting responsibility and must file a separate report.

The [Economic Assessment Office](#), ATP, will provide materials customized for the individual reporting organizations in time for preparation of the reports on a timely basis.

Baseline Report

When Due:

For awardees of the 2007 competition, the Baseline Report will be administered during the first week of January, 2008. For projects where the start of the project is delayed past January 1, 2008, the Baseline Report will be administered at the beginning of the next calendar quarter after the project start (either April, July, or October). Respondents will have Thirty (30) calendar days to complete the web-based report..

Contents:

In this report we ask you to provide information on company characteristics, finances, and personnel; the role of subcontractors; project characteristics and goals; intellectual property strategies; collaborative relationships; and plans for commercialization.

Format:

Electronic questionnaire submitted over a secured website to ATP through its designated contractor.

Annual Report

When Due:

One year after the Baseline Report and subsequently on an annual basis over the duration of the ATP project.

Contents:

In this report, we ask you to update information provided in the Baseline or prior Annual Reports. The Annual Report expands upon the Baseline Report to update technological progress and commercialization strategies; early impacts of the ATP project; collaboration experiences; attraction of new funding; intellectual property creation; dissemination of knowledge; and a summary of company financial data.

Format:

Electronic questionnaire submitted over a secured website to ATP through its designated contractor.

Close-out Report

When Due:

At the beginning of the next calendar quarter after the end of ATP project performance period. (January, April, July, or October). Respondents will have Ninety (90) calendar days to complete the web-based report.

Contents:

In this part we ask you to review and update information presented in prior reports in light of your technical and business accomplishments. In addition, we ask you to provide an assessment of project results and to identify expectations for future commercial progress.

Format:

Electronic questionnaire submitted over a secured website to ATP through its designated contractor.

Quarterly Short-Form Reports

When Due:

Quarterly Reports will be administered at the beginning of calendar quarters following Baseline and Annual Reports. Respondents will have approximately two weeks to complete the web-based report. No separate Quarterly Report is due when completing a Baseline, Annual, or Closeout Report.

Contents:

In this brief report we ask you to review the organization address/telephone/contact information currently recorded in the ATP database and to report significant business developments related to the ATP project for the quarter.

Format:

Electronic questionnaire submitted over a secured website to ATP through its designated contractor.

Post-Project Reports

When Due:

Post-Project Reports are administered three times--once every two years following the end of ATP funding.

Contents:

In this report we ask you to report your progress in commercializing the technology, and the related impacts inside and outside your organization.

Format:

Telephone survey OR electronic questionnaire submitted over a secured website to ATP through its designated contractor.